

# Land and resource rights in the Tsumkwe Conservancies – Nyae Nyae and Nꞑa Jaqna

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## 1 Introduction

Nyae Nyae Conservancy and Nꞑa Jaqna Conservancy in Tsumkwe Constituency of northeast Namibia are the home of some of the best-known, and simultaneously some of the most marginalised, communities in the country. The whole of Tsumkwe Constituency, situated in what is today known as Otjozondjupa Region, corresponds with the former homeland “Bushmanland” established in 1969 under the apartheid system of South West Africa, and is today the constituency with the highest concentration of San in Namibia. The majority of the residents of both Tsumkwe East (which largely comprises Nyae Nyae Conservancy) and Tsumkwe West (most of which is part of Nꞑa Jaqna Conservancy) are San. They are the largest San-majority conservancies in the country,<sup>1</sup> but the demographic composition of the two areas differs in some important ways, as will be outlined in the following sections.

As conservancy members, the San communities living in these two areas have rights over the wildlife resources in their areas, and community forest designations also give them rights over plant resources. Both communities also have political representation in the form of a Traditional Authority (TA), which in combination with their conservancy and community forest status provides a level of recognition by and access to the national government that most other San do not have. Both conservancies today have the support of a well-funded organisation that has been

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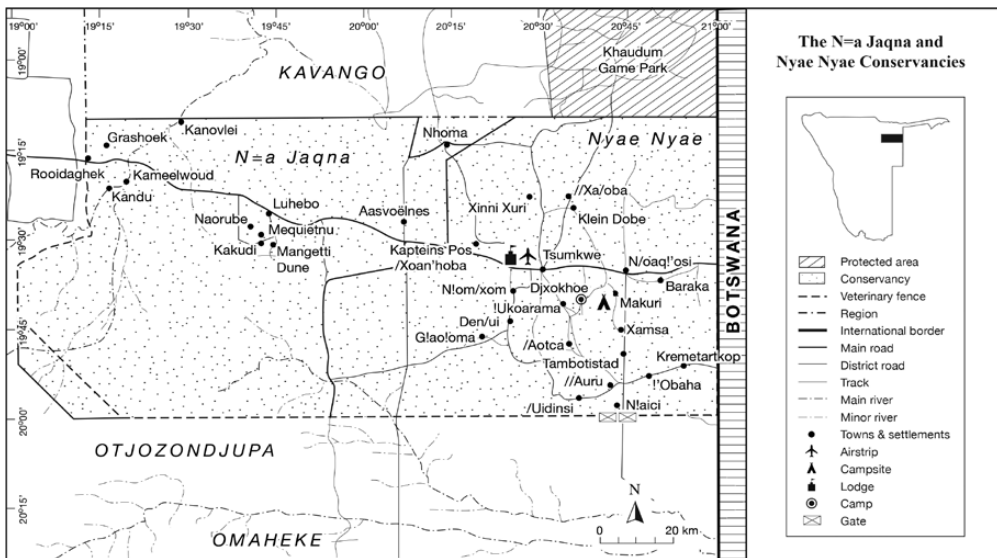
1 Technically these two are the only San-majority conservancies in the country. However, the Kyaramacan Association in Bwabwata National Park has a majority of Khwe San members and is run like a conservancy.

operating continuously for decades, and that assists the communities with financial, political and legal advice, and logistical support.

Because of the relative advantages that both of these communities have in comparison to other San groups, there is a tendency to consider them as well-off. While it may be true that they have resource rights, political recognition, donor support and opportunities that other San communities do not have, in all of these areas they still fall far short of what *all* Namibian communities have a right to, according to the Namibian Constitution and policy. In addition, these rights are by no means secure, and are currently under threat from many directions.

In this chapter we outline the current situations for both the Nyae Nyae and N= a Jaqna conservancy communities, with emphasis on the rights to land and resources that they do have, the ways in which they have been able to defend these rights and to access resources, and the ways in which their rights are continuously being violated. In the next section, we highlight current legislation – in particular that relating to communal land and conservancies, community forests, and traditional authorities – and the ways in which these two San-majority conservancies are affected by these policies and laws.

In sections 3 and 4, we briefly outline the ethnic composition of each area and their recent history. We also describe the current situation in both conservancies, their legal status within the nation, and their traditional leadership and land management practices and how these relate to the contemporary status of the conservancies. Both conservancies are currently facing serious threats to their land and autonomy, and they both have cases before the High Court. In each section, we will describe these cases that are currently under negotiation, and their implications for the communities.



A key point already alluded to must be emphasised and kept in mind throughout this chapter: Although these communities are often portrayed as fortunate, and in some cases even as “spoiled”,<sup>2</sup> in fact very many of their human rights are far from being fulfilled. The supposed advantages that these communities have should be seen instead as a baseline for what all communities have a right to. In addition, much more attention should be given to ensuring that their constitutional rights are met. At the end of the chapter we make recommendations aimed at ensuring equity, social justice and human rights for all people in both conservancies.

## 2 Tsumkwe Constituency context

At the 1991 Conference on Land Reform and the Land Question held in Windhoek a year after independence, a three-minute speech by Ju|’hoan spokesperson Tsamkxao †Oma on the importance of the Ju|’hoan land management system received a standing ovation. As †Oma put it, the Ju|’hoansi placed social relationships among themselves at the heart of their economic lives, which were tied to the land: “our old people long ago worked hard talking together to decide how to share resources.” Using the term *n!ore* (plural *n!oresi*), meaning an area over which local people have rights of access and resource use (see section 3), he described their system of land rights, responsibilities and inheritance:

My mother said: ‘This is my father’s father’s father’s *n!ore*, and I hold rights in it, and so through me do you.’ So it is with my people ... A *n!ore* has a responsible person, who holds the rights in it for everyone else who has rights there. Up to now, we had been holding our *n!oresi* in this way, not sharing with a government our say over the land.<sup>3</sup>

In essence, the Ju|’hoansi had long-standing ties to their land, which they asked that the Government of the Republic of Namibia (GRN) recognise. In 1991, following the successful defence of their territory from pastoralists who were trying to move in, the then President of Namibia, Sam Nujoma, visited Tsumkwe. Nujoma said then that the Ju|’hoansi were the “owners” of their land.<sup>4</sup> The Ju|’hoansi understood Namibia’s first president to be confirming their inherent land rights in Nyae Nyae.

The Tsumkwe district plays an important role in Namibia’s national imagination, as well as the country’s approach to land rights. As former “Bushmanland”, it is the area most closely associated with the San – who are simultaneously seen both as a source of pride, and as problematic. They are recognised as the first inhabitants of the region and as an important part of history, and they are part of Namibia’s

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2 This is an adjective that both authors have frequently heard used in reference to these conservancies.

3 Biesele, Megan & Robert K. Hitchcock, *The Ju|’hoan San of Nyae Nyae and Namibian Independence: Development, Democracy, and Indigenous Voices in Southern Africa* (Paperback Edition), Berghahn Books, London, New York and Oxford, 2013, pp. 28–30.

4 *Ibid.*, p. xxvii.

self-representation, especially in the tourism industry. This recognition does not necessarily translate into respect for their traditional culture or land use strategies, however, and these are often seen as being backward.<sup>5</sup> Nevertheless, they are also important in the history of community-based natural resource management (CBNRM), an innovative approach integrating community development and conservation that was pioneered in Namibia – with some of the first projects in Tsumkwe Constituency – and that has become a signature development strategy of the country.

This section will briefly highlight the context in which both conservancies are operating today, noting both similarities and differences between the two. In addition to being communal conservancies, both have designated community forests covering all or part of their areas, and both have a TA that corresponds to their respective conservancy areas. Both are also specifically supported by the Nyae Nyae Development Foundation of Namibia (NNDNF), which has a long and uninterrupted history of targeted support in this part of Namibia.<sup>6</sup> Each of these elements is highlighted below. Key differences, for example in ethnic composition and historical occupation of the area, conservancy regulations, and the TA, are noted where relevant, and described in more detail in the sections that follow.

## 2.1 People, history and environment

The Tsumkwe district is in the northwest part of the Kalahari desert of southern Africa, one of the major desert systems of Africa. For hundreds of years at least this region has been inhabited by San communities of mobile hunters and gatherers who moved from one residential location to another between five and 15 times a year, depending on the availability of water, plants and wildlife resources.<sup>7</sup> The name *Nyae Nyae* comes from the Ju|'hoan word *N//oaq!'ae*, which means “area of broken rocks.”

The northern Kalahari is semi-arid and supports what is classified as tree-bush savanna.<sup>8</sup> Soils are sandy, with pockets of black cotton soil and outcrops of calcrete. Geomorphological features include undulating savannas and grassland areas, linear sand dunes fixed with vegetation, and fossilised river valleys.<sup>9</sup> There are also

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5 See also Hays, Jennifer, *Owners of Learning: The Nyae Nyae Village Schools Over Twenty-Five Years*, Basler Afrika Bibliographien, Basel, 2016.

6 Cole, Dave, *Water, Land and a Voice: the Nyae Nyae Development Foundation of Namibia, 36 Years of Support to the Ju|'hoan San Living in Namibia*, Nyae Nyae Development Foundation of Namibia, Windhoek, 2018.

7 Marshall, Lorna, *The !Kung of Nyae Nyae*, Harvard University Press, Cambridge, 1976; Yellen, John E. & Richard B. Lee, ‘The Dobe-Du/Da Environment: Background to a Hunting and Gathering Way of Life’, in Richard B. Lee & Irvén DeVore (eds), *Kalahari Hunter Gatherers: Studies of the !Kung San and Their Neighbors*, Harvard University Press, Cambridge, 1976, pp. 27–46.

8 Thomas, David S.G. & Paul A. Shaw, *The Kalahari Environment*, Cambridge University Press, Cambridge, pp. 99–105.

9 (Marshall 1976); Yellen, John E. & Richard B. Lee, ‘The Dobe-Du/Da Environment: Background to a Hunting and Gathering Way of Life’, in Richard B. Lee & Irvén DeVore (eds), *Kalahari Hunter Gatherers: Studies of the !Kung San and Their Neighbors*, Harvard University Press, Cambridge, 1976, pp. 27–46.

important physiographic features known as pans, low-lying playa-like areas that have clay bottoms where water accumulates after rains. These pans were important to the adaptations of both animal and human populations, serving as sources of water, minerals and nutrients, and utilised for hunting and resource collection purposes. The Omatako Valley on the west side of Nṁa Jaqna is a fossilised river valley where water flows occasionally, especially after rains. Rainfall varies, with an average of 400 mm per annum at Tsumkwe. Droughts are common, occurring on average every two years in five.<sup>10</sup> In 2018 and 2019, Namibia saw the height of its worst drought in nearly four decades and one of the worst recorded droughts in the country's history, which affected both conservancies severely.

The Ju]'hoansi and !Kung, two of the main San groups that reside in the area, have a lengthy history and prehistory in the area. A large body of evidence indicates that Ju]'hoansi and !Kung resided in this region in relative isolation for many generations, with archaeological, linguistic and genetic evidence as well as oral traditions indicating that they are directly connected to hunter-gatherers who have been living in the region for millennia. Archaeological and genetics records indicate that they have links going back at least 20 000 years, and possibly much farther.<sup>11</sup> In the past two thousand years, other groups with agro-pastoral backgrounds have moved into the region and begun interacting with local hunting and gathering populations.

In 1959, the town of Tsumkwe, in the eastern side of the district, was established as an administrative centre by the South West African administration.<sup>12</sup> In 1964 the area now known as Tsumkwe Constituency was designated as *Bushmanland* under the Odendaal Commission, and the South West African administration began moving San from other parts of the country to the western side. In the 1970s and 1980s, military posts were established throughout the area as part of efforts to ensure military security against the South West Africa People's Organisation (SWAPO), who were fighting a war for independence.<sup>13</sup> Beginning in the late 1970s, !Kung, Khwe, !Xun and Ju]'hoansi San were employed by the South African Defence Force and the South West African Territorial Force, mainly as trackers and military

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10 Meteorological Service Division, 'An overview of Rainfall Performance and Drought occurrences in Namibia', Windhoek, 2013.

11 Kinahan, John, 'From the Beginning: The Archaeological Evidence', in Wallace, Marion (ed.), *A History of Namibia: From the Beginning to 1990*, Hurst & Co., London, 2011, pp. 15–43; Kinahan, John & Jill H.A. Kinahan, *An Archaeological Survey of Tsumkwe District, Namibia*, Report to the South West Africa Department of Agriculture and Nature Conservation, Department of Agriculture and Nature Conservation, Windhoek, 1984.

12 (Marshall 1976: 60–61)

13 Marshall, John & Claire Ritchie, 'Where Are the Ju/Wasi of Nyae Nyae? Changes in a Bushman Society: 1958–1981', *Communications No. 9*, Center for African Area Studies, University of Cape Town, Cape Town, 1984; Marshall, John, *A Kalahari Family* (film), Documentary Educational Resources, Watertown, 2003; Hitchcock, Robert K., 'Refugees, Resettlement, and Land and Resource Conflicts: The Politics of Identity among !Xun and Khwe San of Northeastern Namibia', *African Study Monographs*, 33(2), 2012.

personnel (some of the people in Tsumkwe District joined the military forces of SWAPO). The social and economic effects of this occupancy and their participation in the military were devastating,<sup>14</sup> and the residual effects of the military presence in Nyae Nyae and (especially) in Nꞑa Jaqna continue to be felt today.

In the run-up to independence in March, 1990, the San of Tsumkwe Constituency took part in numerous local, regional and national meetings regarding land and political representation.<sup>15</sup> This participation laid the groundwork for their future classification as conservancies.

## 2.2 Conservancies and legislation

Both conservancies have special status within the country. Nyae Nyae was the first conservancy established under the Living in a Finite Environment (LIFE) programme, a USAID programme implemented by the US-based World Wildlife Fund in 1998. Nꞑa Jaqna, established in 2003, is still the largest conservancy in the country. They are in many ways two of the most successful conservancies in Namibia from a financial standpoint (see Table 1).

**Table 1: Nyae Nyae and Nꞑa Jaqna conservancy data**

	Nyae Nyae	Nꞑa Jaqna	
Conservancy area	8 992 km <sup>2</sup>	9 120 km <sup>2</sup>	
Community Forest area	8 992 km <sup>2</sup>	Nꞑa Jaqna	8 253 km <sup>2</sup>
		M'kata	867 km <sup>2</sup>
Year established	1998	2003	
Number of villages	38	26	
Number of people	2 700	7 000	
Conservancy members	1 450	2 000	
Main ethnic identity of members	Vast majority Ju 'hoansi (San)	!Kung, !Xun, Khwe, Hai  om and Ju 'hoansi; some Kavango and Herero	
Earnings in 2018	N\$ 7 million	N\$ 1.5 million	
Traditional authority	Ju 'hoan TA (est. 1998)	!Kung Traditional Authority (est. 1998)	
District capital	Tsumkwe (pop. ca. 2 000)	Tsumkwe (pop. ca. 2 000)	

14 Marshall, John & Claire Ritchie, 'Where Are the Ju/Wasi of Nyae Nyae? Changes in a Bushman Society: 1958–1981', *Communications No. 9*, Center for African Area Studies, University of Cape Town, Cape Town, 1984; Lee, Richard B., 'Indigenism and Its Discontents' in Max Kirsch (ed.), *Inclusion and Exclusion in the Global Arena*, Routledge, New York, 2007, pp. 129–60; Hitchcock, Robert K., 'The Impacts of Conservation and Militarization on Indigenous Peoples: A Southern African San Perspective', *Human Nature*, 30(1), 2019.

15 Biesele, Megan & Robert K. Hitchcock, *The Ju|'hoan San of Nyae Nyae and Namibian Independence: Development, Democracy, and Indigenous Voices in Southern Africa* (Paperback Edition), Berghahn Books, London, New York and Oxford, 2013.



Under present legislation, the State has a duty to keep all communal land in trust for the benefit of the traditional communities living in those areas,<sup>16</sup> but conservancies have the right to manage and use the wildlife within its boundaries, in consultation with the Ministry of Environment and Tourism (MET) under the Nature Conservation Amendment Act (No. 5 of 1996).<sup>17</sup> This Act regulates the right of designated communities to use and manage wildlife resources.

The ways that communal conservancies define wildlife use and management, together with the MET, can vary depending on the community's traditions and preferences, and the resources available on the land. A significant difference between the two conservancies described here, for example, is that in Nyae Nyae members have the right to engage in subsistence hunting, while in N̄a Jaqna they do not. The only area of N̄a Jaqna where community members have the right to hunt using traditional weapons is in Grashoek, where they have a Living Museum<sup>18</sup> and are allowed to demonstrate hunting techniques for tourists, and to keep the animals that they obtain (see Table 2 on the next page for a comparison of hunting rules in the Nyae Nyae Conservancy and the N̄a Jaqna Conservancy).

Both conservancies also have the right to grant two-year concessions to professional trophy hunters. These hunters bring clients to shoot big game animals, with quotas again decided in conjunction with the MET. These ventures are economically important to both communities at many levels. The conservancies receive a large sum for each animal hunted; the meat is distributed to communities on a rotating basis; and individuals are employed by the professional hunters as trackers and in other service positions.

The Communal Land Reform Act (No. 5 of 2002) provides for the allocation of rights in respect of communal land, and the establishment of communal land boards under the Ministry of Land Reform; it also provides for the powers of chiefs and TAs (see below) in relation to communal land, and regards conservancies as an integral part of Namibia's CBNRM programme.<sup>19</sup>

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16 See for example section 17 of the Communal Land Reform Act.

17 Republic of Namibia, Nature Conservation Amendment Act (No. 5 of 1996), Government of the Republic of Namibia, Windhoek.

18 Living Museums, supported by the Living Culture Foundation, are community-run projects designed to present local traditional culture to interested visitors: <https://www.lcfn.info/>. There are two Living Museums in Tsumkwe District: the Ju|'hoansi Museum in Grashoek (N̄a Jaqna), established in 2004, and the Little Hunter's Museum in ||Xa|hoba (Nyae Nyae), established in 2010.

19 See for example the provision under section 31(4) of the Communal Land Reform Act (No. 5 of 2002): "Before granting a right of leasehold in terms of subsection (1) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975), a board must have due regard to any management and utilization plan framed by the conservancy committee concerned in relation to that conservancy, and such board may not grant the right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilization plan."

**Table 2: Comparison of hunting rules, natural resource management and utilisation strategies in Nyae Nyae and N#á Jaqna**

Tsumkwe District East (Nyae Nyae)	Tsumkwe District West (N#á Jaqna)
Subsistence hunting allowed	Not allowed to hunt (except in Grashoek)
Use of traditional weapons, including bows and arrows with poison	No use of traditional or modern weapons allowed
Can use traditional snares	No snares or traps allowed
Cannot use dogs to assist in hunting	Cannot use dogs to assist in hunting
No mounted hunting allowed (horses, donkeys)	No mounted hunting allowed (horses, donkeys)
Ambush hunting is allowed	Ambush hunting is not allowed
Limits on types of animals to be hunted	Limits on all animals – no hunting (except Grashoek)
There are quotas for “own-use” subsistence hunting, for safari hunting and for the TA	Quota set by the MET; MET obtains meat for the villages
Some safari hunting done by a concession holder (SMJ Safaris)	Some safari hunting done with a concession holder (Peter Thormalen Trophy Hunting)
No shooting of predators by local people; problem animal control by MET	Problem animal (predator) control done by the MET
Resource management by Nyae Nyae Conservancy and local <i>n!ore kxaosi</i> (Ju ’hoan territorial overseers)	Resource management by N#á Jaqna Conservancy members at the village level and traditional leaders and managers
Tourism encouraged, done in conjunction with communities and the Conservancy Management Committee; 2 community campsites; Little Hunters Museum at   Ao oba provides funds to the Nyae Nyae Conservancy	Tourism encouraged; the Living Museum of the Ju ’hoansi San, Grashoek and local-level involvement in tourism, some returns from a private lodge in the Nhoma area

**Note:** Data obtained from the N#á Jaqna and Nyae Nyae conservancy management committees, the NNDNFN, the Living Culture Foundation of Namibia, the MET, and fieldwork

Although having the right to use and manage wildlife resources is critical for both communities, there are challenging aspects. Keeping close track of animal numbers is necessary for broad decision-making about management, and this is a complex task. Exercises such as the full moon counts of wildlife, conducted once a year in the Nyae Nyae region by the MET, and monitoring of water point usage by wild animals in Nyae Nyae have provided important data,<sup>20</sup> and since 2017 the US-based World Wildlife Fund has also assisted Nyae Nyae Conservancy to conduct ground transect counts of wildlife (see also section 3 of this chapter).

20 Rispel, Melanie & Selma Lendelvo, ‘The Utilization of Water Points by Wildlife Species in Nyae Nyae Conservancy, Namibia’, *Environment and Natural Resources Research*, 6(4), Namibia, 2016, 91–103.



Although wildlife is an important income resource in both conservancies, they also express a desire to keep limited numbers of domestic livestock and to practise gardening and small-scale agriculture. Determining the balance between farming and wildlife management has proven to be challenging, for a number of reasons (see also sections 3 and 4). Human–wildlife conflict includes threats to people and their livestock (including the destruction of gardens and waterholes), and this has been widely reported in both Nyae Nyae and Nꞑa Jaqna. In Nyae Nyae, for example, when people began keeping livestock in the early 1980s, predators frequently took their livestock. This is less of a problem today due to better management and assistance, but water points and gardens are still often damaged or destroyed by elephants (see also section 2.5 on support organisations). Occasionally, people are also killed by wild animals. Despite these challenges, residents interviewed by the authors and others in recent years express a strong desire to maintain wildlife management as a central focus of their conservancy subsistence plan, alongside the small-scale cultivation of crops and rearing of domestic animals.<sup>21</sup>

## 2.3 Community forests

Both areas have community forests, as defined under the Forest Act (No.12 of 2001) and the Forest Amendment Act (No. 13 of 2005).<sup>22</sup> They are overseen by the Ministry of Agriculture, Water and Forestry (MAWF). The Nyae Nyae Community Forest, which was established in 2013, has the same boundaries as the Nyae Nyae Conservancy. Nꞑa Jaqna has two community forests: the MꞑKata Community Forest (established in 2000) and the Nꞑa Jaqna Conservancy Community Forest (established in 2018; see Table 1 for specific data). The 2015 Forest Regulations allow for the people in designated community forests to be able to make decisions about using plant resources for wood (including for fuel and timber), food, medicinal purposes and grazing.<sup>23</sup>

Because community forests fall under the MAWF, while conservancies fall under the MET, in theory this designation should provide an additional level of GRN support (see section 2.5 on support organisations for a discussion of the implications in practice).

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21 See also Hays, Jennifer, Maarit Thiem & Brian Jones, 'Otjozondjupa Region' in *Scraping the Pot: San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014, pp. 93–172.

22 Republic of Namibia, Forest Act (No. 12 of 2001), Government of the Republic of Namibia, Windhoek, 2001; Republic of Namibia, Forest Amendment Act (No. 13 of 2005), Government of the Republic of Namibia, Windhoek, 2005.

23 Ministry of Agriculture, Water and Forestry, Community Forest Guidelines, Windhoek, 2005; Hazam, John, *Conservancies, Community Forests, and Land Issues from a Legal Perspective: Constraints and Opportunities*, Legal Assistance Centre, Windhoek, 2017.

## 2.4 Traditional authority and leadership

The Traditional Authorities Act (No. 25 of 2000)<sup>24</sup> under the Ministry of Urban and Rural Development (MURD) allows a “traditional community”<sup>25</sup> to designate a TA in accordance with customary law. This body includes a “chief or head” and traditional councillors.<sup>26</sup> A traditional authority can make decisions about civil cases according to customary law, as long as it does not contradict the Constitution of the Republic of Namibia. Furthermore, as noted above, chiefs and the TA are part of the decision-making process regarding communal lands and conservancies, with the communal land boards having the ultimate authority.

Today, five San TAs in Namibia have been accorded GRN recognition; of these, two are the leaders of the Nyae Nyae and Nǃa Jaqna communities, which were also the first two San TAs to be appointed, both in 1998. During the first round of applications for TA status, none of the San who applied were approved – mainly due to the misunderstanding that their “egalitarian” social organisation meant they had no leadership structures at all (see paragraph below). Following a formal complaint and reconsideration, however, both Nyae Nyae and Nǃa Jaqna were officially recognised. The NNDFN attributes this to the fact that both communities had retained a portion of their traditional land base.<sup>27</sup> The Nyae Nyae chief has remained in this position since 1998, and his position is not disputed within the community. In Nǃa Jaqna there is more conflict around this role. The chief elected in 1998 died in a car accident in 2012, and there is controversy around the inheritance of the position by his daughter, Gloney Arnold. Issues confronting both of these chiefs and the TA will be described in sections 3 and 4 of this chapter.

Misperceptions about the nature of leadership and land tenure among San groups can undermine their efforts to gain representation and a voice in the Namibian political system, and to maintain land tenure, and here we would like to highlight some general difficulties for San leaders that affect both of these TAs and their chiefs. Although the characterisation of San social organisation as egalitarian is accurate, this does not mean that there are no authority structures. Different groups have their own systems of land tenure and stewardship and recognise individuals as leaders. In the Ju|’hoansi language, there is a word for “leader”: //aiha. In the case of Nyae Nyae, for example, the former //aiha for Gautscha, the village in the centre of the area which was most active politically, was the father of the present chief in Nyae Nyae. The continuity between traditional leadership structures and the current TA is an important aspect of its legitimacy.

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24 Republic of Namibia, Traditional Authorities Act (No. 25 of 2000), Government of the Republic of Namibia, Windhoek, 2000.

25 Understood to be an entity sharing a common language, culture and heritage. To be a part of a community, one has to (a) self-identify with and (b) be accepted by the rest of the community.

26 (Republic of Namibia 2000)

27 (Cole 2018)

Equally important to point out, however is that traditional San leadership styles are different from what is often recognised as such in hierarchical social systems. Like many San groups (and other small-scale hunter-gatherer societies worldwide), the politics of the Ju|'hoansi, !Kung and other San groups were historically based on consensus, and resource distribution systems were based on sharing. Leaders were individuals who had substantial knowledge of their areas (in Ju|'hoansi they were called *n!ore kxaosi*), and who could facilitate consensus and ensure fair sharing among their family group. Leadership qualities that were reinforced at the community level consisted of self-effacing behaviour, possession of historical and social knowledge, notable abilities to resolve conflicts between individuals or groups, and willingness to share goods and services. Although such qualities are still valued today in a leader among San communities, they are not always ideal in modern leadership positions.

For example, as with many small-scale egalitarian societies, a reluctance to impose one's own will on others, or to speak on behalf of others, are deep cultural values that can pose difficulties for modern San leaders, who are expected to do both of these things as national representatives of their communities. Furthermore, pressure exerted by family members to share access to resources, while adaptive at a small group level, can easily lead to actions that are viewed as highly unfair – or even corrupt – when a leader is responsible for much larger groups of people (though it is important to note that recognising the boundaries between responsibility to family and corruption creates problems for many leaders, not only those of the San). These contradictory expectations are at the root of many issues facing San communities and their leaders today, and they affect decision-making processes around land. Nonetheless, community members in both Nyae Nyae and Nꞑa Jaqna consistently assert that the representation at the national level is critical for their communities.

The highest-ranking San politician in Namibia is Royal Johan Kxao |Ui|o|oo (known locally as Kxao Royal), a Ju|'hoan who started out in Tsumkwe as a teacher and who was appointed by the ruling party SWAPO as a member of parliament in 2005. Since 2015 he has been the Deputy Minister of Marginalized Communities, directly under the Office of the Vice President. Although he is not representing any specific San community, Kxao Royal does face many of the challenges noted above, especially in relation to his home community in Nyae Nyae.

Both the Nyae Nyae and Nꞑa Jaqna communities, like other San groups in southern Africa, are thus negotiating a dramatic transition in leadership requirements (among other transitions). Recognition of and support for such processes is critical for their effective political participation and decision-making processes.

## 2.5 Support organisations

Both conservancies receive support from organisations like the Legal Assistance Centre, which supports San communities nationally by providing legal advice and representation; the Namibian Association of CBNRM Support Organisations, which

supports conservancies; and previously, the Working Group of Indigenous Minorities in Southern Africa (WIMSA), a regional organisation which was an advocacy and support group for San communities in the southern African region. The Division for Marginalised Communities, under the Office of the Vice President, also has a major focus on San communities in the country including those in Nyae Nyae and Nꞑa Jaqna.

Both Nyae Nyae and Nꞑa Jaqna receive important support from the NNDFN, an NGO whose primary function is to assist these conservancies with their economic, political and social processes. The organisation grew out of the development-oriented work of anthropologists John Marshall and Claire Ritchie, beginning in 1981. They sought to support the Ju|'hoan communities in Nyae Nyae who wished to move out of the town of Tsumkwe, which had become known as the “place of death” due to severe food shortages and alcoholism during the 1960s and 1970s.<sup>28</sup> To support the communities' move back to their own land (*n!oresi*), Marshall and Ritchie established a Cattle Fund to assist people with small-scale agricultural projects, and provided seeds, livestock, tools, water and technical advice to the Ju|'hoansi.<sup>29</sup> This fund was called the Ju/wa Bushman Development Fund for a few years before being renamed as the Nyae Nyae Development Fund.<sup>30</sup> Since that time the NNDFN has undertaken a wide variety of development and capacity-building activities in Nyae Nyae.<sup>31</sup>

The Nꞑa Jaqna communities have had far less NGO assistance. Most of the support for these communities in the past came from the GRN, the Evangelical Lutheran Church of Namibia and WIMSA, which was the main funder of Nꞑa Jaqna from c. 1995 to 2005.<sup>32</sup> In 2010 the NNDFN officially added support for Nꞑa Jaqna to its mandate.

Based in Windhoek and with international financial support, the NNDFN has for decades played a critical role in facilitating negotiations between communities in the Tsumkwe constituency and decision-makers in the capital. The organisation also alerts national media about current issues in the conservancies, ensuring that the challenges confronting a marginalised group in a remote area are made visible to the general public. The NNDFN also attends national meetings on CBNRM and land policy issues where the challenges that are facing the two conservancies are made known.

The NNDFN today assists both conservancies in their negotiations with professional trophy hunting concessions and with other development and conservation activities, including the hosting of the annual general meetings each year where conservancy business matters are discussed with the conservancies and their members. Considerable investment is also being made in protecting water points and gardens from elephants, as well as in repairing damages.

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28 (Marshall 2003)

29 (Marshall & Ritchie 1984)

30 (Bieseles & Hitchcock 2013: 19–21, 66–72, 84–90)

31 See (Bieseles & Hitchcock 2013 and Cole 2018).

32 (Hitchcock 2012); Welch, Cameron, ‘“Land is Life, Conservancy is Life”: The San and the Nꞑa Jaqna Conservancy, Tsumkwe District, Namibia’, *Basel Namibia Studies Series 20*, Basler Afrika Bibliographien, Basel, 2018.

Both communities also receive support from various ministries. As conservancies, both Nyae Nyae and N̄a Jaqna are supported by the MET, which provides support for wildlife management and agricultural development and intersections between these areas. As community forests, Nyae Nyae and N̄a Jaqna have the support of the Directorate of Forestry in the MAWF, which provides a water support team that helps to maintain water points. For example, support is also provided for human–wildlife conflict; problems with elephants are on the increase in both conservancies, and the MAWF has a team that repairs the water points that these animals often damage. In addition to practical, logistical and economic assistance, having the support of two ministries also in theory provides advantages in terms of access to GRN services and information; furthermore, the two areas are protected by specific legislation that grants them control over resources. In the town of Tsumkwe, the Ministry of Justice and the MURD also have offices, as do the Namibian Police. Although these offices are there to serve the general population and not specifically the conservancies or community forests, their presence in the area could be instrumental in upholding and implementing the national laws pertaining to land rights.

Overall, the economic support and legal protection described above is far beyond that which other San communities in the country have access to,<sup>33</sup> which gives the conservancies the legal footing that they need to bring injustices to court. However, such protection is only meaningful if it is upheld by local, regional and national officials. In practice, both communities have found it very difficult to make their cases heard at all of these levels – examples of this are given in the case studies further on in this chapter. Therefore, although the communities have far more support and access to legal recourse than other San communities, we would like to emphasise here again that firstly, this support is in fact the minimum requirement for addressing the severe historical and current marginalisation faced by these communities; and secondly, that these advantages by no means guarantee justice or economic security.

## 2.6 Important differences

Although the two conservancies share many characteristics and historical influences, there are several important historical, environmental, demographic and economic differences between them, all of which lead to different considerations regarding land rights.<sup>34</sup>

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33 Other San groups, in particular the Hai||om and the Khwe, have received much legal support and advice, in particular from the LAC. However, these and other communities mostly lack the economic support and protection that the two conservancies receive.

34 See also (Hays et al. 2014) and Hitchcock, Robert K., *Improving the Viability and Sustainability of the Nyae Nyae Conservancy and the N̄a Jaqna Conservancy: A Mid-Term Evaluation of an NNDFN/ Brot für die Welt Project in Namibia*, Nyae Nyae Development Foundation of Namibia, Windhoek, and Brot für die Welt, Berlin, 2015.

One major difference between Nyae Nyae and Nǃa Jaqna is the time depth of the occupation by current residents. As noted earlier, the residents of Nyae Nyae have been in the area for many generations, as have the resident !Kung in Nǃa Jaqna. However, many current residents of Nǃa Jaqna are people who were resettled there in the 1970s and 1980s, and in 1990 (described in more detail below). This historical difference is important. Sometimes the assumption is made that residents in both conservancies were resettled there during the apartheid era, when in fact the vast majority of Nyae Nyae residents are descended from people who have lived in the area since before any other current group arrived; this is also the case for the !Kung in Nǃa Jaqna. Although all San have indigenous status in the region, most San communities have been displaced by other groups and are currently landless. The Nyae Nyae Jul'hoansi and the Nǃa Jaqna !Kung are among the very few who are still living on their ancestral land. It must be emphasised, however, that all San communities in Tsumkwe Constituency are equally entitled to the legal protection outlined in the various Acts described above.

A second difference between Nyae Nyae and Nǃa Jaqna is environmental: the Nyae Nyae area is richer and more diverse in terms of both fauna and flora. Nyae Nyae also has more surface water and a generally higher water table than Nǃa Jaqna. Nǃa Jaqna has a significant problem with places that contain mogau (gifblaar; *Dichapetalum cymosum*), a plant that is poisonous for cattle. Furthermore, the Nǃa Jaqna area has a lower wildlife density than Nyae Nyae. These characteristics have led to differences in decisions about land use regulations for the conservancies; they also entail different arguments about the land rights in each conservancy.

Another area of difference is demographic: Nǃa Jaqna has a much higher total population and population density than Nyae Nyae. In combination with the environmental differences noted above, this higher population affects the economic opportunities available to members of the conservancies. The ecotourism and professional hunting potential for Nǃa Jaqna is much lower than it is for Nyae Nyae. Nǃa Jaqna Conservancy thus generates much less income per annum than Nyae Nyae, and the benefits have to be distributed more widely in view of the numbers of members in the respective conservancies. These economic differences are also intensified by the fact that Nǃa Jaqna Conservancy has historically had less investment in infrastructure and capacity building than Nyae Nyae.<sup>35</sup>

Finally, Nǃa Jaqna Conservancy has a much higher number of people who hail from elsewhere, and who have established illegal fences and cattle posts, than is the case for Nyae Nyae. The following sections will provide more detail about the Nyae Nyae and Nǃa Jaqna communities, highlighting their specific historical trajectories as these relate to land use and tenure, and how these characteristics play into current, ongoing dynamics and challenges. Some of the general challenges that they face are shared with all San communities, including poverty, severe social

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35 (Welch 2018)



stigmatisation, very low levels of education, and high levels of vulnerability to economic and environmental disruptions, including droughts, floods and other changes resulting from global warming.

Other general challenges are common to the two areas because of their particular status. For example, both conservancies are experiencing illegal incursions of other groups and their livestock onto their territory – land that is attractive precisely because much of it has not been overgrazed, which is direct result of their careful land management and the NGO and GRN support described above. The following sections will highlight specific characteristics of both conservancies and outline the current cases that are before the Namibian High Court.

### 3 Profile of Nyae Nyae Conservancy

The Ju|'hoansi San of the Nyae Nyae area of north-eastern Namibia represent one of the few African indigenous peoples who have been able to retain a relatively significant portion of their ancestral land.<sup>36</sup> The Nyae Nyae Conservancy is the only place in all of Africa where a hunter-gatherer community has the right to maintain its traditional culture and subsistence strategy to the extent that members of the Nyae Nyae Ju|'hoansi community do. This makes it unique in Africa, and rare in the world. The Ju|'hoansi have been able to do this through careful management of their natural resources and the land where they live, and through extensive participation in GRN policy debates and initiatives.

Nyae Nyae, established in February 1998, was the first communal conservancy in the country. Its TA was recognised later in the same year. The recognition of the people and their land rights had much to do with the visibility of the current chief, Tsamkxao #Oma, and the support of organisations like the NNDFN, and others. Nyae Nyae currently has 42 villages – more than any other conservancy in the country – with 38 of these being recognised officially by the Nyae Nyae Conservancy, while others are new settlements resulting from individuals and families seeking to start their own tourism or other projects.<sup>37</sup> The expansion of villages is currently causing tensions in the conservancy, as they directly impact land, water and other resources.

The conservancy has a management committee and a board who work in conjunction with the NNDFN and other NGOs. Importantly, Tsumkwe itself, the largest and most important town in the Tsumkwe district, is a municipality and not a part of the conservancy. Although it is in the centre of the conservancy, the town itself is subject to different legislation and has independent political representation.

The borders of Nyae Nyae define not only its landmass, but also in part the circumstances of the people living there. To the west it borders N#á Jaqna, with whom it shares important historical elements and current situations, and with

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36 See (Bieseles & Hitchcock 2013).

37 As of June 2019 (Hitchcock & Kelly, field notes).

whom its fate is partially intertwined. The eastern boundary of the conservancy is the national border with Botswana which was fenced in 1965, separating many Ju|'hoan families from their relatives. Today, there is a regular flow of people across the border to visit relatives and for social and economic purposes. Nyae Nyae borders Kavango West Region, and to the north of Nyae Nyae lies the Khaudum National Park. Much of Khaudum was the ancestral territory of the Ju|'hoansi, and its establishment as a game reserve in 1989 resulted in the resettlement of several Ju|'hoan communities into what are now the Nyae Nyae and Nꞑa Jaqna conservancies. In 2007 it was declared a national park,<sup>38</sup> which has both positive and negative implications for the Nyae Nyae community. For some villages on the road to Khaudum, this has resulted in increased tourism; on the other hand, its zoning as a national park further restricted possibilities for hunting and collecting plant resources in the area.

The southern border of Nyae Nyae (bordering Nꞑa Jaqna too) is the demarcation created by the Odendaal Commission of 1964 to divide “Bushmanland” from “Hereroland”. Since the 1960s, a veterinary cordon fence known as the Redline Fence has separated the two areas,<sup>39</sup> preventing the flow of animals from northern districts (including the Tsumkwe district) into the disease-free (notably foot-and-mouth disease-free) area to the south, which is made up largely of commercial farms.<sup>40</sup> As discussed in the case study further on in this chapter, a breach of this boundary in 2009 is currently having serious implications for the Nyae Nyae community.

### 3.1 Research and development organisations

The Ju|'hoansi in particular have been the subjects of long-term interdisciplinary studies since the Marshall family began working in Nyae Nyae at /Aotcha, where they and their colleagues undertook a variety of ethnographic, archaeological, medical and other investigations over the period from 1951 to 1961.<sup>41</sup> Beginning in the 1980s, the Nyae Nyae people have been the hosts to a disproportionate number of researchers and filmmakers, especially relative to Nꞑa Jaqna. This has some advantages; as a result of this research, we have a comprehensive understanding of the land use patterns and how they connect to social structures.

Many of these researchers also focused on how their understanding could support the communities' efforts to be more autonomous. These efforts formed the basis of the NNDFN efforts and facilitated the creation of the conservancy; led to

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38 This park encompasses an area of some 3 840 km<sup>2</sup>.

39 The original Red-line Fence was constructed in 1896 (Miescher, Giorgio, *Namibia's Red Line: The History of a Veterinary and Settlement Border*, Palgrave Macmillan, New York, 2012).

40 This includes the Omaheke district, where many San also live; see Chapter 3 by James Suzman in this volume.

41 (Marshall 1976 and 2003); Thomas, Elizabeth Marshall, *The Old Way: A Story of the First People*, Farrar, Straus & Giroux, New York, 2006.

the documentation of the language;<sup>42</sup> and inspired important projects like the Nyae Nyae Village Schools, which were started in collaboration with an anthropologist and a linguist.<sup>43</sup> These schools (of which there are about five to seven in operation at any given time) have been providing mother tongue education in Grade 1 to Grade 3 for over 25 years, and are important in that they allow people to live on their land and have access to some formal education.<sup>44</sup>

Due to its progressive approach to community-based control over natural resources, the Nyae Nyae area has also become a sort of laboratory for the implementation of CBNRM, and for observing community decision-making processes, making it an easy focus for development efforts, and also for researchers. While some of this attention is necessary in order to support community-based efforts to maintain their autonomy and control over their land, it can also create enormous problems, such as the sheer number of organisations involved and of research projects conducted; the lack of coordination among them; and a lack of consistent consultation with the community and its key support organisations, ultimately threatening community control.<sup>45</sup>

Furthermore, attention by researchers can be especially problematic when there are disagreements between outsiders about the best approaches to take to development, or when research is only deconstructive or critical, without providing insights that are useful to the community. An ongoing debate among outsiders has been over whether the Ju|'hoansi wish to primarily maintain their focus on wildlife, and on hunting and gathering, or if they want to become primarily cattle herders. The Ju|'hoansi consistently say that they wish to try to combine these subsistence strategies, and this is reflected in their current land management plan, described in the section below.

## 3.2 Management and subsistence options and land use

As described above, Nyae Nyae Conservancy is the ancestral land of the Ju|'hoansi; however, their actual territory extended much further. Their term *kxa/ho* (literally “sand surface”) signifies all of the land inhabited in the past and present by the Ju|'hoansi and all of its water, bush foods, game, grazing, wood, minerals and other natural resources, as well as places of historic and cultural significance.<sup>46</sup> At one time, roughly around the beginning of the 20<sup>th</sup> century, it is estimated that the

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42 Dickens, Patrick, *English-Ju/'hoan, Ju/'hoan English Dictionary*, Rudiger Koppe Verlag, Koeln, 1994; Dickens, Patrick, *A concise grammar of Ju/'hoan: with a Ju/'hoan-English glossary and a subject index*, Rudiger Koppe Verlag, Koeln, 2005.

43 Biesele, Megan, “*Women like Meat*”: *Ju/'hoan Bushman Folklore and Foraging Ideology*, Witwatersrand University Press, Johannesburg, and Indiana University Press, Bloomington, Indiana, 1993.

44 (Hays 2016)

45 See also (Hays et al. 2014).

46 For more information see (Marshall 1976 and Biesele & Hitchcock 2013).

Ju|'hoan ancestral territory was between 70 000 and 80 000 km<sup>2</sup> in size, including what is now Khaudom, the area to the south that is now Ondjou Conservancy, and parts of western Botswana stretching across to Kauri near the Okavango Delta. The current territory of Nyae Nyae Conservancy (8 992 km<sup>2</sup>) is thus just over 10% of this ancestral territory.<sup>47</sup>

Although the Nyae Nyae community is indeed fortunate to have the land and resource rights and the possibility of maintaining traditional subsistence practices (which many express a desire to continue doing), the population density is now too high for them to rely on that as their only, or even their primary, means of subsistence. Nonetheless, hunting and gathering continue to play a critical role in their overall subsistence strategy, both directly and indirectly. The conservancy has thus made a conscious choice to prioritise wildlife and plant resources and traditional land use patterns in its land management strategy.

Partly as a result of the existence of the conservancy and the emphasis on wildlife, most employment opportunities in the area (both temporary and long term) are directly connected to traditional hunting and gathering activities. These include activities in three primary (and overlapping) categories: gathering, hunting and tracking, and tourism – each of these is described below. In addition, the land use plan allows for cattle and other livestock – but in limited numbers in order to avoid overgrazing and to allow space for wildlife to thrive and move freely, and to preserve the plants that people depend on for their subsistence.

The gathering of plant foods (and worms that feed on plants) provides an extremely important part of the everyday diet of Nyae Nyae residents, and one that should not be overlooked – even though it does not in most cases result in cash income. An exception to this is the gathering of devil's claw (*Harpagophytum procumbens*), which is one of the most important sources of income for many villages. People receive payment by weight, and they usually make N\$20 – N\$30 per day. People usually leave their villages (and gardens and herds, if they have these) to go to collecting camps for several days to a few weeks. This involves significant trade-offs – children are taken out of school to accompany parents, gardens and herds suffer, and a significant portion of their income is used for transport to the sites and to pay for food and water to be supplied. Nevertheless, people are choosing to engage in this activity, and it will be crucial to examine the benefits and options to enable people in Nyae Nyae to more efficiently take advantage of this important resource.

Hunting and tracking are also major sources of subsistence, both directly and because of cash earned through these activities. Many households in Nyae Nyae do still rely on the hunting of large or small animals for a significant part of their

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47 This situation is exacerbated by the fact that Ju|'hoan family size is growing substantially, from what used to be 2 children in the past to 6–8 children today. Factors contributing to this change include sedentarisation of the Ju|'hoansi in Nyae Nyae and N#á Jaqna, and GRN programmes that provide N\$250/month per child to Namibian families.

subsistence.<sup>48</sup> It is important to note here that subsistence hunting has a relatively low impact on the resource base in Nyae Nyae, and is currently sustainable. Some individuals work as trackers for trophy hunters, or as guides for tourists on bush walks or drives; this is an important source of income for individuals, and is redistributed among family members and village residents. In addition, Nyae Nyae Conservancy earns money from a lease agreement with a safari company.<sup>49</sup> The meat from kills is distributed on a rotating basis among community members, and the profits from this arrangement are divided equally among conservancy members, each of whom receives a cash benefit once a year.

In addition to tracking for professional hunters, general tourism is another important source of revenue for conservancy members. However, it has both costs and benefits in Nyae Nyae. Some communities have had limited success with their own tourism projects (such as the Living Museum in ||Xa|hoba noted earlier, and similar projects in a handful of other villages). Competition among various Nyae Nyae communities to attract tourists is causing some social tensions, however, and it must be carefully managed. Furthermore, data from Tsumkwe Lodge and Nyae Nyae Conservancy suggest that many of the tourists who visit Nyae Nyae do not pay tourist fees to the conservancy, and there are many tourists who camp in the conservancy without paying, rather than staying at Tsumkwe Lodge. There is a significant need to address issues relating to community tourism and its impacts on Nyae Nyae Conservancy.

In addition to food and money obtained from the traditional livelihood strategy of hunting and gathering, people in Nyae Nyae also rely upon wages earned through either piecework or salaried positions.<sup>50</sup> The latter include employment by the conservancy and the TA; acting as pastors for local churches, and as teachers for the Village Schools; and positions at Tsumkwe Lodge, shops in the town, or the Namibian Police, among others. But these jobs are limited, and often require special training and/or residence in Tsumkwe, which makes them unavailable to the vast majority of Nyae Nyae residents – most of whom have limited education and many of whom prefer to live in their *n!oresi*. Thus, despite the limitations and concerns noted above, clearly having access to wildlife and other natural resources

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48 (Hays et al. 2014); Lee, Richard B., 'In the Bush the Food is Free: The Ju|'hoansi of Tsumkwe in the 21st Century', in Brian Coddling & Karen Kramer (eds), *Why Forage? Hunting and Gathering in the 21st Century*, School for Advanced Research Press, Albuquerque, and University of New Mexico Press, Santa Fe, 2016, pp. 61–87; Laws, Megan, *All things being equal: trust, transparency, and ambivalence in a Namibian conservancy*, Ph.D. Dissertation, London School of Economics and Political Science, London, 2019.

49 For example, in 2017, Nyae Nyae earned N\$7.2 million (about US\$492,000), most of it coming from the lease agreement with SMJ Safaris (Nyae Nyae Development Foundation of Namibia, Annual Report 2017, NNDFN, Windhoek, 2017).

50 Wiessner, Polly W., 'Embers of Society: Firelight Talk among the Ju|'hoansi Bushmen', *Proceedings of the National Academy of Sciences*, 111(39), 2014.

in these areas has brought significant benefits to the Ju|'hoansi – and any threats to these resources have serious impacts on the community.

### 3.3 Traditional land management systems

As noted above, a *n!ore* is an area over which local people have rights of access and resource use. *N!oresi* contain natural resources upon which people depend, including water, wild edible and medicinal plants, trees for shade, fuel wood and construction, and materials such as stone used in the manufacture of tools and other goods (e.g. hammerstones for cracking mongongo nuts).<sup>51</sup> Since 1991, the Ju|'hoansi in Nyae Nyae have been mapping their traditional *n!oresi*.<sup>52</sup> The advantage of the *n!ore* system is that it spreads people out across space and facilitates management at the local level. The management of the *n!oresi* among Ju|'hoansi is done collectively, often overseen by individuals known as *n!ore kxaosi* (land owners/managers), usually older people in the group who have a deep understanding of the history of land use and occupancy of the areas where they live.<sup>53</sup> It is these individuals to whom outsiders go to seek permission to enter a *n!ore* and use its resources. Today, people often go to the Ju|'hoan TA to ask for land; nevertheless, the *n!ore kxaosi* are well known to the local group members as well as to other Ju|'hoansi, and they still play an important role in local decision-making processes.

As Polly Wiessner points out, “Land rights were largely maintained by social boundary maintenance, with *hxaro* partnerships giving others temporary access.”<sup>54</sup> *Hxaro* is a delayed-return system of reciprocity linking people as exchange partners over extensive areas, through the exchange of gifts (traditionally often ostrich eggshell bead bracelets and necklaces). These exchanges have been reduced over time, but people retain the knowledge of their *hxaro* partners, and these links are important to mobility options available to people in both the Nyae Nyae and Nꞛa Jaqna conservancies.

We mention these two examples as illustrations of how land management systems are inextricably connected to exchange systems, both of which (along with

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51 *N!ore* sizes vary substantially, averaging approximately 200 km<sup>2</sup> to 400 km<sup>2</sup> in the Nyae Nyae region. The boundaries between the *n!oresi* are generally not marked, but most local people were familiar with these areas and knew where their own *n!oresi* ended and where the *n!oresi* of others began. Rights to the *n!oresi* are inherited from both sets of parents, though in some cases, Ju|'hoansi could gain access to an empty *n!ore* through moving in and living there, in other words, through occupation.

52 Vermeulen, Saskia, Gemma Dovies & Dan van der Horst, ‘Deconstructing the Conservancy Map: Hxaro, N!ore, and Rhizomes in the Kalahari’, *Cartographica: The International Journal for Geographic Information and Geovisualization* 47(2), 2012; (Bieseles & Hitchcock 2013); Begbie-Clench, Benjamin, *Illegal Grazing in Nyae Nyae Conservancy: Assessment and Recommendations*. Nyae Nyae Development Foundation of Namibia and Legal Assistance Centre, Windhoek and Nyae Nyae Conservancy, Tsumkwe, 2016.

53 (Bieseles & Hitchcock 2013)

54 (Wiessner 2014: 1428)



other cultural aspects) were integral aspects of a broad network that connected Ju|'hoansi over a large territorial range. This simultaneously provided a security net for people, and it allowed them to manage resources effectively for many thousands of years. A question is whether such systems are still relevant today, either for the community themselves, or for broader society; increasingly, the evidence suggests that they are.

Given the unique position of the Nyae Nyae community in terms of land tenure, we would like to emphasise that maintenance of their land rights is crucial both for the residents themselves, and because it can set a precedent for similar communities elsewhere in the nation, the region, and the continent. We present the following section describing a current serious threat to the long-term land tenure by the Ju|'hoansi with this perspective in mind.

### 3.4 Legal case: the Nyae Nyae invasion

On 29 April 2009, an incident occurred that has triggered a series of threats to Nyae Nyae Conservancy. A group of Herero farmers from what was then called Gam, a conservancy to the south (now Ondjou), cut the veterinary cordon fence (the Redline Fence) that separated them from Nyae Nyae, and moved into the conservancy with their cattle. This initial illegal invasion ultimately grew to 1 200 cattle, all of which were confiscated by the government in May and June of 2009. The farmers subsequently sued the government and were awarded a financial settlement, with which they proceeded to purchase more cattle, while still remaining in Tsumkwe.<sup>55</sup> As the cattle had been confiscated because the farmers broke the law by cutting the veterinary cordon fence and entering illegally into the Nyae Nyae territory, the fact that the Herero farmers were awarded a financial settlement was surprising.

This situation has now been playing out for over 10 years. Despite numerous efforts to address the situation through political and legal channels, many of the initial group that entered remain in Tsumkwe, the number of cattle held illegally in the Municipality of Tsumkwe continues to increase, and resources from the conservancy are being illegally consumed by non-conservancy members. In this section we highlight the main concerns that this situation raises and the legal issues involved, and note some critical lessons that can be learnt.

It is important to note that there are two different jurisdictions in Nyae Nyae: 1) the Municipality of Tsumkwe; and 2) the surrounding Nyae Nyae Conservancy, which falls under the authority of the Ju|'hoan TA. The increasing numbers of cattle are problematic in both areas, and in practice, as the municipality is in the

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55 Hays, Jennifer, 'The Invasion of Nyae Nyae: A Case Study in on-going Aggression against Hunter-gatherers in Namibia' in *Forum Conference on Indigenous Peoples 2009: Violent Conflicts, Ceasefires, and Peace Accords Through the Lens of Indigenous Peoples*, Report, Forum for Development Cooperation with Indigenous Peoples, Tromsø, 2009, pp. 25–32.

centre of the conservancy and many members live there, it is difficult to separate the two jurisdictions. In the municipal area of Tsumkwe, it is not legal to maintain cattle; the farmers (and others) are thus in violation of the municipal regulations. The cattle themselves frequently move onto conservancy land; and there are also several reports of illegal resource harvesting by farmers within the conservancy boundaries.

Immediate and visible problems that have been reported by community members and by other witnesses include the following:

- the overgrazing of plants in general, specifically around Tsumkwe, but also extending into the conservancy;
- a reduction in plants such as devil's claw harvested for sale, especially around Tsumkwe, because of trampling and cattle and other domestic animal plant consumption;
- the illegal harvesting of trees for poles to make kraals;
- some harvesting of high-value timber, and sales to outsiders;
- incursions by non-conservancy members onto conservancy land; and
- a dramatic increase in cattle in Tsumkwe, which is interfering with the quality of life in the municipality itself, because the cattle are making both driving and walking dangerous, are noisy, and eat plants and peoples' gardens produce and crops.

A key point is that these are violations of Namibian laws and regulations. The Ju|'hoansi are *not* requesting special rights – the lack of conformation with and upholding of national laws relating to land rights is the foremost problem. Ju|'hoan leaders have articulated this position since the first invasion. Kiewiet |Un, then the Conservancy Chairperson, expressed this, and other key facets of the situation in 2009:

And I ask myself, are we a people here in Namibia who have not one law but two? I thought we had one law, that we had made one law, that we had our *n|ore* and they had theirs. What has been sustaining us is our wildlife ... and we have people who dig Kamaku roots [devil's claw] and sell them. It's a business of ours, and as I now see it, if the Gam farmers still stay with us here, it will die.<sup>56</sup>

As |Un highlights, Nyae Nyae Conservancy made a deliberate choice to prioritise wildlife and maintaining their plants over increasing their numbers of cattle. They say that this is important to them because it is their culture and heritage; because it is an integral part of a nature conservation strategy and land use plan agreed upon with the GRN; and because they are making a living from these resources. The Ju|'hoansi say that they have always depended on these resources, and they want the wildlife to be there for their children and future descendants. They understood

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56 "Kiewiet" |Un, interview with Megan Biesele, 27 June 2009.

that their land rights are protected under Namibian law. The increase of cattle not owned by conservancy members within the conservancy and the Nyae Nyae Community Forest are not in accordance with their land use plan – this thus clearly constitutes illegal grazing. The chief and other members of the community consistently express concern and frustration over the apparent lack of will on the part of the GRN to uphold the laws of the land.

### 3.5 Cumulative effects of the initial lack of repercussions

Long term effects of the illegal grazing and the failure to resolve it include the potential for the gradual spread of overgrazing and a reduction in usable plant and wildlife species. This will seriously affect subsistence hunting and gathering, tourism, big game hunting, and the gathering of valuable commercially useful plants, and will bring about a reduction in other resources that people rely on, as described above. There is increasing anxiety among the population of Nyae Nyae and concern for their future. The current situation also leads to a general distrust of legal structures and processes, and in the legal protection they thought they had.

An important – and complicating – factor is that the ongoing expansion in livestock numbers is not only due to the accumulation of cattle by the initial group of invaders; individuals from other ethnic groups have also acquired more cattle. Furthermore, local Ju|’hoansi have also obtained cattle through programmes run by the NNDFN, and through their own purchases. The lack of legal repercussions over the past ten years has created an environment in which many individuals in Tsumkwe feel free to amass more cattle than is legally allowed because they feel that they can do so with impunity. The result of this lack of control is a dramatic increase in cattle within the Tsumkwe Municipality. These cattle are in turn encroaching onto Nyae Nyae Conservancy and Nyae Nyae Community Forest beyond the boundaries of Tsumkwe, and extending west into Nṁa Jaqna.

In July 2015, a criminal legal case against several of the illegal grazers in Nyae Nyae was filed in terms of the Forest Act of 2001 with the High Court in Namibia. For three years the High Court made no decision on this matter, and as a result of that delay, the numbers of in-migrants continued to increase. The GRN, including the president of the country and the Ministry of Justice, were reluctant to take sides in the dispute, since both groups (Ju|’hoan and Herero) are seen as “marginalized communities” that were historically disadvantaged.<sup>57</sup> The second matter was brought in 2018 before the High Court in Windhoek. This was a civil application in which Chief Tsamkxao ṁOma, as first applicant, was seeking an interdict preventing the Herero cattle owner respondents from unlawfully grazing their cattle in Nyae Nyae Conservancy and Community Forest. On 10 August 2018, the High Court ruled

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57 Otjzondjupa Regional Governor, personal communication, June 2019.

by default judgment on behalf of the applicants and against the illegal grazers, ordering them to leave the Nyae Nyae area. However, the Herero cattle farmers brought an application to rescind the default judgment. The applicants did not oppose the application. An initial hearing on the Nyae Nyae case scheduled for July 2019 was delayed, and was eventually heard in October 2019.

## 4 Profile of Nǀa Jaqna Conservancy

The Nǀa Jaqna area has had a more complex history than Nyae Nyae. As described earlier, Nǀa Jaqna was originally inhabited by small groups of hunter gatherers whose descendants are today known as the !Kung. However, Nǀa Jaqna has experienced efforts by colonial powers to resettle people from outside the area for over a century. Afrikaners who had made the trek from South Africa established farms in the vicinity at what came to be known as the Republic of Upingtonia in 1885,<sup>58</sup> and the German colonial government established the Grootfontein Farms in the late 1890s. !Xun were moved from the town of Grootfontein to these farms, and some of them moved into the Omatako area in the Nǀa Jaqna lands prior to the 20<sup>th</sup> century when they left the farms to seek places of their own to settle. The !Xun and the !Kung, with different backgrounds and histories, thus ended up in the same area.<sup>59</sup>

During the war in Angola, many San fled south across the border to the northern regions of Namibia, and in particular to the (then) Caprivi Strip. In the 1970s and 1980s, the South West African Administration forcibly relocated Khwe, !Xun, and Mpungu and Vasekele San from Caprivi into what was then known as “West Bushmanland”, in part to create a “buffer zone” against SWAPO. Just before independence in March, 1990, Khwe and !Xun working for the South African Defence Force and the South West African Territorial Force were given the options of going to South Africa, remaining in what was then West Caprivi, or moving to Nǀa Jaqna. Some 4 500 !Xun and Khwe moved to Schmidtsdrift in South Africa, while at least 2 000 !Xun and Khwe opted to relocate to Nǀa Jaqna.<sup>60</sup>

Today, Nǀa Jaqna is bound on the west by the Grootfontein Farms, where sizable numbers of San have engaged in farm work for farm owners of Afrikaner and German ancestry. Over the years, many farmworkers migrated to Nǀa Jaqna, including Hai||om who are still living in the conservancy. To the south is the Ondjou Conservancy (described in section 3 above), and Herero farmers from this

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58 Gordon, Robert, *The Bushman Myth: The Making of a Namibian Underclass*, Westview Press, Boulder, San Francisco, Oxford, 1992; Nedvĕd, Radek, ‘Outline of the Economic Strategies of the Urban Bushmen Dwellers: Case Study of the !Xun Living in the Omulunga Township of Grootfontein in Namibia’, *Český LID*, 101(3), 2014, pp: 299–320, 301–302.

59 For a detailed discussion of the !Xun see Takada, Akira, *Narratives on San Ethnicity: The Cultural and Ecological Foundations of Lifeworld among the !Xun of North-Central Namibia*, Kyoto University Press, Kyoto, and Trans Pacific Press, Melbourne, 2015.

60 (Hitchcock 2012 and 2019; Welch 2018)

area have also migrated into Nꞑa Jaqna. The result is that today, Nꞑa Jaqna has a much more diverse San population than does Nyae Nyae. It also has a much higher population of Otjiherero- and Oshiwambo-speaking people, and speakers of one of the languages from the Kavango regions, many of whom moved into the area toward the end of the 20<sup>th</sup> century and in the first decade of the 21<sup>st</sup> century. This in-migration was highly controversial, and was opposed by Nꞑa Jaqna Conservancy, as will be described below.

In view of its diverse ethnic composition, Nꞑa Jaqna Conservancy has different systems of land management than those of Nyae Nyae (which uses the *n!ore* system and does not have fences in the conservancy). Some of the people in Nꞑa Jaqna, including the Mpungu and Vasekele !Xun and the Khwe, have somewhat different land management systems than do the !Kung and the Ju|'hoansi, with a greater emphasis on farming.

The numbers of cattle and small stock owned by conservancy members in Nꞑa Jaqna are lower than those in Nyae Nyae, and the degree of dependence on wild plants for food and income is also less than in Nyae Nyae. Fewer people in Nꞑa Jaqna Conservancy are involved in tourism activities in the conservancy and elsewhere (e.g. in places such as Grootfontein and Outjo) than is the case in Nyae Nyae. Devil's claw is a more important source of revenue than it is in Nyae Nyae; in 2015 and 2016, for example, devil's claw collection returns constituted a third of the total annual benefits for Nꞑa Jaqna Conservancy. Subsistence options in Nꞑa Jaqna are much more limited than in their neighbouring conservancy. An updated membership list for Nꞑa Jaqna Conservancy would go some way towards ensuring more equitable distribution of benefits to the members of the conservancy.

Probably in part as a result of this history and the greater ethnic diversity, there are more tensions over land and resources in Nꞑa Jaqna than in Nyae Nyae. One village, Nhoma, which currently is under !Kung TA and Nꞑa Jaqna Conservancy authority, comprises mainly Ju|'hoansi. People in Nhoma have applied to the GRN and the Otjondjupa Regional Land Board for the right to fall under the Ju|'hoan TA and Nyae Nyae Conservancy. Decisions are in the process of being made in this regard.

## 4.1 !Kung Traditional Authority

Nꞑa Jaqna Conservancy is overseen by the !Kung TA, which is based in Omatako. John Arnold became the !Kung Traditional Authority Chief in 1998. He played a significant role in the efforts of the people of Nꞑa Jaqna to resist the GRN's plans in 2000–2001 to move the Osire Refugee Camp to M'Kata, a community in Nꞑa Jaqna. This was one of the first GRN efforts to bring outsiders into the region. John Arnold died in 2012, and for three years there was a leadership vacuum in the conservancy. John Arnold's daughter, Glony Arnold, was appointed by the GRN to the position of chief in Nꞑa Jaqna on 28 March 2015. However, some of the community members in Nꞑa Jaqna objected, saying that there was not a formal electoral process; they also

said that there was no such thing as a “royal house” in which a traditional leader could pass on his or her authority to the next generation. They argued instead for a new election to be held, something that the GRN chose to ignore in 2015.

At present, Nǃa Jaqna Conservancy is experiencing severe conflict between the !Kung TA and the Nǃa Jaqna Conservancy Management Committee. Some of these conflicts revolve around the alleged !Kung TA allocation of land to outsiders, as occurred in 2019 in Aasvoëlsnes. The following section will outline the issue of illegal fencing in Nǃa Jaqna.

## 4.2 Legal case: Nǃa Jaqna illegal fencing and cattle posts

Although incursions of other groups with their livestock is an issue in both conservancies, Nǃa Jaqna is facing more – and more diverse – threats than is Nyae Nyae. This can be traced in part to the history of migration patterns and forced resettlement described above.

A major turning point in the history of Nǃa Jaqna was the decision in 2000 by the GRN to move the large refugee camp known as Osire south of Otjiwarongo to M’Kata in the Nǃa Jaqna area.<sup>61</sup> This plan was opposed by the then Chief John Arnold, backed up by organisations such as the WIMSA and the NNDFN. The refugee resettlement plan was abandoned in 2002 after the death of Jonas Savimbi of UNITA (*Uniao Nacional para a Independencia Total de Angola*) and the negotiations leading to peace accords between Namibia and Angola. However, the series of visits by GRN officials and others relating to the Osire resettlement effort led to an increase in applications of people from outside the region for land in M’kata and Nǃa Jaqna, and some of them moved into the area and established small farms without the explicit agreement of either the !Kung TA or Nǃa Jaqna Conservancy. This laid the foundation for the illegal fencing crisis which is still playing out in the area today.

In addition, Hereros from the south would periodically approach the (then) chief John Arnold and ask for land to establish a residence (*okarango*) and a cattle kraal (corral/*orumbo*). Chief Arnold turned down these requests but that did not prevent some people of Herero, Owambo and Kavango backgrounds from moving into the Omatako and Nǃa Jaqna areas and establishing small cattle posts, which they then began to fence, especially toward the end of the first decade of the 21<sup>st</sup> century.

In 2006, the GRN decided to establish a small-scale farming programme in Nǃa Jaqna.<sup>62</sup> This effort, which was aimed at supporting livestock producers and farmers

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61 See Hitchcock, Robert K., *Anthropological Study in the Potential Impact of Refugees in M’Kata, Namibia*, United Nations High Commissioner for Refugees, Windhoek, 2001; (Hitchcock 2012).

62 Odendaal, Willem, *San Communal Lands Contested: The Battle over N/a Jaqna Conservancy*, Legal Assistance Centre, Windhoek, 2006.



from outside Nǀa Jaqna, was countered through efforts by Nǀa Jaqna Conservancy and their supporters. Nevertheless, by 2013, there were over 120 fences in Nǀa Jaqna, and dozens of inhabited cattle posts. The fences, according to Nǀa Jaqna Conservancy, restricted access to gathering areas for food plants and medicines. Several cases were reported in which cattle post owners refused to let !Kung and other San enter their areas, sometimes threatening them at gunpoint.

This in-migration was consistently opposed by Nǀa Jaqna Conservancy, which sought help from the Legal Assistance Centre to file a legal case against 32 individuals who had established fenced farms in Nǀa Jaqna Conservancy, some of them clearly with the implicit agreement of the !Kung Traditional Authority. A legal case filed in the High Court in 2013 against those responsible for the illegal fences was won by the applicants (the Nǀa Jaqna Conservancy Committee) in 2016.<sup>63</sup>

One of the orders was that the Otjozondjupa Land Board and the TA should, where any one of the respondents failed to remove a fence erected in contravention of the Communal Land Reform Act of 2002, or to remove their livestock from the area constituting Nǀa Jaqna Communal Conservancy, take the necessary action to cause the fences and the livestock to be removed. However, the lack of enforcement of the High Court decision by the Otjozondjupa Communal Land Board and the !Kung TA continues to be problematic, and Nǀa Jaqna Conservancy is today facing a number of land-related and leadership issues. Tensions between the !Kung TA and its chief, Glony Arnold, on the one hand, and Nǀa Jaqna Conservancy, on the other, are high,<sup>64</sup> fences continue to be built in Nǀa Jaqna, and the numbers of people from other parts of Namibia in the area continues to rise.

From a legal standpoint, the Otjozondjupa Communal Land Board is required by statute to enforce the Communal Land Reform Act and the Namibian Constitution. Nǀa Jaqna Conservancy is pushing for enforcement of the High Court decision of 2016, and the removal of the fences and cattle posts that have been established in Nǀa Jaqna over the past decade. Overall, the land situation in Nǀa Jaqna continues to be complex and needs to be addressed at the local, regional and national levels.

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63 High Court of Namibia, *Case No. A: 276/2013, In the High Court of Namibia, Main Division, Windhoek in the matter between the N/a Jaqna Conservancy Committee, Applicant and Minister of Lands and Resettlement and 35 Others, Respondents*, Windhoek, High Court of Namibia, 2013; High Court of Namibia, *Case No. A: 276/2013, In the High Court of Namibia, Main Division, Windhoek, Thursday, 18 August, 2016 in the matter between the N/a Jaqna Conservancy Committee, Applicant and Minister of Lands and Resettlement and 35 Others, Respondents*, Windhoek, High Court of Namibia, 2016; Hebinck, Paul & Christa van der Wulp (in press), 'Fighting Fences: The Legal Battle for Negotiating the Cattle-Conservation Nexus in Namibia', *African Affairs*.

64 Sassman, Catherine, 'Illegal Invasion in Nǀa Jaqna Continues', *Namibian Sun*, 3 October, 2016a; Sassman, Catherine, 'Angolan San must get out', *Namibian Sun*, 20 October, 2016b (<https://www.namibiansun.com/news/angolan-san-must-get-out>); Sassman, Catherine, 'Police break up San meeting: traditional leaders say meetings cannot take place without the chief's knowledge and consent', *The Namibian*, 15 December, 2016c.

Nǃa Jaqna Conservancy management committee and some of the members maintained that the presence of the fenced areas and cattle posts was leading to overgrazing and to a reduction in water availability for local people and their animals, especially during the rainy season. There were also complaints that some of the cattle posts were in areas where !Kung and other San engaged in collection of devil's claw. In addition, some of the farms that were declared illegal in the High Court lawsuit were in areas that had a high water table and supported high quality grazing and economically important plants and timber. The Nǃa Jaqna Conservancy members have maintained in their annual general meetings since 2015 that the expansion of fenced areas and cattle posts in the conservancy was the equivalent of a "land invasion".

Both Nǃa Jaqna Conservancy and Nyae Nyae Conservancy are on communal land, which, in effect, is state land, and hence the GRN technically has the right to make decisions about land allocation and resettlement in these areas.<sup>65</sup> However, the GRN cannot make unilateral decisions on land without proper consultation with those who are living on the land. A more recent effort to establish small-scale cattle farms in the Aasvoëlsnes area near Nhoma under the Programme for Communal Land Development in 2015–2016 by the Ministry of Land Reform with financial support from the European Union and the German Development Bank was stopped by Nǃa Jaqna Conservancy in 2018.<sup>66</sup> Meetings held between the GRN, the !Kung TA and Nǃa Jaqna Conservancy revealed deep divisions between the TA and the members of Nǃa Jaqna Conservancy. The conservancy was concerned that some of the illegal fencers in the west would simply move over to the east and occupy the newly established small-scale farms. Being so close to Nyae Nyae, the illegal occupation of San land could then easily have spilled over to Nyae Nyae, creating a bigger problem in the whole of the Tsumkwe Constituency.

As of 2019, few of the fences had been removed, and there were significant tensions between the Nǃa Jaqna Conservancy Management Committee and its members, and the !Kung TA.<sup>67</sup> The Otjozondjupa Communal Land Board and the !Kung TA were asked to meet with the conservancy about their failure to remove the fences in 2019. The conservancy called for a formal inspection to be made of the area that would include both aerial and ground survey methods, with follow-up enforcement of the 2016 High Court decision. The land issue in Nǃa Jaqna remains unresolved at the time of writing (August 2019). Clearly, enforcement of the High Court decision on the Nǃa Jaqna case is crucial, and will require the collaboration

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65 Werner, Wolfgang, 'Land tenure and governance on communal Land in Namibia', paper presented at the Second National Land Conference, Windhoek, 1–5 October 2018.

66 Steinmann, Daniel, 'Nǃa Jaqna and Communal Land Development Partners Talk Over Each Others' Heads – Land invasion is the Core Issue', *Namibia Economist*, 18 July 2018; Tjihenuna, Theresia, 'San Reject Govt Livestock Project', *The Namibian*, 15 June 2018 (<https://www.namibian.com.na/178448/archive-read/San-reject-Govt-livestock-project>).

67 (Hebinck & van der Wulp, in press)

of GRN line ministries with local institutions, including the !Kung TA and Nǀa Jaqna Conservancy.

## 5 Discussion and conclusion

Discussions around land issues for the San are often framed in language that suggests that the San are being accorded “special rights” of some kind. This perception is most often expressed in reference to Tsumkwe Constituency – especially Nyae Nyae – where the San have more rights to territory and resources than any other San in Namibia. However, the concept of indigenous rights is specifically *not* about special rights, but about ensuring that the most marginalised peoples in the country have their *human rights* respected. Even in these conservancies, which are the best scenarios in the country – indeed, in all of southern Africa – San communities must constantly defend their land against incoming groups, who are stronger, have more resources, and engage in more intensive land use strategies.

These differences in land use strategies are of crucial importance, as they are at the centre of the threats to their land that San and other small-scale subsistence societies in Namibia – and elsewhere in the world – are experiencing today. Nyae Nyae and Nǀa Jaqna are important areas in which to look at these issues, precisely because they have more land rights, access and support than groups in other parts of Namibia. In this section we would like to highlight some critical issues that are relevant to all San in Namibia, and that are especially visible in the conservancies.

Hunter-gatherers (even those engaging in small-scale agriculture) are not a threat to pastoralists; in general, they do not tend to invade others’ land. As a rule, the lower impact land use strategy is the one under threat. A common refrain in the Nyae Nyae case is that the Ju|’hoansi’s land was “not being used” and thus should be made available for grazing cattle. In other words, a low-impact environmental management plan based on traditional livelihood patterns is effectively “invisible”. This could be considered a measure of success from a natural resource management perspective. This is especially true in a semi-arid area such as the Kalahari, where drought and other effects of climate change put additional strain on the land and sustainable use of natural resources, and the land quickly becomes degraded if disciplined land management systems are not in place. However, in this case, this success is being turned against them as they are increasingly pressured to give up portions of the land that they have been so carefully managing, in order that a more intensive (and potentially destructive) form of land use should be allowed.

The very reason that the land in Nyae Nyae was attractive to the neighbouring pastoralists was that it was not overgrazed, but instead had been carefully managed. Likewise, the concern of the Nyae Nyae Conservancy and community members is

that if the numbers of cattle continue to increase at the current rate, their land will also become overgrazed – a concern that is underscored by a comparison between the results of land management strategies in Ondjou, with those of Nyae Nyae. All of this is particularly problematic when one considers that hunter-gatherer land use patterns are the ones that are contributing the least to environmental problems that are currently faced globally, and within Namibia.

First, hunting and gathering should be recognised and respected as a legitimate form of land use, and one that furthermore might be beneficial to the society as a whole. There is increasing evidence that small-scale subsistence practices of societies such as the San are effective forms of land use management. The specialised skills associated with tracking are important for observations of climate change, for wildlife management, and for anti-poaching efforts, as well as for trophy hunting and other economic enterprises. Their intimate knowledge of plants has yielded medicinal, nutritional and other knowledge beneficial for wider society. Their skills are useful for carrying out ecological surveys, and they also provide employment and local learning opportunities for adults and children.

Secondly, the complex situations that we have described in this paper are often seen as examples of “inter-ethnic conflict” – between the Ju|’hoansi and Herero in Nyae Nyae, for example. However, this perspective takes the focus away from larger issues that are at the root of problems confronting both groups. The Ju|’hoansi and Herero have both been excluded from territories that they once occupied, and they have both suffered historically at the hands of other groups (this is also true for the !Kung, Khwe, !Xun, and other San in the Tsumkwe area). However, recognising that both groups are disadvantaged does not justify the encroachment of one group onto the land of another.

The subsistence and land rights of one ethnic group in Namibia should not be held up against the rights of another ethnic group that has also been historically marginalised. The illegal encroachment of individuals from pastoralist groups deeply threatens the capacity of San groups to maintain their way of life. A solution should be found that preserves the rights of all groups. In the case of Nyae Nyae, this means fully maintaining the rights of the Ju|’hoansi while also seeking a solution for the Herero and other farmers in Nyae Nyae. In Nꞑa Jaqna Conservancy, it means maintaining the rights of the !Kung and other San who have been residing there.

A third important point is that research regarding what the San say about their viewpoints and values has revealed various perspectives – some individuals want to own cattle, for example; others prefer to continue their traditional way of life; others might want to get salaried positions or go for further studies. There is a tendency to present information gathered from a section of the population and to say what “the Ju|’hoansi” or “the San” want – but these societies are made up of individuals with differing goals and motivations. It is important to simultaneously take into consideration these multiple perspectives while also allowing for the

general aim of maintenance of traditional subsistence practices, as this is indeed a desire expressed by many San.<sup>68</sup>

One argument that San in both conservancies have made is that they live “sustainable” lives, and that they work hard to ensure that the resources of their areas are not overexploited. However, although emphatic about their close connection to the land and their desire to manage the natural resources on their territories, San groups in Tsumkwe Constituency and elsewhere say that they belong not just to nature, but also to society. They argue that they are citizens of Namibia and therefore have rights equal to other citizens. They want to be able to access the benefits of modernity and development if they choose to, while at the same time protecting and promoting their languages and cultures and passing on their cultural heritage, traditions and values to their children. They also value the wildlife in their areas, and they want to have the opportunity to both maintain it, and to benefit from it.

Fourthly, we would like to emphasise that the political will of the GRN in upholding its own laws and court judgments is crucial. This is illustrated by the Nꞑa Jaqna case, where a positive judgment given in 2016 in favour of the conservancy committee against illegal fencers remains unenforced. Authorities offer a number of reasons for this, none of which are legally defensible. Thus, although the legal rights of the conservancy have technically been upheld in court, in practice these rights are still being violated. The practical implication is that NGOs supporting the community are spending (limited) donor funds to enforce GRN compliance with its own legislation, which has been passed through parliament. The point we would like to make here is that this is a national issue – it is the responsibility of the GRN to uphold its own laws and to enforce judgments that its own courts have made.

Finally, despite all the setbacks and violations that are still occurring, it is crucially important to look at the way that the San are actively negotiating their circumstances, especially with respect to land and resources. The San of Nyae Nyae, in particular, have had a significant measure of success negotiating their rights. They have done this in part through participating in regional, national and international meetings and discussions, presenting their case and describing in detailed terms their land and resource management systems. They have attended the United Nations Permanent Forum on Indigenous Issues meetings in New York and meetings held by the Marginalized Communities Division of the GRN. They have sought to change GRN policies; for example, the Ju|’hoansi and !Kung both opposed the GRN’s decision to relocate the Osire refugee camp at M’Kata in 2001, and they together opposed the decision of the Ministry of Land Reform and its predecessor to establish small-scale farms in the Nhoma and Aasvoëlsnes area.<sup>69</sup>

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68 Dieckmann, Ute, Maarit Thiem, Eric Dirkx & Jennifer Hays (eds), *“Scraping the Pot”: San in Namibia Two Decades after Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014; (Cole 2018).

69 (Odendaal 2006; Hitchcock 2012; Welch 2018)

At the time of this book going to print in early 2020, rumours are circulating that another potential threat to the land and people in Nyae Nyae is the possibility that the GRN will establish a Namibian Defence Force base in the area to the east of Tsumkwe, closer to the Botswana border. Such a move would be reminiscent of the attempt to relocate the Osire Refugee Camp to M’Kata in 2001, and the presence of military personnel would have significant impacts on the people of Nyae Nyae Conservancy.

This potential threat is one among many that face the area. Some Ju|’hoansi stress that the *kxa/ho*, “the landscape of home”, is threatened, and that they want to ensure that they are able to regain access to lands and resources that have been lost in the past. Filing legal cases and seeking answers from regional and central government authorities demonstrates the degree to which the Ju|’hoansi and !Kung and their neighbours want to defend their areas from outsiders and to reinforce their control over their land and resources. The San definitely want to establish what they see as their customary rights to communal land – land which they feel has belonged to them since, as they put it, “time immemorial”. They want to have both their collective and individual rights recognised. The residents of the two conservancies are striving to use the legal systems that they understand are there to protect them, as Namibian citizens.

Although the Nyae Nyae community, and to a lesser extent that of Nǀa Jaqna, may have many “advantages” in comparison to other San communities, these are actually *rights*, not privileges. Furthermore, these rights are tenuous and currently highly threatened. We argue that the focus should be on carefully protecting and enforcing the land rights of these groups as they are defined in national and international law, with the goal of making Nyae Nyae and Nǀa Jaqna positive models of what could be possible elsewhere.

