

THE FAILURE OF LAW AND POLITICS

6 August 2013

Insight

By: Willem Odendaal

With land grabs increasing, government comes across as reluctant to protect the rights of the San and the world is taking note, writes Willem Odendaal

Ongoing land grabs in San areas are laying bare weaknesses in state protections of the rights of marginalised communities.

And the San are arguably the poorest and most marginalised group in Namibia with little access to existing political and economic institutions. While their marginalisation has a long back-story, recent events are just serving to spotlight this sad situation.

Since soon after independence, San communities living in the former 'Bushmanland', in north-east Namibia, have been enduring a systematic process of land alienation as a result of illegal land settlement by 'outsiders'.

In May 2009, Herero cattle herders from the neighbouring Gam area invaded the Nyae Nyae Conservancy, in the Eastern Tsumkwe constituency, where the Ju/'hoansi San people reside, by cutting through the veterinary cordon fence. Since then, these herders have not only remained there, they also illegally exploit conservancy resources such as grazing, water and firewood.

At the same time, unauthorised fencing off of land by an estimated 30 cattle herders, predominantly entering from the Oshana, Oshikoto and Otjozondjupa regions, has been a threat to the development of the N# a Jaqna Conservancy ever since it was gazetted in 2003. The total population of N# a Jaqna is approximately 7,000 people, of whom the majority are !Kung San.

Cause & effect

The reason why such a large number of cattle herders have moved into the area is not entirely clear. It is speculated that cattle farmers outside the area have been bribing the !Kung traditional authorities to obtain land illegally. Another possible reason is that land in other regions is becoming scarcer, as more and more of these areas are being fenced off by local rich elites. Compounding this situation, the drought currently gripping Namibia has forced many communal cattle farmers to desperately search for additional grazing as grazing in overstocked communal areas is depleted.

The size of N# a Jaqna Conservancy is approximately 9,120 square kilometres with an average rainfall of 400-450 mm. Large parts of the geographical area is flat Kalahari sands, covered by broadleaf and acacia woodland. The main enterprises within the conservancy from which the !Kung community receive some income include the Omatako Valley Rest Camp, Grashoek Cultural Village, crafts, trophy hunting, own-use hunting, dry wood harvesting projects, and devil's claw harvesting.

The latest invasions, over the last few months, into the N# a Jaqna Conservancy ironically started just a few weeks after a UN Special Report was released in April 2013. The Report, titled 'The Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples', raises concerns about the Namibian government's inability to address the invasions of San lands.

Apart from the fact that these invasions amount to unlawful land grabbing, the San community's ability to harvest veld food is severely compromised as a result of the fencing off of land. Veld food plays a vital part in providing food security to the !Kung San.

When the Communal Land Reform Act 5 of 2002 came into force in 2003, it was anticipated

that it would provide a sound basis to protect the lands of people in the communal areas. Unfortunately, it has not done so.

Legislative failure

Most significantly, the Act seems to have failed in granting any specific legal status to people's land rights in communal areas. For example, Section 17 of the Communal Land Reform Act asserts that "all communal land areas vest in the state in trust for the benefit of the traditional communities residing in those areas", a provision which might allow a community to sue the Government for breach of trust in an instance where the government is either failing to protect their lands or use their lands to benefit some other group.

Under the Communal Land Reform Act, the !Kung Traditional Authority with the support of the Otjozondjupa Communal Land Board has the legal authority to remove illegal cattle farmers and their fences from San communal lands allocated under customary law.

Therefore, what is happening at the moment in N#a Jaqna Conservancy could be regarded as a failure of the state to enforce the law.

As a result of the Otjozondjupa Communal Land Board's failure to promptly deal with the N#a Jaqna land invasions in line with the Act, the current situation also raises uncertainty about the administration of communal lands. For example, it is not clear whether the government is administering these lands for the benefit of the San, or whether these lands belong equally to any citizen of Namibia, who might desire to move his cattle onto these lands.

Some commentators argue that because Article 21 (h) of the Namibian Constitution provides that "All persons shall have the right to reside and settle in any part of Namibia", and that gives anyone the right to move to any communal area and settle there. Such an interpretation however discards existing communal landholders' rights on the lands they occupy and it treats all communal lands as "government land", freely available to any kind of settlement. It would also be inconsistent with the provisions in the Communal Land Reform Act which gives traditional authorities in conjunction with Communal Land Boards the right to allocate customary land rights within the communal areas.

In addition, since San traditional authorities and the Otjozondjupa Communal Land Board apparently lack coordination, as well as administering capacity, encroachments on San communal lands encourages an anarchistic form of land reform based on no other principle than self-help, a process that rewards the richest people capable of moving large cattle herds to other's communal lands.

Encouraging conflict

Moreover, while private property on commercial land is clearly protected by Article 16 of the Namibian Constitution, the non-application of these constitutionally protected principles to communally owned land encourages conflict in the communal areas between the people who now live on the land, and the people who move there. It also encourages environmental degradation and overgrazing in communal areas, as no one has any legal interest in land. This is obviously not a rational way to accomplish land tenure security in Namibia.

The inability of authorities and administrative bodies in dealing with land invasions also means that for many San the land they live on, is beyond their control.

!Kung Traditional Authority representatives complain that they are powerless to deal with the situation on their own and that repeated requests to the local police, the Ministry of Lands and Resettlement and the Ministry of the Environment and Tourism to enforce actions against land invaders have proven in vain.

However, on 10 June 2013, in what appears to be a dramatic turn of events, Inspector-General Sebastian Ndeitunga of the Namibian Police boldly condemned the illegal fencing taking place at the N?a Jaqna Conservancy and ordered the invading parties to remove fences by 6 July 2013.

But before the police can take action, the Otjozondjupa Communal Land Board has to complete the notification process, as set out in the Communal Land Reform Act, to the farmers to remove their fences in the conservancy. The Land Board apparently already gave the farmers a final notice to remove the illegal fences on 2 May 2013. In accordance with the Communal Land Reform Act, these farmers have been given a 30-day notice period to appeal against the Board's decision. So far the Land Board is silent as to whether the farmers have appealed against the Board's decision or not.

It is evident from what is happening in N#a Jaqna Conservancy at present that a lot is at stake. It may well be that N#a Jaqna Conservancy is a test of the shortcomings of the Communal Land Reform Act.

What is clear is that if the rights of communal land-holders are not challenged, they are easy to protect. But if these land rights are challenged, and the law is powerless to protect them, then the law is ineffective.