

Natural Justice

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Shadow report to South Africa's initial report under the ICCPR

NATURAL JUSTICE
Lawyers for Communities and the Environment

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Introduction

Natural Justice envisions conservation and sustainable use of biological diversity through the self-determination of indigenous peoples and local communities. To this end Natural Justice is active in eight countries, including South Africa. Our head office and registration is in Cape Town, South Africa, no. 63 Hout Street, Cape Town 8001. Website: naturaljustice.com.

This shadow report serves to give input on the legal issues in South Africa concerning indigenous people within the framework of the International Covenant of Civil and Political Rights (ICCPR). Our input refers to

- Right to self-determination (Art. 1):
 - Right to freely pursue economic, social and cultural development.

- Right of minorities (Art. 27):
 - Recognition Khoi-San languages as official languages with the corresponding benefits.
 - Right to freely dispose of natural resources and not to be deprived of the means of subsistence.
 - Restitution of land and compensation.

Indigenous peoples in this case are defined in accordance with the *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005)* as part of the African Commission on Human and Peoples Rights, endorsed by the African Union. The Report confirms that indigenous peoples in Africa, *does not mean* 'who is first'; nor does it entail special rights for one community, it rather addresses the human rights and developmental concerns of these historically marginalized communities in post-colonial Africa. African communities who do identify with the human rights standards as outlined in the United Nations Declaration on the Rights of Indigenous Peoples and the worldwide movement of indigenous peoples, do so, because these standards speak to the particularities of their socio-political challenges in Africa. It is with that understanding this report hopes to address the key and in many ways, unique concerns of the Khoi and San communities' continued challenges.

Furthermore, this report is mindful that South Africa is still a young democracy having to deal with the brutal colonial legacies of over 300 years and institutionalized oppression under Apartheid. South Africa has come far in ensuring rights of all historically marginalized communities. The country is still deeply embedded in its decolonization processes. This decolonization work is ongoing and no easy task for the country. This report sees the issues outstanding pertaining the Khoi-San communities as part of redressing that historical decolonization legacies.

Natural Justice wishes to acknowledge South Africa's legislative and policy efforts to ensure that all citizens enjoy their fundamental freedoms in post-Apartheid South Africa. This has been the first government to give some form of recognition to the Khoi-San communities and their concerns. There is an important investment from the South African government to redress the wrongs of the past, especially in the case of the Khoi-San people. This is reflected through their inclusion of the Khoi-San in the Traditional & Khoi-San Leadership Bill (2015); supporting them in securing their rights to natural resources and sharing of benefits arising from commercialization of these plant resources, the reopening of the land claims period from 2014 - 2018 through the Amendment of the Restitution of Land Rights Act (2014), as well as the key efforts in ensuring their historical land concerns and heritage sites are addressed through the development of the Exceptions policy as referenced in the Amendment to the Restitution of Land Rights Act (2014).

We also wish to take this opportunity to congratulate in particular the South African Ministry of Environmental Affairs for the study they commissioned on the associated traditional knowledge of the indigenous biological resource, Rooibos. This is a historic moment for the Khoi-San, as the Report confirms their associated traditional knowledge to this unique indigenous resource and its uses. Rooibos is also the second most widely used tea beverage in the world. The government is playing a key role in supporting the Khoi-San communities to enjoy benefit sharing arising from the commercial uses of Rooibos and other plant species. This is seen as a first form of restitution for the long struggle of the Khoi-San people.

These are very fundamental developments and investments for an extremely historically marginalized community for many hundreds of years, which the government is currently engaged in.

Natural Justice hopes to continue to assist the country in the role of strengthening good laws and human rights frameworks along with its implementation of securing the rights of all communities, including that of the Khoi-San. It is with that context, this report will aim to show where further deepened efforts and focus are needed to help ensure the continued efforts by government, will be successful. This is said in the context of partnership and growth as the collective success of South Africa is the responsibility of not only the government, but also civil society.

Background information

South Africa's indigenous peoples account for roughly over 1 per cent of the total population.¹ The main groups are the Khoekhoe (also known as Khoi) and the San, collectively known as the Khoi-San. The *Status Quo Reports² of 1999*, confirmed the Khoi and San (Khoi-San) historically comprised five main groupings, namely, (i) Griqua, (ii) Koranna, (iii) Cape Khoe, (iv) San and (v) Nama. These groups have various subgroups

¹ International Work Group for Indigenous Affairs. 2015 Yearbook article: South Africa. Although a country census is yet to be done including the Khoi-San specifically.

² These official state reports were commissioned by former President Nelson Mandela's administration and are mainly concerned with the national, regional and international legal accommodation of indigenous communities, a historical overview of the Khoisan community in South Africa pertaining to origin and subdivisions that developed, leadership, structures of governance, residence and movement, relationship with colonial/republican authorities' pre and post 1994. [taken from the draft Discussion document towards a White Paper on Traditional Leadership and its Institutions 2000]

most of whom are populated in the Northern and Western Cape Province.³ They are represented on the national structure called the National Khoi & San Council (NKC). This structure was formed in 1999 during the presidency of former President Nelson Mandela. He instituted independent researchers to verify the leadership claims made by the Khoi and San at the time. And on that basis membership of the NKC was comprised seventeen years ago. There is also a strong “revivalist-Khoi-San” movement reclaiming their historical heritage as indigenous peoples.⁴ The membership to the NKC was three years ago extended to include the voices of these revivalist groupings as well.⁵

Under Apartheid race classification laws all Khoi-San were identified as “coloureds”, which has led to marginalisation and stigmatisation.⁶ The Khoi-San did not identify themselves as “coloureds”, yet they were forcibly registered as such.⁷ Under Apartheid laws they were socially and politically invisible. Furthermore, their unique identity as distinct indigenous people was unrecognised. Still, this classification as “coloureds” exists in the South African legal system.⁸ Consequently, institutions regulating employment, recruitment and job security continue to categorise the Khoi-San under “coloureds” in policymaking, further marginalizing these indigenous communities. The former UN Special Rapporteur on Indigenous Peoples, Professor Rodolfo Stavenhagen recommended in his 2005 report that all stigmatization that the Khoi-San could experience as a result of being labelled coloured, should be removed.

Issues

Right to self-determination (art. 1):

- **Right to freely pursue economic, social and cultural development**

³ United Nations Commission on Human Rights. 2005 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, 2005.

⁴ Adhikari, Mohamed. *Not white enough, not black enough: Racial identity in the South African coloured community*. Ohio University Press, 2005. p. 185-187.

⁵ Kindly note, this extension of membership was not independently verified through research studies. Membership to the NKC was done by elections. No further verification of their claims were done.

⁶ United Nations Commission on Human Rights. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, 2005.

⁷ Ibid.

⁸ A. le Fleur & L. Jansen. "The Khoisan in contemporary South Africa: Challenges of recognition as an indigenous people." (2013).

- (1) The **Traditional and Khoi-San Leadership Bill 2015** (formerly called the National Traditional Affairs Bill) has finally been introduced to the South African parliament in September 2015. It has been an over 17 year wait for the Khoi-San after 300 years of onslaught on their culture. The bill will recognise the Khoi-San communities and its institutions and include them in access to justice and various levels of governmental processes. This is a key outcome in the Khoi-San community's life. The bill has been opened for public consultation. Although there has been criticism levelled against the bill, it is not directly related to the Khoi-San issue.
- (2) The National Khoi & San Council supports the bill and urge it should be enacted however it should reflect and protect human rights, accountability and principles of democracy of all its affected communities. The enactment of the bill is also in line with the recommendation of the former UN Special Rapporteur of Indigenous Peoples in his country mission to South Africa during 2005.⁹
- (3) This report wishes to highlight the concerns surrounding the recognition criteria the Khoi-San communities have to show to be recognized in terms of the Bill, as set out in Chapter 2, Section 5(1) (a),¹⁰ with specific reference to **criteria (i) and (v) underlined** :
- (i) a *history of self-identification* by members of the community concerned, as belonging to a unique community distinct from all other communities;
 - (ii) observes distinctive established Khoi-San customary law and customs;
 - (iii) is subject to a system of hereditary or elected Khoi-San leadership with structures exercising authority in terms of customary law and customs of that community;
 - (iv) has an existence of distinctive cultural heritage manifestations;
 - (v) *has a proven history of coherent existence* of the community from a particular point in time up to the present; and

⁹ United Nations Commission on Human Rights. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, 2005. para. 81-102.

¹⁰ Republic of South Africa. Traditional and Khoi-San Leadership Bill 2015, section 5(1)(a). http://pmg-assets.s3-website-eu-west-1.amazonaws.com/b_23_-_2015_traditional_khoi-san_leadership.pdf.

- (vi) occupies a specific geographical area or various geographical areas together with other non-community members. These provisions affirm that Khoi-San communities are formally recognized with their leaders by law. This official recognition is important for the community's own internal organization.
- (4) It is problematic, as this criteria of (i) history of self-identification and (ii) proven history of coherent existence, could exclude several Khoi-San communities¹¹ from their opportunity for recognition. The Status Quo reports as commissioned during Pres. Nelson Mandela's administration already vetted these communities' historical existence. In most instances it will be difficult for some of the Khoi-San communities to show an unbroken history of self-identifying or showing their coherence as a community. In effect it would expect them to show that Apartheid had no impact of social engineering of their identity and that it did not brutally disrupt their community coherence. Apartheid outlawed their cultural identity by forcibly labelling them coloured. Their customary institutions suffered a deep disruption from which South Africa is still rebuilding and decolonizing.
- (5) This report advocates for the criteria to take a more 'restorative approach' to the recognition of the Khoi-San communities. It also asks the government to use the Status Quo reports as the guiding standard in determining what that restorative approach could be, because it clearly outlines who the historical Khoi-San communities in the form of the five groupings were with their subgroups. It is a legacy former President Nelson Mandela and his administration left to assist government to help identify the historical Khoi-San communities.

Rights of minorities (art. 27):

- **Recognition Khoi-San languages as official languages with the corresponding benefits.**
- (6) South Africa has made great strides in the recognition of all other indigenous languages making the total official languages, eleven. The 1996 South African

¹¹ Kindly note this criticism is only pertaining communities, it does not address the leadership issue.

Constitution for the first time made constitutional reference to the Khoe and San people. Article 6 (2) of the South African Constitution states: “Recognizing the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages”. To address these historical challenges to the recognition of indigenous languages, the PanSALB was formed including a subcommittee called KSNLB which specifically looked at the issues around the Khoi and San languages. This structure has not shown an obvious meaningful role to help promote these near extinct languages. It is unclear whether it (PanSALB) still exists and if so, what its current role is in the promotion and protection of the Khoi and San indigenous languages.¹²

(7) We do however want to draw urgent attention for institutionalized support in the honorable efforts of an 81 year old San chief from Upington, Northern Cape province, called Ouma (Grandmother) Katrina. She is an advocate and teacher that is working tirelessly under impoverished circumstances to protect, preserve, and teach the ancient N!UU (San) language and culture of her ancestors to Khoi-San preschoolers so that the ancient knowledge can be preserved and promoted. She is one of the last three fluent speakers of this ancient N!UU language. She now lives in the Upington area of South Africa which is the entrance to the Kalahari Desert; her childhood home and historic range of the Khoi-San people.

(8) A second indigenous language being promoted without the necessary institutionalized support, is Khoekhoegowab (Nama language). It is related to the Khoi language that was spoken for many centuries by the Khoi-San inhabitants of the area known today as the South-Western Cape. The remaining Cape Khoe speakers were gradually assimilated into colonial society, which is today labelled Coloured. A revitalization is taking place around this language in Cape Town with community activists giving classes in this language since 2008. They however

¹² <http://www.gov.za/speeches/minister-nathi-mthethwa-dissolves-board-pan-south-african-language-board-13-jan-2016-0000>

face challenges such as lack of funding, teaching materials and basic infrastructure support.¹³

- (9) This report recommends firstly, for these community initiatives to receive support from government towards the promotion and teaching of these languages and secondly, that these languages receive official recognition to ensure the Khoi and San can preserve these near extinct languages.

Right to freely dispose of natural resources and not to be deprived of the means of subsistence

- **Restitution of land and compensation**

(10) We are most encouraged with the recent Amendment to the Restitution of Land Rights Act (2014) and the mentioning of the Khoi-San Exceptions policy to be developed. Not only does it give communities another opportunity to institute land claims to those who might have previously missed it, but it is a crucial step in addressing the historical land concerns of the Khoi-San in partnership with government. This step by the South African government is directly compliant with the recommendation of UN Special Rapporteur on Indigenous Peoples, Professor Rodolfo Stavenhagen stating: ‘... [he] *recommends that the restitution of land claims by indigenous communities not be limited to the cut-off date of 1913; the launching of a systematic land needs and land rights study of indigenous communities; and the acceleration of the land restitution process.*’

(11) The only aspect to further improve, is that the government through the Ministry of Lands & Rural Development is not working through the National Khoi & San Council (NKC) as the representative structure of the historical Khoi and San communities as clarified in the Status Quo reports. The current participation and consultation in developing this Exceptions policy is therefore occurring outside of these NKC customary structures. By not meaningfully including these customary structures, it does not allow for meaningful

¹³ A. Calata. “Reviving an ancient tongue”. University of Cape Town (2014). <http://www.uct.ac.za/mondaypaper/?id=9814>.

consultation. As a result the crucial discussion of historical lands loss is not occurring within the NKC where the historical communities were originally vetted. This is important as it is causing inter community conflict and confusion. It also makes it difficult for these historical communities, as set out in the Status Quo reports, to meaningfully dialogue around the aims of the Exceptions policy in the context of the Amendment of the Restitution of Land Rights Act 2014. This report wishes to advise the government on how to further strengthen this process by consulting with the historically vetted Khoi and San communities as outlined in the Status Quo reports.

(12) One such place of huge sacred concern is the burial site of the iconic Griqua/Khoi-San leader Andrew Abraham Stockenstrom le Fleur, who died during 1941 in Robberg, Plettenberg Bay in the Western Cape. It is where the Griqua peoples meet as part of their annual pilgrimage to honor his legacy as part of a cultural ceremony. The government is currently in the process of purchasing the land where Robberg is situated in Plettenberg Bay to return it to the Griqua community. “To the Griquas, the tombstone which marks the burial place of their great leader and Prophet, Andrew Abraham Stockenstrom Le Fleur the First, is more than a mere grave or a monument to his memory. It is a living symbol of their past and their aspirations as a nation, which they refer to as their “nasielike bloedsgevoelte” (feeling of nationality) and their “geestelike sielsgevoelte” (spiritual dedication).” There is a huge expectation that the SA government will deliver on this promise. This report wishes to acknowledge the government’s commitment to return this sacred land to them, in principle. However, the implementation of this decision is taking very long.

Conclusions and suggested recommendations

We trust this report can serve to further supplement the report back by the South African government and help guide already existing efforts to addressing the concerns of the Khoi-San communities.

The recommendations in summary are therefore as follows:

- Amending the community criteria for recognition of Khoi-San communities in terms of the Traditional & Khoi-San Leadership Bill 2015, to take a more 'restorative approach' by using the Status Quo report as a reference for a guiding standard for identifying and recognizing these historical communities.
- Including the Khoi and San indigenous languages as official languages. As well as formally supporting the community initiatives to promote, teach and preserve the languages such as N!UU language and Khoekhoegowab.
- Work through the Status Quo vetted communities represented through the National Khoi & San Council to consult on the historical land concerns of the Khoi-San through the development of the Exceptions policy framework.
- Speeding up the implementation of the returning of Robberg sacred land to the Griqua/Khoi-San communities in Kranshoek.