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FIGHTING FENCES AND LAND GRABBERS IN THE STRUGGLE FOR THE COMMONS IN N≠A JAQNA, NAMIBIA

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ABSTRACT

Livestock owners, elites and non-elites alike, from different parts of Namibia fence in land that belongs to the indigenous San people who collectively manage their land as a conservancy. Fencing violates the Communal Land Reform Act of 2002. The conservancy started a lawsuit in August 2013 with reference to this Act to remove the fences and end the illegal occupation of land. The High Court ruled in 2016 in favour of the conservancy, but the fences have not been removed and more illegal settlers have settled in the conservancy. We conceptualize and analyse the act of fencing as land grabbing but argue simultaneously that the legal battle of the conservancy is more than a struggle for justice. The case unfolds as an ontological struggle between actors, their institutions and respective policies and discourses, pivoting on conflicting visions of modernities of (rural) development in Tsumkwe West. The wider significance beyond N≠a Jaqna is that the core of struggles about land and rights in situations of land grabbing is whose modernity counts. The court case has also paved the way for conservancies and other resource communities to become involved in dealing with land issues and contesting the multiple meanings of land.

LIVESTOCK OWNERS, ELITES AND NON-ELITES alike, originating from elsewhere in the country, fence in large tracts of land in the communal areas

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of Namibia in search of land titles and grass and water for their cattle. Fencing is today widespread in Namibia; the intensity and scale of fencing increased since 1970 and accelerated after independence in 1990.¹ Fencing communal land has been illegal since the Communal Land Reform Act of 2002 (CLRA) was passed and holds that all fences that have been erected after its ratification in 2002 should be removed.² The authority to remove these has rested with the Traditional Authority (TA) and the Communal Land Board (CLB). Fencing of communal land was allowed, provided that proper authorization was obtained from the TA and the CLB.

The case we consider here involves the fencing of indigenous land by non-indigenous livestock owners on communal land in Nǀa Jaqna in Tsumkwe West. The San in Tsumkwe West who are among the most socially, economically, and politically marginalized and dispossessed groups in Namibian society³ argued that settlement by non-San groups contributed to their further marginalization and that the negative impact of their presence was widely felt.⁴ In 2003, the San formed the Nǀa Jaqna conservancy (NJC), following the amended Nature Conservation Act of 1996, not only to boost their livelihoods by benefiting from the natural resources on their territory, but also to protect their (land) rights.⁵ The conservancy committee of the NJC (CC-NJC) reported several illegal fences that were constructed between 2002 and 2013 to the !Kung TA and the CLB and made a request to remove them. When these institutions failed to take action and to remove the fences, in 2013 the CC-NJC with support from the Legal Assistance Centre (LAC) filed a lawsuit indicting the fencers, the TA and the CLB, and the relevant government departments (Ministry of Environment and Tourism (MET) and Ministry of Lands and Resettlement (MLR)).⁶ The Committee's objection to

1. See for an overview of the fencing question in Namibia: Rose-Mary Popyeni Kashulu and Paul Hebinck, 'The fencing question in Namibia: A case study in Omusati region', in Willem Odendaal and Wolfgang Werner (eds), *'Neither here nor there': Indigeneity, marginalisation and land rights in post-Independence Namibia* (Legal Assistance Centre, Windhoek, 2020), pp. 163–183; Wolfgang Werner, *'What has happened has happened': The complexity of fencing in Namibia's communal areas* (Land, Environment, and Development Project, Legal Assistance Centre, Windhoek, 2011).

2. Republic of Namibia, Communal Land Reform Act 5 of 2002, Government Gazette, Windhoek (2002).

3. James Suzman, *An assessment of the status of the San in Namibia* (Legal Assistance Centre, Windhoek, 2001); Ute Dieckmann, Maarit Thiem, Erik Dirks and Jennifer Hays, *Scraping the pot: San in Namibia two decades after independence* (Legal Assistance Centre, Windhoek, 2014).

4. Interview with conservancy member, Omatako, 22 June 2015; Interview with conservancy committee members, Mangetti Dune, 18 June 2015.

5. NJC, Constitution of the Nǀa Jaqna conservancy, NACSO, Mangetti Dune (2005).

6. MLR and MAWF merged into Ministry of Agriculture, Water, and Land Reform in 2020. MET was renamed Ministry for Environment, Forestry and Tourism. LAC is a public interest law firm based in Windhoek funded by national and international donors, <<http://www.lac.org.na/>> (15 June 2015).

the fences was that these restricted the free movement of wildlife, which directly affected the income generated from eco-tourism and trophy hunting and interfered with their gathering of ‘veldkos’.⁷ A leading argument that was presented in the High Court, however, was that the fencers should not have been granted customary land rights because they were not from the !Kung ‘traditional community’.⁸ They, therefore, could not claim customary rights in N≠a Jaqna. The fencers were consequently branded as ‘land grabbers’ illegally occupying the land.⁹ The defence lawyer claimed that according to Article 21 of the Constitution, every Namibian had the right to settle anywhere they wish. The respondents also asserted that they received permission from the TA and the chief after having paid the customary fees. After a procedure of about three years, the High Court of Namibia ruled in August 2016 in favour of the NJC that 22 out of the 32 illegal fencers must vacate the land they fenced and remove the fences.¹⁰ During a visit in November 2019 to the NJC, we were informed that 14 of the 22 fences that were ordered to be removed by the High Court were still standing.¹¹ As of February 2021, the fences were still intact and the number of illegal fencers had even increased since.¹² The TA and CLB had refused to act.

We approach fencing as a material manifestation of land grabbing. This is a shared opinion in N≠a Jaqna, in Namibia’s leading newspaper and in non-governmental organization (NGO) circles.¹³ The typical dimensions of land grabbing of inflicting injustice, alienation and mounting conflicts apply to the N≠a Jaqna case.¹⁴ Fencers have deprived San groups of their

7. Founding affidavit of Sarah Zungu, Case NA276/13 in the matter between the N≠a Jaqna conservancy Committee and the Minister of Lands and Resettlement & 35 others, 2013 (High Court of Namibia, Windhoek). ‘Veldkos’ is also referred to as wild foods and is vital for the daily caloric intake and food security.

8. ‘Founding Affidavit Sara Zungu’.

9. Interview with conservancy committee member, Omatako, 23 June 2015; Robert K. Hitchcock, ‘Refugees, resettlement, and land and resource conflicts: The politics of identity among !Xun and Khwe San in northeastern Namibia’, *African Studies Monographs* 33, 2 (2012), pp. 73–132.

10. Judgement in the matter between The Njagna conservancy Committee v The Minister of Lands and Resettlement and 35 others (A 276–2013), 18 August 2016 (High Court of Namibia, Windhoek).

11. Interview with conservancy staff member, Mangetti Dune, 7 November 2019.

12. Email and WhatsApp interviews with the contracted trophy hunter in the conservancy, 1 February 2021.

13. Ndapewoshali Shapwanale, ‘Illegal fencing is land grabbing – LAC ... 1991 land conference resolution should be implemented’, *The Namibian*, 10 March 2018, <<https://www.namibian.com.na/181937/archive-read/Illegal-fencing-is-land-grabbing-%E2%80%93-LAC—1991-land-conference-resolution-should-be-implemented>> (20 May 2019). See also Kashululu and Hebinck, ‘The fencing question’; Willem Odendaal, ‘Elite land grabbing in Namibian communal areas and its impact on subsistence farmers’ livelihoods’, *PLAAS Policy Brief*, 33 (2011), pp. 1–7.

14. Ruth Hall, ‘Land grabbing in Southern Africa: The many faces of the investor rush’, *Review of African political economy* 38, 128 (2011), pp. 193–214; Ruth Hall, Marc Edelman, Saturnino M. Borrás, Ian Scoones, Ben White and Wendy Wolford, ‘Resistance, acquiescence

ways of using land by *de facto* privatizing their communally held land. Land grabbing has intensified the struggle for territorial autonomy and land rights in N≠a Jaqna and across Africa.¹⁵ Illegal fencing became an item on the political agenda during the Second National Land Conference in 2018.¹⁶ The land grabbing literature documents numerous cases of affected people resisting grabbing in many ways and with varying degrees of success.¹⁷ Litigation is one such form of resistance and fits within the broad framing of Saturno Borrás and Jennifer Franco that the struggle against land grabbing stands for the bigger, more encompassing type of ‘struggles in defence of the commons’.¹⁸ In October 2020, the CC-NJC and the LAC initiated another lawsuit to enforce the 2016 High Court ruling.¹⁹

The lawsuit serves as an entry point to disentangle the complexities of the struggle in defence of the commons. This battle, however, involves more than a legal struggle for justice and seeking recognition of land rights. Whereas most studies of land grabbing focus on extending large-scale commercial agriculture,²⁰ the present case unfolds as an ontological struggle between actors, their institutions and policy discourses—a struggle that pivots on conflicting visions of modernities of (rural) development in Tsumkwe West. The wider significance of our analysis beyond N≠a Jaqna is that the core of these struggles boils down to whose modernity counts. The N≠a Jaqna case illustrates what Hugh Campbell understands as an enactment of ontological politics in the micro-political space of N≠a

or incorporation? An introduction to land grabbing and political reactions “from below”, *Journal of Peasant Studies* 42, 3–4 (2015), pp. 467–488; Saturno Borrás and Jennifer Franco, ‘Global land grabbing and trajectories of agrarian change: A preliminary analysis’, *Journal of Agrarian Change* 12, 1 (2012), pp. 34–59.

15. See Jeremy Lind, Doris Okenwa and Ian Scoones, *The politics of land, resources & investment in Eastern Africa’s pastoral drylands* (James Currey, London, 2020); Hall, ‘Land grabbing in Southern Africa: The many faces of the investor rush’.

16. Staff writer, ‘Resolutions of the 2nd National Land Conference’, *The Villager*, 8 October 2018, <<https://www.thevillager.com.na/articles/14012/resolutions-of-the-2nd-national-land-conference/>> (10 February 2019); Editorial, ‘Land resolutions need swift implementation’, *The Namibian*, 12 October 2018, <<https://www.namibian.com.na/182243/archive-read/Editorial—Land-Resolutions-Need-Swift>> (2 January 2021); Ngaevuarue Katjangua, ‘Geingob gives ultimatum for removal of illegal fences’, *The Namibian*, 11 October 2018, <<https://www.namibian.com.na/182191/archive-read/Geingob-gives-ultimatum-for-removal-of-illegal>> (2 January 2021).

17. See for an overview: Hall, Edelman, Borrás, Scoones, White and Wolford, ‘Resistance, acquiescence or incorporation?’.

18. Saturno Borrás and Jennifer Franco, ‘Global land grabbing and political reactions “from below”’, *Third World Quarterly* 34, 9 (2013), pp. 1723–1747, p. 1370.

19. This time through an action and not as an application as before. An action is favoured as this allowed to subpoena the chief or the chair of the CLB to explain why they ignored and were reluctant to enforce the court ruling. Personal communication, Willem Odendaal, 10 September 2020.

20. See for an overview: Ruth Hall, Ian Scoones and Dzodzi Tsikata, ‘Plantations, out-growers and commercial farming in Africa: Agricultural commercialisation and implications for agrarian change’, *Journal of Peasant Studies* 44, 3 (2017), pp. 1–23.

Jaqna.²¹ It is typical that conservancy formation was at first a relatively smooth process.²² The situation began to change dramatically with the grabbing and fencing of land and the political and development interventions of the state fuelling escalating tensions and contestations over the allocation and meaning of land and use of resources. These processes not only fractured the San community but also triggered articulated responses of the San enacting their modernity. Here we show the means by which local actors navigated the micro-political space of N≠a Jaqna by constructing and enacting their modernity in interaction with extra local actors while contesting their agendas and discourses of development. In N≠a Jaqna, leadership contestations and power struggles cloud the struggle for justice and land. The struggle is further complicated and frustrated by the institutional intricacies arising from reforming the state since independence (i.e. decentralization and conservancy formation) to support the implementation of the CLRA. This process generated institutions whose powers and authorities overlap and whose ontological politics conflict with locally embedded ontologies of land–people relationships. To complicate matters further, the judicial system works rather slowly and more importantly the political will to support the struggle for indigenous land rights is absent.²³

The main question we address here is: what is, and how do we understand, the relationship between the San's quest for justice and modernity, the state's land and agrarian policies and laws, land grabbing, and overlapping authorities in the context of fencing? This allows for a discussion of the potential role of litigation and conservancies as vehicles to address land–people relations including the ontologies of land, land rights and security.

We proceed by first explaining our methodological perspective. We fuse legal anthropology perspectives on land and authority with ideas from land as an assemblage of practices legitimized and underpinned by multiple discourses of modernity. We briefly describe the policy and legislative reforms aimed at restructuring communal lands. We then present the NJC case and introduce key actors. In the last sections, we reflect from the perspective of what Christiaan Lund understands as a 'state in the making'²⁴ on the

21. Hugh Campbell, *Farming inside invisible worlds: Modernist agriculture and its consequences* (Bloomsbury Academic, London, 2020).

22. Cameron Welch, *Land is life, conservancy is life. The San and the N≠a Jaqna conservancy, Tsumkwe District West, Namibia*, Basel Namibia studies series (Namibia Resource Centre and Southern Africa Library, Basel, 2018), Chapter 5.

23. See Sid Haring and Willem Odendaal, 'Our Land They Took': *San land rights under threat in Namibia* (Legal Assistance Centre, Windhoek, 2006); Willem Odendaal and Wolfgang Werner (eds), 'Neither here nor there': *Indigeneity, marginalisation and land rights in post-Independence Namibia* (Legal Assistance Centre, Windhoek, 2020).

24. Christiaan Lund, 'Rule and rupture: State formation through the production of property and citizenship', *Development and Change* 43, 6 (2016), pp. 1199–1228.

role of new institutions with a specific focus on the potential role for conservancies in resource governance and how these interface with the various expressions of modernity.

Methodology

We apply an ‘extended case study’ not just to illustrate our argument but to draw conclusions of a broader theoretical significance.²⁵ The ordering, interpretation and presentation of data are informed and structured by two theoretical tenets that revolve around the centrality of land. The first, land as relational, concerns seeing property relations as involving relations between actors concerning things (e.g. land and fences) and the new ontological meanings they attach to these as changes occur.²⁶ These concern not only social relationships (of power, gender and ethnicity) but also changes to the properties of land. Through land grabbing, fencing or new land policies, property acquires new properties capturing the various ontological meanings of land.²⁷ Olivier Razac and Reviel Netz pointedly relate this to situations where and when new forms and interpretations of modernity develop and spread and clash with customary and historically guaranteed resource-use patterns.²⁸ Barbed wire facilitates the controlling of mobility and the space of human and non-human actors; its extension in the landscape generates violence and discursive conflicts about the interpretation of modernity and what that holds for the meaning of land.

The second tenet is that land–people relationships evolve in a socio-material and historical context, which we, with David Moore (2005) and others, understand as ‘territory’.²⁹ N \neq a Jaqna represents territory where land as property acquires its ontological meaning: territory as embodying

25. See for instance Jaap van Velsen, ‘The extended-case method and situational analysis’, in Arnold L. Epstein (ed.), *The craft of Social Anthropology* (Tavistock, London, 1967), pp. 129–149.

26. See, for instance, James Ferguson, ‘The cultural topography of wealth. Commodity paths and the structure of property in rural Lesotho’, *American Anthropologist* 94, 1 (1992), pp. 55–73; Christopher M. Hann, ‘Introduction: The embeddedness of property’, in Christopher M. Hann (eds), *Property relations: Renewing the anthropological tradition* (Cambridge University Press, Cambridge, 1998), pp. 1–47.

27. Franz von Benda-Beckmann, Kebeth von Benda-Beckmann and Melanie C. Wiber, ‘The properties of property’, in Franz von Benda-Beckmann, Kebeth von Benda-Beckmann and Melanie C. Wiber (eds), *Changing properties of property* (Berghahn Press, Oxford, 2006), pp. 1–39; Tanja Murray Li, ‘What is land? Assembling a resource for global investment’, *Transactions of the Institute of British Geographers* 39, 4 (2014), pp. 589–602.

28. Reviel Netz, *Barbed wire. An ecology of modernity* (Wesleyan University Press, Middletown, CT, 2004); Olivier Razac, *Barbed wire* (New Press, New York, NY, and London, 2002).

29. David Moore, *Suffering for territory: Race, place, and power in Zimbabwe* (Duke University Press, Durham, NC, 2005); see also Angela Kronenburg Garcia, ‘Territorial conflicts, agency and the strategic appropriation of interventions in Kenya’s southern drylands’, *Sustainability* 10, 1 (2018), pp. 41–56.

the space where multiple human and non-human elements interact and co-exist, generating landscapes such as those in Tsumkwe West. With Bruno Latour we conceptualize territory with the notion micro-politics.³⁰ Territory emerges as the site par excellence of situated ontological struggles between social actors, as groups and as individuals, who actively engage with each other while finding ways to accommodate the changes happening around them, where people–land relationships are prompted, forged, transformed, accommodated, negotiated and get their new meaning.³¹ This is the micro-political space where, and when, it shows that territory is constituted by multiple institutional and legal normative orderings. This is also the space where controversies about rights and the meaning of land are being fought out and where claims are made about the right to self-determination about the future of their territory and its resources.³² Territory also illuminates the micro-practices of government and spatial disciplining (i.e. through enacting their political ontologies). These aspects do not just entail a discursive confrontation between perceiving land and land use as embedded in land–people relationships, as historically structured by customary arrangements or by government land policies that set out to modernize land use. Territory likewise is the space where different (i.e. ‘local’ and ‘global’) discourses of development are produced, debated and contested, and clash.³³

We draw on 3 months of ethnographic fieldwork in Namibia in 2015 undertaken by the first author. In November 2019, she revisited the field site for a week for informal talks with conservancy staff members and collected additional materials regarding the court case. Insights gained were infused with understandings generated by research by the second author

30. Bruno Latour, *Reassembling the social: An introduction to actor-network-theory* (Oxford University Press, Oxford, 2005). See also Nick J. Fox and Pam Alldred, ‘New materialist social inquiry: Designs, methods and the research-semblage’, *International Journal of Social Research Methodology* 18, 4 (2015), pp. 399–414. Micro-political does not imply an exclusive focus on the micro level only. Moreover in line with Latour’s interpretation, micro-politics involves interactions between human and non-human actors.

31. Campbell, ‘Farming inside invisible worlds’; Norman Long, ‘Contesting policy ideas from below’, in Morten Boås and David MacNeill (eds), *Global institutions and development: Framing the world?* (Routledge, London, 2004), pp. 24–41.

32. Sara Berry, ‘Access, control and use of resources in African agriculture: An introduction’, *Africa* 59, 1 (1989), pp. 1–5; Sara Berry, ‘Social institutions and access to resources’, *Africa* 59, 1 (1989), pp. 41–55; Paul Hebinck, Nosiseko Mtati and Charlie Shackleton, ‘More than just fields: Reframing deagrarianisation in landscapes and livelihoods’, *Journal of Rural Studies* 61, 4 (2018), pp. 323–334.

33. See also Latour, ‘Reassembling the social’; Gill Seidel, ‘Political discourse analysis’, in Teun A. van Dijk (ed.), *Handbook of discourse analysis* (Academic Press, London, 1985), pp. 43–60, p. 44; Alberto Arce and Norman Long, ‘Reconfiguring modernity and development from an anthropological perspective’, in Alberto Arce and Norman Long (eds), *Anthropology, development and modernities: Exploring discourses, counter-tendencies and violence* (Routledge, London, 2000), pp. 1–31.

on illegal fencing in Ovamboland.³⁴ In both projects, we collaborated with the Land Environment and Development programme of the LAC whose mandate is investigating and litigating fencing cases in the country.³⁵ Data collection centred on capturing the voices, experiences, explanations and practices as well as the mapping of the relevant actors. Informal conversations were held in Nǀa Jaqna, focus group discussions, semi-structured interviews and above all participant observation. In total, during the first phase of the research semi-structured interviews were conducted with three TA representatives, two LAC employees, one NGO employee, one MET representative, three conservancy committee members, one CLB representative, one police officer and five community members. A total of 46 community members were also interviewed during seven focus group discussions. A translator assisted with interviewing and invited participants to the focus group discussions. Other participants were introduced to us by members of the conservancy committee or the LAC. We also consulted the National Archives of Namibia in Windhoek. Data from Affidavits and the 2016 High Court ruling were used and combined with attending three court hearings between 2013 and 2016. We corroborated our findings by retrieving articles from newspapers (e.g. *The Namibian*) and combining these with reports about the NJC from the websites of the Namibia Association for Community-Based Support Organisation (NACSO) and the Nyae Nyae Development Foundation. We were not so successful in tracking and interviewing fencers; they appeared either not so keen to be interviewed or absent. Coronavirus disease-2019 prevented follow-up field visits in 2020. We instead conducted interviews through email and WhatsApp with stakeholders from the LAC and MLR, and a professional trophy hunter. Because the situation is politically tense and the controversies are mounting, we did not disclose names.

Land–people relations and territory in Namibia after independence

Namibia gained independence in 1990 and inherited a spatially, socio-economically, and institutionally unequal and divided society.³⁶ Policy and legislative initiatives since 1990 have been prompted by restructuring and democratizing the governance of the communal areas. Namibia adopted the Community-Based Natural Resource Management (CBNRM) model to conserve and sustainably manage and protect the natural resources and

34. Kashululu and Hebinck, 'The fencing question'.

35. See Legal Assistance Centre: Land Environment & Development (LEAD), <<http://www.lac.org.na/index.php/projects/land-environment-development-lead/>> (13 February 2015).

36. Marion Wallace, *A history of Namibia. From the beginning to 1990* (Jacana Press, Cape Town, 2011).

reduce poverty in the communal areas.³⁷ Promoted by the state and its institutions (MET in particular) and NGOs (i.e. the Integrated Rural Development and Nature Conservation and NACSO), and with financial backing from global donors (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Department for International Development, and Swedish International Development Assistance (SIDA)), CBNRM became the predominant conservation and rural development framework in Namibia, in the region and beyond.³⁸ MET kick-started the conservancy formation process in 1995, which was later ratified by the enactment of the Nature Conservation Amendment Act 5 of 1996.³⁹ This legislation devolved resource rights to communities to stimulate stewardship and legally to obtain and share the economic benefits of the harvesting and marketing of natural resources. Allocating and administering land rights remained, however, in the hands of the state.⁴⁰ Despite these restrictions, the formation of conservancies fed the idea, as was the case in N≠a Jaqna that their mandate was a lot broader.⁴¹

For a conservancy to be legally recognized a defined membership, an elected conservancy management committee, defined boundaries that territorialize the resources, and a legal constitution are required.⁴² Trophy hunting which was controlled by MET through allocating quota, the selling of crafts and indigenous plants became major sources of income and food for the conservancies.⁴³ Community-based eco-tourism operations (e.g. living museums, community-run campsites and lodges in partnership

37. Karine Nuulimba and Julie Taylor, '25 years of CBNRM in Namibia: A retrospective on accomplishments, contestation and contemporary challenges', *Journal of Namibian Studies: History Culture Politics* 18, 1 (2015), pp. 89–110.

38. See Christo Fabricius, Eddie Koch, Stephen Turner and Hector Magome, *Rights, resources & rural development: Community-based natural resource management in Southern Africa* (Earthscan, London, 2004); Fred Nelson (ed.), *Community rights, conservation and contested land: The politics of natural resource governance in Africa* (Routledge, London, 2012).

39. Republic of Namibia, Nature Conservation Amendment Act, 1996 (No. 5 of 1996), Government Gazette of the Republic of Namibia, Windhoek (1995).

40. See Republic of Namibia, 'Communal Land Reform Act 5 of 2002', sections 17.01 and 17.02.

41. Michael Bollig, 'Towards an arid Eden? Boundary-making, governance and benefit sharing and the political ecology of the new commons of Kunene Region, Northern Namibia', *The International Journal of the Commons* 10, 2 (2016), pp. 771–799, p. 775. See also Wolfgang Werner, 'Land, resource and governance conflicts in Kunene Region involving conservancies', in Willem Odendaal and Wolfgang Werner (eds), *'Neither here nor there': Indigeneity, marginalisation and land rights in post-Independence Namibia* (Legal Assistance Centre, Windhoek, 2020), pp. 255–283.

42. See NACSO, *Namibia's communal conservancies* (Namibian Association of Community Support Organisation, Windhoek, 2007). This is also written in the CLRA of 2002, Section 4.

43. See Section 24A of the Nature Conservation Amendment Act 5 of 1996. See also Bollig, 'Towards an arid eden?'; Rodgers Lubilo and Paul Hebinck, "'Local hunting" and community-based natural resource management: Resistance and livelihoods in Namibia', *Geoforum* 101, May (2019), pp. 62–75; Nuulimba and Taylor, '25 years'. For a critical note see: Stasja Koot, 'The Limits of economic benefits: Adding social affordances to the analysis

with private companies) provided significant opportunities for generating cash and employment.⁴⁴ Conservancy committees invested this income in food aid, schools, borehole and drinking water and to pay for the management fees, cash pay-outs to members and investments into development projects.

The First National Conference on Land Reform and the Land Question held in 1991 reformulated policies and legislation for land redistribution and land resettlement and securing of land rights in the communal areas.⁴⁵ The Agricultural Commercial Land Reform Act was passed in 1995 for land held under freehold in the South.⁴⁶ Seven years later, similar legislation for the communal areas was approved in 2002 by Parliament, the CLRA. This time-lag in legislation between independence and the CLRA of 2002 created a legal and political vacuum, which facilitated the construction of fences in communal areas. One reason for the delay in passing the CLRA was that the future powers of traditional leaders in communal land administration were severely contested.⁴⁷

As of May 2021 the CLRA was the most important piece of legislation dealing with land matters in communal land. It codified land–people relations through allocating and registering land rights; private ownership was banned, limiting commercial activity to situations where one had applied for a right of leasehold.⁴⁸ Those who resided within a communal area could obtain a customary land right for farming and/or residence, which could not exceed 50 hectares.⁴⁹ Pastures were designated as open access. The CLRA confirmed what the new land policies in the early 90s proposed: a transfer of the authority over the administration of rights to communal land

of trophy hunting of the Khwe and Ju/'hoansi in Namibian CBNRM', *Society and Natural Resources* 32, 4 (2019), pp. 417–433.

44. Renaud Lapeyre, 'Revenue sharing in community-private sector lodges in Namibia: A bargaining model', *Tourism Economics* 15, 3 (2009), pp. 653–669; Stasja Koot and Wouter van Beek, 'Ju/'hoansi lodging in a Namibian conservancy: CBNRM, tourism and increasing domination', *Conservation and Society* 15, 2 (2017), pp. 136–146.

45. For a critical view of land reform in Namibia: Wolfgang Werner, 'Tenure reform in Namibia's communal areas', *Journal of Namibian Studies* 18, (2015), pp. 67–87; Wolfgang Werner, 'An overview of land reform in Namibia', *Agrekon* 38, S1 (1999), pp. 314–325; Jan Kees van Donge, Gorge Eiseb and Alfons Mosimane, 'Land reform in Namibia: Issues of equity and poverty', in A. Haroon Akram-Lodhi, Saturnino M. Borrás and Christobal Kay (eds), *Land, poverty and livelihoods in an era of globalization perspectives from developing and transition countries* (Routledge, London, 2007), pp. 284–310; Phanael Kaapama, 'Commercial land reforms in postcolonial Namibia', in Henning Melber (eds), *Transitions in Namibia* (Nordic African Institute, Uppsala, 2007), pp. 29–50.

46. Republic of Namibia, Agricultural Commercial Land Reform Act, 14(1), Government Gazette, Windhoek (1996).

47. See Chris Tapscott and Lazarus Hangula, *Fencing of communal rangeland in northern Namibia: Social and ecological implications* (Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1994); Werner, 'Tenure reform', p. 75.

48. Kashululu and Hebinck, 'The fencing question' pp. 174–177.

49. Republic of Namibia, *Government Gazette of the Republic of Namibia No 5760* 2015. This is also specified in the CLRA.

to regional CLBs. The power to allocate land was previously in the hands of the TA and traditional leaders. Their responsibilities were reframed in the Traditional Authorities Act in Namibia in 1995 and amended in the Traditional Authorities Act 25 of 2000.⁵⁰ The government selected and appointed chiefs as heads of the TA. The TA Act as well as the political practices of several chiefs and government securing loyal supporters in the rural domain through appointing chiefs had been subjected to substantial criticism.⁵¹ The role of the TA in the CLB was to confirm whether an applicant was a member of the community and to settle land disputes before allocating a land right. Chiefs were often accused of corruption and accepting bribes.⁵² The decisions to allocate land only became legal once they had been ratified by a CLB.⁵³ The CLRA also addressed illegal fencing by verifying that plots and fences did not exceed the maximum size.⁵⁴ The Act considered all post-2002 constructed fences illegal unless permission to remain was granted by the CLB.⁵⁵ The CLRA allocated the authority to remove illegal fences to the TA and the CLB.

Namibia's new land policies also provided a set of policy frames for the use of land and natural resources in communal areas, including conservancies. Previously existing policies and support structures to stimulate and expand agriculture and conservation were redirected to also support communal farmers and to implement the land resettlement programme.⁵⁶ This includes allocating land for crop and livestock production, introduction of new crops, providing extension and veterinary services, and improving market access, credit and infrastructure such as water points and irrigation. Conservancy land-use planning involves MET, WWF and NACSO together designing a Multiple Zonation Plan (MZIP) to establish coherence in land-use activities to promote the conservancy's (non-)consumptive

50. Republic of Namibia, The Traditional Authorities Act 25 of 2000, Government Gazette No. 2456 of 22 December, Windhoek (2000).

51. See Werner, 'Land conflicts'; Ute Dieckman, 'From colonial land dispossession to the Etosha and Mangetti West land claim – Hai||om struggles in independent Namibia', in Willem Odendaal and Wolfgang Werner (eds), *Neither here nor there: Indigeneity, marginalisation and land rights in post-Independence Namibia* (Legal Assistance Centre, Windhoek, 2020), pp. 95–121; Henning Melber, 'Namibia: A trust betrayed—again?' *Review of African Political Economy* 38, 127 (2011), pp. 103–111.

52. See Kashululu and Hebinck, 'The fencing question'.

53. Republic of Namibia, 'Communal Land Reform Act 5 of 2002'.

54. Wolfgang Werner, 'Land tenure and governance on communal land in Namibia' (Paper presented at the Second National Land Conference, Windhoek, 1–5 October 2018). Maarit Thiem, *A decade of communal land reform. Review and lessons learnt, with a focus on communal land rights registration* (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Windhoek, 2014).

55. Republic of Namibia, 'Communal Land Reform Act 5 of 2002'. Section 28(2) specifies that it is the CLB to which an application for the retention of fences is to be made. The CLB, in essence, decides whether a fence can remain or not. Section 28(5)(b) specifies that the application needs to be accompanied by a letter from the Chief or TA.

56. van Donge, Eiseb and Mosimane, 'Land reform in Namibia'.

tourism values.⁵⁷ Intensifying communal farming, securing customary land rights and expanding community-based conservation remained in broadly stated terms key policy objectives.⁵⁸

The N≠a Jaqna conservancy and conservancy formation

N≠a Jaqna is situated in Tsumkwe West District (see [Figure 1](#)), in a relatively well-watered part of the semi-arid Kalahari Desert. It covers 9,120 square kilometres in which 7,500 people live in some 20 settlements scattered over the area. The population consists of the !Kung San and eight other San groups from northern Namibia and Angola. The latter were resettled by the South African Defence Force (SADF) during the 1970s when they created the '36 Bushman Battalion' in Mangetti Dune (see [Figure 1](#)).⁵⁹ Some inhabitants have a history as farm workers on white farms and others as conservation and game guards in Namibia's national parks and reserves or trackers for the SADF, whereas others lived and worked in the cities.⁶⁰

The discussion to establish a conservancy started in the late 1990s. NGOs, the !Kung TA and the MET took part in the deliberations.⁶¹ The formation of the NJC was delayed by government plans to relocate refugees from the Osire camp into Tsumkwe West and the development of small-scale farming schemes.⁶² The unclear definition of 'community', which is necessary to establish a conservancy, also delayed the gazetting. Finally, there were several boundary disputes with the neighbouring Nyae Nyae conservancy.⁶³ The issues were eventually resolved through negotiations and the NJC was formerly registered in July 2003.⁶⁴ The MZP was designed shortly after. This included setting and agreeing of village boundaries and the mapping of a variety of resource usages (i.e. areas for mixed farming of cropping and grazing of goats and cattle, for wildlife,

57. See Lee Hewitson, 'Following elephants: Assembling nature knowledge, values and conservation spaces in Namibia's Zambezi region' (University of Leicester, Unpublished PhD dissertation, 2018). Eduard Gargallo, 'Community conservation and land use in Namibia: Visions, expectations and realities', *Journal of Southern African Studies* 46, 1 (2020), pp. 129–147.

58. Republic of Namibia, *Namibia Agricultural Policy 2015*, Government Printer, Windhoek (2015); Republic of Namibia, Ministry of Environment, Forestry and Tourism. *Annual Progress Report 2019–2020*, Government Printer, Windhoek (2015).

59. Suzman, 'An assessment of'; Hitchcock, 'Refugees, resettlement'; Welch, 'Land is life'.

60. Hitchcock, 'Refugees, resettlement'. The distribution of these profiles is unknown.

61. Dieckmann, Thiem, Dirkx and Hays, 'Scraping the pot'; Welch, 'Land is Life'.

62. Hitchcock, 'Refugees, resettlement', p. 104. The camp numbered 21,000 refugees.

63. Thekla Hohmann, "We are looking for life. We are looking for the conservancy". *Namibian Conservancies, nature conservation and rural development: The N≠a Jaqna conservancy*, in Thekla Hohmann (ed.), *San and the state. Contesting land, development, identity and representation* (Rüdiger Köppe Verlag, Köln, 2003), pp. 205–254.

64. Republic of Namibia, *Government Gazette of the Republic of Namibia No 3027 2003*, Government Notice 162.

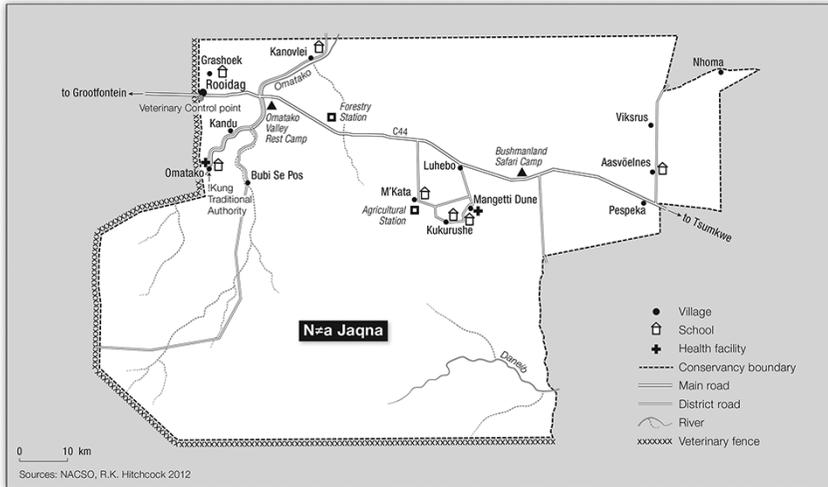


Figure 2 Map of N≠a Jaqna conservancy.

It is not exactly known when the first non-San settlers moved in. It was a gradual process that started as early as 2002 (that is at the time of the conservancy being formed) and which intensified from 2012 and onwards. The records of MLR and the conservancy were not up to date. The vast area with few roads and the rugged terrain inhibited updating and regular monitoring of illegal settling and the unauthorized drilling of boreholes; available sources mentioned various numbers: 30–40.⁶⁶ The Founding Affidavit listed 32 respondents as illegal fencers.⁶⁷ Recent data points at 54 illegal settlers.⁶⁸ Combining these sources and discounting possible overlaps, we arrived at the number of illegal settlers being over 65 in February 2021.

The N≠a Jaqna conservancy and contestations

The pillars of the new land policies sediment in conservancies in an assemblage of land-use practices (e.g. small-scale farming units, gathering and conservation zones)—each with their logic and discursive repertoires. These have co-existed; however, their co-existence has not always been peaceful as we will show in this section. We focus on the social actors that

66. Personal email communication with Robert Hitchcock, 10 October 2020.

67. 'Founding Affidavit Sara Zungu'.

68. Email and WhatsApp communications with a professional trophy hunter with a concession in N≠a Jaqna (January and February 2021).

have played visible roles in the micro-politics of managing territory. They may not be equally positioned in the ontological struggles about whose modernity counts. But by spotlighting those that have discursively resisted land grabbing/fencing, those that have facilitated and aligned with land grabbers, and the state actors that have intervened in the make-up of the territory, we highlight and problematize the contestations that came about during and after the conservancy was established.

The TA, chief, land grabbers and the NJC

Since the enactment of the TA Act in 2000, the conservancy has fallen under the jurisdiction of the !Kung TA.⁶⁹ When the TA Act became operational in 2000, the different San groups held elections for their TA.⁷⁰ Customarily, the San in the Tsumkwe District have not had a single chief, but rather several local leaders of smaller bands; thus, the idea of a single chief is rather a 'modern invention'.⁷¹ John Arnold, whose position as chief dates back to 1992, was officially installed in 2002 as the chief of the !Kung.⁷² The relationship between the TA and the conservancy has been problematic ever since Chief John Arnold was appointed. He feared that the conservancy would challenge his position and powers.⁷³ Several people interviewed in N≠a Jaqna expressed their discontent with Chief Arnold's leadership because he allowed the land grabbing by non-San livestock farmers with no ancestral claims to the land and with no identification as San, but rather as Kavango, Herero or Ovambo. It is claimed that the chief, along with several senior councillors, authorized them in return for bribes and payment of customary fees to fence enclosures, set up cattle posts and graze their cattle.⁷⁴

The relationship between the TA and the conservancy further deteriorated with the issue of illegal fences, dividing the senior councillors in Tsumkwe West into two factions within the TA and conservancy.⁷⁵ One

69. Republic of Namibia, 'The Traditional Authorities Act 25 of 2000'. The Act is silent on the geographical area of the TA. In the case of the NJC case it is accepted that the TA's jurisdiction covers that of the NJC.

70. Robert K. Hitchcock and Walter Babchuk, 'San traditional authorities, communal conservancies, conflicts, and leadership in Namibia' (paper presented at the American Anthropological Association, Minneapolis, MN, 16–20 November 2016).

71. Richard Pakleppa, 'Civil rights in legislation and practice: A case study from Tsumkwe-District West, Namibia', in Robert K. Hitchcock and Diana Vinding (eds), *Indigenous people's rights in Southern Africa* (International Work Group for Indigenous Affairs, Copenhagen, 2004), pp. 82–96, p. 96.

72. Although John Arnold was installed as chief of the !Kung traditional community in 1992, he was only officially recognized by the government as the !Kung TA in 1998.

73. Interview with conservancy committee member, M'kata, 16 July 2015.

74. Interview with conservancy member, 22 June 2015, Kandu; Interview with conservancy member, 23 June 2015, Omatako; Interview with conservancy member, 24 June 2015, Omatako; see also Hitchcock and Babchuk, 'San traditional authorities'; Welch, 'Land is life'.

75. Dieckmann, Thiem, Dirckx and Hays, 'Scraping the pot', p. 140.

faction aligned with and was backed by the CC-NJC in Mangetti Dune and continued to oppose illegal fencing. The second faction was based in Omatako where the TA office was located; the TA continued to allow and defend non-San livestock farmers to settle within the Omatako area. The political divisions have cultivated and entrenched different land-use strategies within the conservancy's territory and produced a landscape divided by and through fences. There is a clear spatial clustering of fenced areas in the area around and close to the TA's Office in Omatako and Bubi se Post (see [Figure 2](#)). The global positioning system data on illegal settling and subsequent Google Earth mapping confirms this spatial clustering as well as that north of the main Grootfontein-Tsumkwe gravel road (i.e. Grashoek, Jazu and Kanovlei), in Kanovlei, and the Jazu area.⁷⁶ In contrast, the area around Mangetti Dune where the NJC-CC Office was located and further east ([Figure 2](#)) was hardly settled by illegal settlers.⁷⁷

Another source of discontent between the TA and the NJC was the appointment of a chief. When Chief Arnold died in 2012 in a car accident, the position remained vacant for 3 years. Several NJC members pointed out that the number of illegal fences drastically increased when the senior councillors took control in the period between the death of chief John Arnold and the instalment of a new chief in 2015.⁷⁸ John Arnold's daughter, Chief Glony Arnold, was appointed by the Namibian government in 2015 as the new chief. Unlike her father, Chief Glony Arnold had not been elected. This caused dissatisfaction among the San who believed that they should have elected a successor. They disagreed with the government that the !Kung had a 'royal family' and that leadership is inherited.⁷⁹ When the chief did not show up at one of the Annual General Meetings of the NJC in 2015, one of the village representatives stated that the community 'doesn't have a chief to represent us'.⁸⁰

Chief Glony Arnold added fuel to the tensions by publicly stating that those that originate from Angola but now reside in N \neq a Jaqna were 'outsiders'; they have no right to oppose the non-San settlers and their fences and cattle.⁸¹ A CLB representative complained that the rift hampered its ability to allocate land rights transparently because the CLB now had to consult with two different parties.⁸² In theory, there

76. 'Judgement in the matter'.

77. Interview with conservancy member, Grashoek, 29 June 2015; Interview with conservancy committee, Kandu, 22 June 2016. The Google Earth mapping confirms this.

78. Interview with conservancy member, Omatako, 22 June 2015; Interview with conservancy committee member, Mangetti Dune, 22 July 2015.

79. Group interviews with conservancy members, Omatako, 22 and 23 June 2015.

80. Annual General Meeting, M'kata, 30 July 2015.

81. Hitchcock and Babchuk, 'San traditional authorities'.

82. Interview with conservancy member, Otjiwarongo, 18 August 2015.

was only one recognized TA. But in practice, the two factions did not consult each other on land matters in ‘their’ respective areas of the conservancy.⁸³

The disagreements between the TA and the conservancy, along with the institutional challenges caused by the factional divide within the TA resulted in a loss of faith in the traditional structures and a continued challenging of the authority of the !Kung TA by the conservancy members. They were not convinced that their representatives at the CLB meetings were acting in their best interest. The TA was supposed to publish new applications for land rights at the TA office and allow community members to lodge objections.⁸⁴ Our interviews revealed that most community members were unaware of such a notification list and none of the interviewees in NJC had ever seen such document displayed at the TA office in Omatako. Moreover, many key stakeholders were not able to attend all the CLB meetings. The way in which the TA operated confused many in the conservancy, creating, in turn, an institutional void. Several game guards of the NJC told us that more people were ignoring the TA on the matter of reporting illegal fences. New fences were instead reported to the game guards. This was problematic and confusing because the power to physically remove fences lay with the CLB and the TA. However, their reluctance to act in these land-related matters pushed the community to turn to the CC-NJC instead.

Land-use plans, projects, contestations and shifting visions of modernity

The Namibian government and NGOs, through the design and implementation of development projects, have played important roles in the micro-politics of N≠a Jaqna, aggravating the rift amongst and between the various San factions.⁸⁵ The core of the rift and the contestations is that the visions of outsiders and their plans and practices have not resonated with the cultural and religious repertoires of the !Kung and other San groups and their making of modernity. We should be careful not to interpret these as rigidly fixed; they are rather subject to transformations due to interactions with the state, commercial farmers, trophy hunters, tourists, NGOs and non-San groups that have settled in or close by.⁸⁶

83. Interview with conservancy committee member, Mangetti Dune, 14 July 2015.

84. Werner, ‘Land tenure and governance’.

85. See also Harring and Odendaal, ‘Our Land They Took’ and Welch, ‘Land is life’, chapters 5 and 6.

86. See for instance Polly Wiessner, ‘Owners of the future? Calories, cash, casualties and self-sufficiency in the Nyae Nyae area between 1996 and 20031’, *Visual Anthropology Review* 19, 1-2 (2003), pp. 149–159, and Robert K. Hitchcock and Megan Biesele, ‘Bitter roots: The ends of a Kalahari myth’, *Canadian Journal of African Studies* 48, 2 (2014), pp. 373–376.

Livelihoods evolved rather diversified in Nǀa Jaqna. The economic pillars that secured food and income for the conservancy and its members hinged on a preferred type of land use that combined the sustainable harvesting of Devil's claw ('Harpagophytum') and gathering of 'veldkos' including medicinal plants with trophy hunting and eco-tourism. In 2017, about 275 harvesters harvested and sold 21.7 tonnes of the plant, worth about N\$950,000, while the total projected income to the conservancy was about N\$1.2 million in the same year.⁸⁷ Some conservancy members reared livestock combined with small-scale but unfenced crop farming. Food aid and cash income from piece work, pensions and the sale of crafts also evolved as important livelihood sources.⁸⁸ The diversified nature of livelihoods in Nǀa Jaqna defies the use of labels such as 'indigenous'.⁸⁹ The label 'indigenous land use' is contested if only because of its colonial connotation.⁹⁰

Although the fencers were not permanently on the land, their presence was felt discursively and through their cattle, their grazing, the herders they hired, and the fenced enclosures. They were considered 'elites' because they had the capital to purchase fencing materials and hire labour to construct the fences. They introduced a cattle farming discourse in Nǀa Jaqna on a scale larger than ever before—a land-use type that legitimizes fencing as the only way to conduct modern 'commercial' agriculture on communal land and accumulate wealth.⁹¹ Investing in the construction of fences in communal lands was easier and cheaper than acquiring commercial land in other regions.⁹² Some fencers viewed fencing as a necessary means to rectify the land inequalities, which were created during the colonial period.⁹³ Fencers/grazers claimed that fences protected their cattle from the poisonous 'gifblaar' (*Dichapetalum cymosum* or poison leaf) and prevented cattle from causing damage to the area.⁹⁴ Development experts

87. 'Conservancies get bumper devil's claw harvest', *The Namibian*, 12 April 2017, <<https://www.namibian.com.na/172326/archive-read/Conservancies-get-bumper-devil&amp;39s-claw>> (30 January 2021).

88. Dieckmann, Thiem, Dirkx and Hays, 'Scraping the pot', p. 140.

89. Personal communication with Ben Begbie-Clench, 2 February 2021.

90. Anne Heeren-Hauser, Ahmad Cheikhyoussef and Percy M. Chimwamurombe, 'The Namibian bioeconomy: Transformation to a sustainable society?' *Discover Sustainability* 1, 1 (2020), p. 8.

91. Kashululu and Hebinck, 'The fencing question'.

92. Werner, 'What has happened?'; Kashululu and Hebinck, 'The fencing question'.

93. Werner, 'What has happened'.

94. See the Answering affidavit in respect of the 9th Respondent Case NA276/13 in the matter between the NJC Committee and the Minister of Lands and Resettlement & 35 others, 2013 (High Court of Namibia, Windhoek); Answering affidavit in respect of the 16th Respondent Case NA276/13 in the matter between the NJC Committee and the Minister of Lands and Resettlement & 35 others, 2013 (High Court of Namibia, Windhoek); Answering affidavit in respect of the 17th Respondent Case NA276/13 in the matter between the NJC Committee and the Minister of Lands and Resettlement & 35 others, 2013 (High Court of Namibia, Windhoek).

have conveyed that fencing contributes to a reduction of available communal grazing land and overgrazing and allows fencers to benefit from exclusive access to resources such as water.⁹⁵ The illegally grazed cattle browsed the above-ground leaf cover of Devil's claw in the growing season and threatened the growth of tubers and their ability to flower and produce seeds. Cattle also compacted the land, making it difficult for harvesters to trace the Devil's claw.⁹⁶ Some informants said they feared to be accused of trespassing *de facto* private fenced lands. Once areas have been fenced, the 'owners' often behave aggressively in protecting their fences—often by armed guards—which adds to the widely felt sentiment of insecurity and unsafety among the San.⁹⁷ Violent conflicts have erupted between fencers and San conservancy members in places where fencers also fenced boreholes, thereby restricting access to water.⁹⁸

Development projects such as the construction of small-farm units near Aasvoelness (Figure 1) as proposed by MLR and the illegal grazing and fencing were interpreted in N≠a Jaqna as jeopardizing the preferred land use. MLR's proposal was a component of a nation-wide government programme for communal land development. The US\$1.5 million agricultural project to be funded by GIZ, European Union (EU) and KfW, would, according to MLR, be of great benefit to the conservancy and its people. Several informants stated that they believed that the government saw Tsumkwe West as prime farming land that was 'productive' but 'underutilized'.⁹⁹ This explained to them why the government had been hesitant to respond adequately to the illegal fencing and grazing. Little exposure and experience with farming and the absence of a tailor-made extension, they said, rendered the proposed small-farm units unproductive. Farming, they said, required cash that they preferred to invest in tourism-related activities (e.g. campsites).¹⁰⁰ Likewise the income from trophy hunting would be less as illegal grazing and illegal fencing interfered with wildlife management and hunting. Herders who were employed by the illegal grazers

95. See Eduard Gargallo, 'Conservation on contested lands: The case of Namibia's communal conservancies', *Journal of Contemporary African Studies* 33, 2 (2015), pp. 213–231. See also Peter Klintonberg and Anton Verlinden, 'Water points and their influence on grazing resources in central northern Namibia', *Land Degradation & Development* 19, 1 (2008), pp. 1–20.

96. See also Blog Post Nyae Nyae Development Foundation, 'Illegal grazing and fencing impacting on San livelihood opportunities', 12 November 2019, <<https://www.nndfn.org/illegal-grazing-and-fencing-impacting-on-san-livelihood-opportunities>> (20 January 2021).

97. Interview with conservancy committee members, Mangetti Dune, 18 June 2015.

98. Interview with community member, Omatako, 23 June 2015. This is quite common in Ovamboland: See Kashululu and Hebinck, 'The fencing question'.

99. Welch, 'Land is life'; Hohmann, 'We are looking for life'.

100. This is a summary of the interviews held in the NJC. The findings are supported by Welch, 'Land is life', chapters 6 and 7. See also Gargallo, 'Community conservation and land use' and Hewitson, 'Following elephants'.

were killing predators that were roaming the conservancy.¹⁰¹ The CC-NJC feared that if the government projects were implemented, this would further undermine the conservancy and create a situation where potentially more fencing and illegal grazing would take place and more land will be grabbed. In effect, these are all activities that interfered with their preferred land use.

MLR's proposal to establish small-scale farm units aptly illustrates the core of the uneasy relations between the MLR and the CC-NJC. The CC-NJC objected to that small-farm unit proposal in 2018. The plans were both poorly consulted and communicated by an MLR consultant and designed in a way that did not align with the ideas of the CC-NJC.¹⁰² The NJC supposedly had to simply sign the document to approve the plans.¹⁰³ The NCC-NJC made clear that

the local community want the EU and German funds to be channelled into projects that will directly support the local San community. This should include helping to address the systematic and unaddressed illegal fencing and settlement that is taking place in the conservancy. San farmers should be supported with solar water infrastructure and storage facilities at their villages, water sources for wildlife development, tractors and resources so that the San farmers can increase the scale of their activities and support the conservancy in upholding the rights of its community that are being systematically challenged almost daily by the government and now donors too.¹⁰⁴

Chief Arnold disputed the claims by the CC-NJC chairperson that the community rejected the MLR plans to develop a farming infrastructure in the area.¹⁰⁵ Meanwhile, she and the TA continued to allow illegal fencing and grazing and even allocated more land to non-San in the conservancy territory.

MET added to the controversies by banning hunting in the conservancy as a measure to preserve the game for trophy hunting. While in the

101. Personal communication with contracted trophy hunter, 2 February 2021.

102. Informants, whose names remain undisclosed, confirmed that the foreign agencies after all were not very happy with the nature of this planning process. They informally confessed that the projects would not be beneficial for the San communities.

103. Brigitte Weidlich, 'San people do not want farms in their conservancy: Wimsa', *The Namibian*, 20 December 2007, <<https://www.namibian.com.na/178448/archive-read/San-reject-Govt-livestock-project-THE-N%27a>> (13 January 2021); Theresia Tjihenuna, 'San reject Govt livestock project', *The Namibian*, 15 June 2018, <<https://www.namibian.com.na/178448/archive-read/San-reject-Govt-livestock-project-THE-N%27E2%89%A0a>> (2 January 2021).

104. Blog Post, Nyae Nyae Development Foundation, 'Voices of the San being ignored', 1 May 2018, <<https://www.nndfn.org/voice-of-the-san-being-ignored>> (20 January 2021).

105. Theresia Tjihenuna, '!Kung chief, chairperson divided over Govt project', *The Namibian*, 28 June 2018, <<https://www.namibian.com.na/178946/archive-read/Kung-chief-chairperson-divided-over-Govt>> (13 January 2021).

neighbouring Nyae Nyae conservancy, MET did not ban hunting. Trophy hunting after all, MET reasoned, had become a major income-earning venture for the NJC. MET, on the other hand, was also not happy with the plans of MLR to promote small-scale farming. The inevitable fencing that the farming units would entail interfered with the trophy hunting. Fences reduce the space and numbers of the game for trophy hunting, which not only represents cash but also meat for food. Moreover, MET objected to the fact that the planned position of the farm units was to the wildlife zone that forms the core of MET's MZP for the NJC. The reduction in game numbers was counter-productive to the attempts of MET and other organizations to increase game numbers and expand (eco-)tourism. MET also pointed out that fencing contributed to intensified human-wildlife conflicts.¹⁰⁶

There is another aspect that added to the discontent in N≠a Jaqna about the presence of government. Grassroots level bureaucrats (e.g. veterinarians) were accused of having found ways to be elected to local development committees so as to access and (re)direct government funding for development. Many San viewed this as attempts by wealthy newcomers to control and secure developmental resources for individual purposes that were not congruent with the collective aims of the San.¹⁰⁷

Our analysis of the opposition to government and NGO plans is to a degree problematic. We do not intend here to contrast commercial livestock farming and small-scale farming units with a romanticized notion of the San as 'traditional' hunter-gatherers who operate outside of a cash economy and do not maintain commoditized relations.¹⁰⁸ Such image of the San in NJC would be inaccurate; in fact, the livelihood strategies of the San were as indicated earlier highly diversified. The histories and background of the San in N≠a Jaqna were diverse. Subsistence hunting was no longer an important part of San livelihoods in the NJC in part because of the ban on hunting. The classic CBNRM model may be subject to contestation in the long run, notably by the younger generations.¹⁰⁹ There is also some evidence that members of the NJC supported efforts to rearrange the landscape.¹¹⁰ A small group of conservancy members and non-San settlers

106. Informal conversation, MET officer at Annual General Meeting, M'kata, 27 July 2015.

107. Welch documented some of this in chapter 6 in Welch, 'Land is life'. This includes a land-grabbing attempt of a Canadian-based religious group to develop an unspecified area adjacent to one of the conservancy-operated tourist camps.

108. See Robert Gordon J. and Stuart Sholto-Douglas, *The Busman myth: The making of a Namibian underclass* (Westview Press, Boulder, CO, 2000); see also Wiessner, 'Owners of the future?'; Hitchcock, 'Refugees, resettlement'.

109. Sian Sullivan raises similar questions: See Sian Sullivan, 'Protest, conflict and litigation. Dissent or libel in resistance to a conservancy in North West Namibia', in E. Berglund and D. Anderson (eds), *Ethnographies of conservation: Environmentalism and the distribution of privilege* (Berghahn Press, Oxford, 2003), pp. 69–89.

110. We in part also rely here on chapters 6 and 7 in Welch, 'Land is life'.

spoke out in favour of the small-farm units, particularly those with some experience with farming as farmworkers on farms near Grootfontein or in Kavango. They argued that fencing farming units would help to mitigate human–wildlife conflict as the fences would protect livestock from predators. The !Kung chief and some of his senior councillors also strongly supported the idea of establishing individual commercial farming units in the NJC. The rumour is that he would financially benefit from his support of the farms. But youngsters, as Polly Wiessner argues in her paper, are also interested in cell phones and other modern technologies.¹¹¹ This indicates that modernity comes in different forms and shapes and is not constructed and operationalized in uniform ways in N≠a Jaqna.

State in the making: overlapping authorities

The NJC–illegal fencing case illustrates the problem of overlapping and conflicting authorities and unequal power relations in the communal areas. These are in part the product of the creation of new institutions following the post-independence decentralization efforts. These institutions embody rules, norms and values that aim to regulate social practice, but these are not only embedded in statutory law. Given that customary law and land governance is both practised and recognized in the Namibian Constitution,¹¹² we thus need to consider land–people relations as situated and evolving in complex legal systems of overlapping legal orders and governance repertoires.¹¹³ Legal pluralism implies that state law is not the only normative order but rather part of a wider constellation of normative and institutional orders.¹¹⁴ When it comes to national policy agenda settings and legal rulings, however, these normative orders are placed in a hierarchical relationship with the state’s laws and procedures as the first and most important ones. Those actors involved in disputes over land and

111. Wiessner, ‘Owners of the future?’. The same point is raised by Hitchcock and Biesele, ‘Bitter roots’.

112. Article 66 of the Namibian Constitution: Customary and Common Law specifies that (1) both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law. (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or particular periods.

113. Franz von Benda-Beckmann, ‘Legal pluralism and social justice in economic and political development’, *IDS Bulletin* 32, 1 (2001), pp. 46–56.

114. Franz von Benda-Beckmann, ‘Who’s afraid of legal pluralism?’ *Journal of Legal Pluralism and Unofficial Law* 47, 1 (2002), pp. 1–46; Franz von Benda-Beckmann, Kebeth. Von Benda-Beckmann and Melanie C. Wiber (eds), *Changing properties of property* (Berghahn Press, Oxford, 2006).

resources, in contrast, adhere to different discourses and may apply different legal rules tapped from different legal and governance repertoires.¹¹⁵ Franz von Benda-Beckmann and colleagues understand this as ‘forum shopping’.¹¹⁶

The NJC court case exemplifies what Christiaan Lund describes as ‘authority in the making’,¹¹⁷ implying that the different normative orders of property and rights to a territory (still) need to be aligned. There is no pre-defined state authority; instead, claims are brought forward to various statutory and non-statutory institutions, and during the process of recognition, the authority of different institutions is legitimized.¹¹⁸ In situations where different institutions operate, this leads to competition over jurisdiction and the question of ‘who is the legitimate authority’ becomes contested and (re-)negotiated.¹¹⁹ Jesse Ribot, Thomas Bierschenk and Jean Pierre Olivier de Sardan problematize the inherent ambiguity in the creation of new institutions and the decentralization of authority from the central state to local institutions of governance.¹²⁰ Catherine Boone and colleagues are likewise critical of the ideas behind the creation of new institutions.¹²¹ They point out that such ‘institutional fixes’ are shaped by ‘a political process that takes place on the uneven playing field of existing state structure, and in any given setting, this same context will go far in shaping the practical meanings, uses and effectiveness of new regulatory structures and laws’.¹²² These unequal playing fields exist in Namibia and across Africa, making it difficult for institutions dealing with land matters to react adequately to land claims and disputes.

This is exactly what happened in Namibia. The resulting ambiguity created confusion and rivalry, and more importantly an institutional void, between the TA and CLB and the CC-NJC concerning their reluctance to

115. Von Benda-Beckmann, Von Benda-Beckmann and Wiber, ‘Properties of property’.

116. Von Benda-Beckmann, Von Benda-Beckmann and Wiber, *Changing properties*.

117. Lund, ‘Rule and rupture’, p. 1200.

118. Thomas Sikor and Christiaan Lund, ‘Access and property: A question of power and authority’, *Development and Change* 40, 1 (2009), pp. 1–22.

119. Christiaan Lund, *Local politics and the dynamics of property in Africa* (Cambridge University Press, Cambridge, 2008); Thomas Bierschenk and Jean Pierre Olivier de Sardan, ‘Powers in the village: Rural Benin between democratisation and decentralisation’, *Africa* 73, 2 (2003), pp. 145–173; see also Fiona A. MacKenzie, ‘Land and territory: The interface between two systems of land tenure, Murang’a District, Kenya’, *Africa* 59, 1 (1989), pp. 91–109; Thomas Bierschenk and Jean Pierre Olivier de Sardan (eds), *Beyond patrimonialism. States at work: Dynamics of African bureaucracies* (Brill Academic Publishers, Leiden/Boston, MA, 2014).

120. Jesse Ribot, ‘Democratic decentralisation of natural resources: Institutional choice and discretionary power transfers in Sub-Saharan Africa’, *Public Administration and Development*, 23, 1 (2003), pp. 53–65; Bierschenk and Olivier de Sardan, ‘Powers in the village’.

121. Catherine Boone, Alex Dyzenhaus, Ambreena Manji, Catherine W. Gateri, Seth Ouma, James Kabugu Owino, Achiba Gargule and Jacqueline M. Klopp, ‘Land law reform in Kenya: Devolution, veto players, and the limits of an institutional fix’, *African Affairs* (2019), pp. 1–23.

122. *Ibid.* p. 2.

remove the illegal fences. In N \neq a Jaqna this void has skilfully and in articulated ways been filled by the CC-NJC, which also signifies that the San are not necessarily to be treated as victims. The CC-NJC has been proven to possess substantial discursive powers to reject proposals and engage in alliances with other conservancies and NGOs and other partners in navigating the micro-politics of N \neq a Jaqna. This is in contrast to elsewhere in Namibia where institutional voids create room for manoeuvre especially for elites that have the means, discursive and financially, to devise extra-legal strategies to gain access to resources and *de facto* exclude others.¹²³ Lund refers to these as ‘ruptures’, which are the sites where the re-arrangement of previous institutional relations and ‘authority in the making’ takes place.¹²⁴ These emerge as moments of opportunity: in the case of Namibia new ‘communal entrepreneurs’ and conservancy committees are cast in the language and rhetoric of the state to legitimize their claims even though they may not be regarded as government institutions and not legally positioned to have jurisdiction over people–land relations.¹²⁵

The emerging institutional voids and opportunities add an unintended layer of complexity in Namibia’s legal system of land–people relationships, hampering the implementation of legal judgements and more general development policies. This represents an institutional incapacity, which James Scott understands as the ‘prostrate’ institution.¹²⁶ These are institutions that fail to adequately take cognisance of the various forms of human agency displayed in the rural domain (e.g. by the NJC-CC, TAs, CLBs, elites and fencers). This incapacity is endured and strengthened by failing to take into consideration the micro-politics at hand and how these intersect with national politics and policies.¹²⁷ With Boone and colleagues, we argue that institutional reforms need to take account of the power of an institutions-in-context explanation.¹²⁸ This also underlines the argument of John Friedman that the state takes root in the local (or everyday life) and conversely local political processes in the state.¹²⁹ Or, as Francois Bayard documented skilfully, state policies ignore the roles bureaucrats at

123. See Kashululu and Hebinck, ‘The fencing question’; Werner, ‘What has happened’.

124. Lund, ‘Rule and rupture’, p. 1202.

125. Lund, ‘Local politics’, p. 5. See also Jean Francois Bayart, *The state in Africa: The politics of the belly* (Longman, London, 1993).

126. James C. Scott, *Seeing like a state: How certain schemes to improve the human condition have failed* (Yale University Press, New Haven, CT, 1998).

127. This point is well elaborated by Sara Berry, ‘Property, authority and citizenship: Land claims, politics and the dynamics of social division in West Africa’, *Development and Change* 40, 1 (2009), pp. 23–45 and Bierschenk and Olivier de Sardan, ‘Powers in the village’.

128. Boone, Dyzenhaus, Manji, Gateri, Ouma, Owino, Gargule and Klopp, ‘Land law reform in Kenya’.

129. John Friedman, ‘Making politics, making history: Chiefship and the post-apartheid state in Namibia’, *Journal of Southern African Studies* 31, 1 (2005), pp. 23–52.

grassroots level play in accessing, controlling and redirecting state funds for development.¹³⁰

Whose modernity counts?

We have shown that N≠a Jaqna is an assemblage of co-existing and clashing land-use practices and unfolding discourses about land. It is paramount to capture that these discourses and practices are legitimized by locally specific makings of modernity and views on what land is (its ontology), what it can or should do (its affordances) and how humans should interact with it.¹³¹ The judicial process, we argue, hinges predominantly on a rights perspective, ignoring the agency displayed in N≠a Jaqna that manifests in the contrasting visions of modernity that are imposed from the national (or global) level but (re)negotiated in local arenas.¹³² The question ‘whose modernity counts’ in Tsumkwe West is significant for mitigating solutions. This implies fully embracing the idea that modernity is made by actors in villages in communal areas and conservancies, sometimes shared and accommodated and not exclusively defined by experts, NGOs and state actors, and often outside the realm of NGOs and the state.¹³³ This is the foundation for the contestations we have observed in N≠a Jaqna.

The bigger issue at stake is whether, and how, the San and similar indigenous groups will be in a position to shape their future and take control over the direction of land use in territories like Tsumkwe West. The outcome of the struggle for the commons depends on the one hand on whether the political processes in the country are supportive. The absence of support for the removal of fences does not only appear as limited implementation capacity but a lack of imagination to question what is meant by ‘land’? Franz von Benda-Beckmann points out that

We are likely to be confronted with a situation that such categorisation of resource elements may be different and contradictory in different legal subsystems within the state organisation, with different rights and obligations flowing from such differences - a source of legal uncertainty and many socioeconomic and often political conflicts.¹³⁴

130. Bayart, ‘The state in Africa’.

131. Murray Li, ‘What is land?’.

132. Long, ‘Contesting policy ideas from below’.

133. See Arce and Long, ‘Reconfiguring modernity’. See also Paul Hebinck, Luwiche Bosma and Gert Jan Veldwisch, ‘Petrol pumps and the making of modernity along the shores of Lake Victoria, Kenya’, *Water Alternatives* 12, 1 (2019), pp. 13–29.

134. von Benda-Beckmann, ‘Legal pluralism and social justice’, p. 53. See also Murray Li, ‘What is land?’.

This implies ontological politics and pursuing such policies as Campbell argues¹³⁵ will entail a continued confronting with visions of land use that are materializing in the various line ministries. At present, MLR's discourse has not been challenged within the realm of the state. State agricultural policies, as Jonathan Cox argued, are dominated by the belief that communal farming and gathering of plants are designated as 'subsistence' and 'backward', whereas commercial farming on private land and for the market is more efficient.¹³⁶ This policy discourse represents a remarkable continuity in Namibia, like elsewhere in Africa. The Odendaal Commission aired these ideas in the mid-1960s and argued for the settlement of the San and the end of their gathering way of life.¹³⁷

The making of a new state does not always adequately translate into coherent and harmonizing policies to deal with new and emerging issues; this is quite common in the region. MET's strategy of a fenceless community-based conservation trajectory does not so easily combine with small-scale farming units that are fenced. This certainly adds to the confusion and creates space for unintended outcomes and for land grabbers and fencers to construct fences illegally, elites to capture resources, and institutions whose power overlap to refuse to act in a situation when they have the statutory powers to do so.

Conclusion: new role for conservancies?

While statutory law and the CLRA acknowledged the jurisdiction of the CLB and the TA over the issues of customary land rights and illegal fencing, local people experienced the failure to act as evidence of a lack of political will. Illegal fencing continued to be a source of conflict in the management of the commons. The authority of the TA and CLB was weakened in the process, simultaneously increasing the authority of the conservancy as an alternative configuration to pursue their claims and playing a role in the ontological politics of resource governance. Ultimately, the purpose of a conservancy is to allow communities to benefit from natural resources, not to provide tenure security *per se*.¹³⁸ The relative democratic structure of CBNRM-like resource-use models provided community representatives substantial agency to oppose land grabbing and development schemes and

135. Campbell, 'Farming inside invisible worlds'.

136. Jonathan Cox, 'The research context', in Johathan Cox, Carol Kerven, Wolfgang Werner and Roy Behnke (eds), *The privatisation of rangeland resources in Namibia: Enclosure in eastern Oshikoto* (Overseas Development Institute, London, 1998), pp. 8–18.

137. Commission of enquiry into South West Africa Affairs (Odendaal Commission), Report of the commission of enquiry into South West Africa Affairs 1962–1963, (Government Printer, Pretoria, 1963), p. 295.

138. Bollig, 'Towards an arid eden?' and Gargallo, 'Community conservation and land use' raise the same point.

projects designed by state and experts. Their experience with their fight against fences was marked by frustrations. Their struggles simultaneously paved the way for organizing the struggle for the commons by calling upon the resources of the same state and the global community. The legal significance of the NJC case is that it has established an important, new standard in that conservancies have *locus standi* to take land-related matters to court. Conservancies can now deal with land issues without consulting TAs. The claiming of authority is an aspect of ‘authority in the making’,¹³⁹ and a real and ongoing process. Lawsuits are important democratic ingredients in the political negotiations to settle authority in resource management. However, the legal separation of rights to land and the ontology of land cripple the effectiveness of the lawsuit. This separation inhibits incorporating the reality that unfolded over time in N≠a Jaqna in which the controversy is as much about the land as the resources on the land itself, and in the end about what constitutes modernity in Tsumkwe West and for whom.

Authority setting also involves harmonizing policy processes to arrive at consistent policies to avoid contradictions between the various departmental agendas and land management plans. This would, however, demand a state that is staffed by a well-trained and non-technocratically oriented bureaucracy capable of translating legal pluralism into policies that revolve around plural legal orderings as well as land having different ontological meanings. Such policies would resonate with locally accepted and shared notions of modernity and further pave the way for conservancies and other resource communities in an alliance with land-based NGOs in the rural, peri-urban and urban domain in Africa to become involved in dealing with land matters beyond rights only. This strategy would counteract the global tendency to undermine the legitimacy of land–people relationships that are embedded in communalism and related land ontologies.

139. Lund, ‘Rule and rupture’.