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Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution

Background

The restitution of ancestral land rights in Namibia has since independence divided opinions. Some argue that it is a fitting process in dealing with colonial era land dispossessions, while others are concerned about the complexity of implementing this kind of restitution.

At independence, the Namibian Government assumed the viewpoint of the latter group. Their position on ancestral land rights is captured in a resolution taken at the end of the 1991 National Land Conference, concluding that the restitution of ancestral land rights is not possible because of the historical complexities in establishing land occupancy by indigenous people at the time of Namibia's colonialization. As a result, subsequent Namibian policy and law on land reform excluded the restitution of ancestral land rights.

Nevertheless, the public debate on the restitution of ancestral land rights remained alive among those mostly affected by historical land dispossessions, so much so that the topic was again brought to the table during the Second Land Conference in 2018.

Establishing the Commission

After the 2018 conference, President Geingob established the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution in terms of the Commissions Act, 1947. The main purpose of the Commission was to inquire into and report on the claims of ancestral land rights and restitution to groups and individuals.

The Commission defines "ancestral land" as land that was occupied and utilised by the forebears of indigenous communities, and views "ancestral land losses" as the loss of ancestral land through colonial land dispossession or other forms of contested alienation in either pre- or post-colonial eras. "Ancestral land rights" are linked to rights to land that was occupied and utilised by the forebears of indigenous communities, while "ancestral land restitution" involves restoring the rights to lost ancestral land.

The Commission's methodology

The Commission's methodology included consultations with government stakeholders and other persons familiar with the topic. It also considered written submissions and conducted public hearings in all of Namibia's 121 constituencies. Through their testimonies, individuals and communities who claimed to have been affected by historical land dispossessions made suggestions regarding land restitution. Some of these include: the restoration in full or in part of areas claimed as ancestral land, compensation for the loss of ancestral land, the provision of alternative land where the restoration of land rights is not possible, the renaming of places, receiving benefits from businesses and natural resources on areas claimed as ancestral land and receiving preferential treatment and recognition in the resettlement programme.

The Commission's statement on the Namibian land reform process

The Commission also analysed the performance of the National Resettlement Programme and the Affirmative Action Loan Scheme, and considered the administration of the communal land reform process and the problem of illegal fencing on communal land.

Testimonies presented to the Commission expressed deep-seated dissatisfaction, frustration and disillusionment with all of these land reform initiatives. Some cited the shortcomings of these initiatives as contributing to the increasing demand for the restitution of lost ancestral land. Some also bemoaned what they claimed to be inadequacies in the current resettlement policy and criteria –including the failure to address the difficulties faced by those most affected by colonial land losses, the slow pace of the current land reform programmes, the poor feedback on resettlement applications and the low numbers of beneficiaries. In addition, the transparency of the land reform process was questioned, with claims that only specific ethnic groups have benefitted from the resettlement programme.

The impact of illegal fencing in communal areas

While the Commission focused mainly on the restitution of ancestral land as a result of historical land dispossessions under colonial rule, it also examined the loss of land as a result of ongoing illegal fencing in communal areas. There were complaints that illegal fencing by powerful members of society takes place at the expense of local and often powerless inhabitants, as well as allegations that corrupt Traditional Authorities collude in this process. In some cases, persons who testified before the Commission provided details of the amount of land lost to communities through illegal fencing, which has resulted in loss of communal grazing land and mahangu fields. The Commission observed that illegal fencing disputes threaten the loss of what community members regard as their ancestral land.

The Commission's findings

Based on its consultative process, the Commission concluded that ancestral land has different meanings to different communities, that ancestral land rights have different meanings in different contexts and that the purpose of ancestral land restitution involves correcting the historical injustices of land dispossession.

The Commission also concluded that what communities are demanding as restitution fits into the broader concept of reparations under international and human rights law.

In light of these conclusions, the Commission recommends that the Namibian Parliament should enact an ancestral land rights claim and restitution law within the next two years, on condition that this process and its outcome must be consistent with constitutional, international and human rights law.

The way forward

Overall, the Commission has made some convincing arguments in support of the restitution of ancestral land rights. Its findings are in line with the principles of constitutional and international human rights. It has argued for the development of a statutory framework on claims and restitution of ancestral land rights that focuses on mediation rather than on litigation. Furthermore, it has made the point that the restitution of ancestral land rights could become a workable supplement to the current land reform programme.

However, the Commission's findings also include some forewarnings about restitution. Its critical assessment of the land reform programme creates the impression that the government will be unable to implement an ancestral land rights restitution programme that could heal the scars of both historical and present ancestral land rights disputes. In addition, presuming that future legislation will provide for a land claims court, similar to the South African model, one wonders how it will deal with overlapping claims and the possibility of extinguished land rights claims? What type of property rights regime will it recommend for successful claimants? And how will just compensation as provided for under the Namibian Constitution be implemented? Who will foot the bill of successful ancestral land rights claims? Will it be Namibia's colonial masters - Germany or South Africa – or Namibia's already cash-stripped taxpayers?

Moreover, the international experience on ancestral land claims has shown that ancestral land claims take a long time to finalise and, in some cases, where claimants have been successful, governments have been reluctant to enforce court orders.

Assuming that the Namibian Government follows the bulk of the Commission's recommendations, it has to be considered how the restitution of ancestral land rights could be streamlined into existing land reform programmes, what the government wants to achieve with land reform and when this process could realistically come to an end.

At most, the law can create an enabling platform for claimants to assert their rights. But the realisation of justice for claimants ultimately requires the political will of our elected political leadership.

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