

San Communal Lands Contested: The battle over N#a Jaqna Conservancy

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Background

The Namibian San are living lives of poverty and dislocation. While different San peoples face different situations, there is a depressing common core to their poverty. It begins with being landless, often on their own land. Government policies since Independence, some well meaning, some ignorant of San needs, have not helped. Poor information and inconsistent policy implementation has exacerbated this situation. Currently, the San's right to land use in the former Western Bushmanland is being challenged by a Ministry of Lands and Resettlement proposal to resettle small scale farmers in the N#a Jaqna Conservancy. The N#a Jaqna Conservancy was gazetted by Parliament in 2003 as provided under the Nature Conservation Amendment Act 5 of 1996. Members of the Conservancy are mainly San, and although, the Amendment Act, does not give ownership of the conservancy land to the community, it does give them the legal right to use the natural resources of this land.

The aim of this article is to provide an overview of the conditions under which the San of the N#a Jaqna Conservancy are living, the flaws in planning small scale resettlement farms in this area and their potentially negative impact on the San community's livelihoods.

History of "Western Bushmanland"

The former Bushmanland (now part of the Otjozondjupa Region) was a communal area originally set aside for the San in the 1960s. Unlike the other communal areas created by the Odendaal Plan, "Bushmanland" never became self governing, but rather one administrative centre, Tsumkwe, was created to administer the affairs of the San. At the time of the creation of Bushmanland, there were probably only a few hundred San,

primarily Ju/'hoansi, living there in a traditional hunting and gathering way of life. These people became concentrated around the administrative centre, Tsumkwe, now in East Bushmanland (also part of the Otjozondjupa Region), and soon ceased traditional hunting and gathering activities.

Originally, there was no division of Bushmanland, but different social conditions prevailed. East Bushmanland was the isolated traditional home of the Ju/'hoansi, but West Bushmanland was largely unoccupied and later became a centre of South African Army operations during the war. San were brought to these bases from Angola, Caprivi, and the Ovambo and Kavango communal areas and, at Independence in 1990, these relocated San remained on the army bases. Over 2000, fearing retaliation, followed the army to South Africa, but the rest remained at resettlement camps, primarily Mangetti Dune. About 2000 San remain in this area, scattered in a number of remote camps as well as in several larger settlements. Except for a few Ju/'hoansi, the San people who have lived in Bushmanland for centuries and perhaps a few others, all of the San in West Bushmanland were either brought there by the South African Army, or resettled there. They are not one San people, but include !Xu, also called Vasekele, and Mpungu, and !Kung. The fact of resettlement of different San populations means that there is not a cohesive population. Until the election of a !Kung traditional chief in 1998 there was no political leadership and, even now, Chief John Arnold represents a varied !Kung constituency, composed of both local and immigrant !Kung, with no common political tradition.

The San people of Western Bushmanland are poor, and like the San in other parts of Namibia, lack regular work. Because almost all of them were relocated to the area, they have abandoned most traditional hunting and gathering activity. Some subsist with small scale agricultural pursuits, small stock or gardening. Few San have cattle. The major villages are, like Mangetti Dune, abandoned South African army bases, with the basic housing still intact, but with few services. Mangetti Dune is the largest, with a few hundred people.

Because West Bushmanland both sparsely settled and close to Kavango, Ovambo, and Herero communal lands, there has been a significant amount of in migration by non-San groups. While the entire former Bushmanland is a communal area, created for the San, other groups have brought in cattle pushing San off their lands and spoiling waterholes. Two significant legal issues have emerged that are unresolved and create an essentially lawless situation in West Bushmanland.

The population of West Bushmanland is apparently about 2,000, but the illegal and itinerant nature of much occupation obstructs a better count. The 1991 state census put 2,358 in central and western Bushmanland. As of 2003 there were 1,275 members of the N#u Jaqna Conservancy.

Encroachment in San Communal Lands

The Namibian government claims that it “owns” all communal lands, but it has never determined adequate policies for the administration of such lands. The Communal Land Reform Act was intended to provide a legal framework for the administration of communal lands, but this has clearly failed in West Bushmanland. It is not clear, for example, whether the government is administering these lands for the benefit of the San, or whether they belong equally to any citizens of Namibia who might desire to move to West Bushmanland, with their cattle.

Some argue that Article 21 (h) providing that “All persons shall have the right to reside and settle in any part of Namibia” gives anyone the right to move to any communal area and settle. Such an interpretation gives no meaning to any right of existing communal landholders in their present lands, treating all communal lands as “government land” freely available to any kind of settlement. This would deny any property right at all to most communal land holders and is apparently inconsistent with the provisions in the Communal Land Reform Act which gives the traditional authorities in conjunction with Communal Land Boards the right to allocate customary land rights within the communal areas.

In addition, since the Traditional Authority and Otjozondjupa Communal Land Board lack coordination between themselves as well as administering capacity, this settlement on San communal lands, it encourages an anarchistic form of “resettlement” based on no other principle than self-help, a process that would reward the richest people capable of moving large cattle herds to other communal lands. Also, since private property (so called “commercial areas” outside communal areas) is clearly protected by Article 16 of the Constitution, it 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. Clearly, this is no rational way to approach a resettlement policy.

All observers in the N#u Jaqna Conservancy report that large herds of Herero, Ovambo, and Kavango cattle have been moved on to San communal lands and that the San lack the legal authority to evict them. For the San, this means that the communal lands that they live on are beyond their control. This is true even though the !Kung of West Bushmanland have a recognized Chief, John Arnold, and a recognized traditional authority which should have as one of its responsibilities the administration of San communal lands within the jurisdiction of the traditional authority. Chief John Arnold has stated that he is powerless and that repeated requests to the local police and the Ministry of Lands and Resettlement, as well as the Ministry of the Environment and Tourism have not resulted in enforcement actions to protect San lands.

Under the Communal Land Reform Act, it seems clear that Chief John Arnold 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 here is apparently a failure of the state to enforce the law. The Communal Land Reform Act 5 of 2002 is the primary law regulating the use of communal lands in Namibia. Long awaited, it was expected to address a wide range of legal issues in the communal areas and, as the first legal statement on the communal lands following Independence, it was hoped that it would

provide a sound basis to protect the lands of Black people in the communal areas. It has not done so.

Most significantly, it failed to grant any definite legal status to black land rights in the communal areas. A general providing, 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 traditional San community to sue the Government for breach of trust in a situation where the Government is either failing to protect San lands or using San lands to benefit some other group. In the context of land reform, while Article 16 of the Constitution provides that the Government must compensate private land-owners when it expropriates their land, there is no similar protection for traditional land holders in the communal areas, arguably violating Article 10 of the Constitution.

But, perhaps more significantly, individual black landholders have little legal protection of their land rights under the Communal Land Reform Act. This means no legal right to protect their land occupancy against the Government. For example, the Commercial (Agricultural) Land Reform Act 6 of 1995, provides that a private land-owner, once his or her land has been earmarked for expropriation can turn to a Lands Tribunal who would independently adjudicate on just compensation matters. A similar dispute resolution mechanism, such as the Lands Tribunal, does not exist under the Communal Land Reform Act.

Under the Communal Land Reform Act, the Chief, acting with the Traditional Authority, and the regional Communal Land Board is responsible for the allocation of communal land. It may be that N#a Jaqna Conservancy is a test of the failure of the Communal Land Reform Act: 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.

This legal uncertainty puts communal land holders at a great disability in trying to make a living on their own land. They cannot, for example, get mortgages to improve their homes and they also cannot take legal action against many types of encroachments in Namibian courts, although they can take such actions to the Traditional Authority, effective only if their dispute is with another member of the same community. And they virtually have no protection at all against encroachments by the Namibian state.

The current situation in N#u Jaqna Conservancy illustrates the weakness of San land rights in the communal areas. The situation in N#u Jaqna has become chaotic as hundreds of Kavango, Herero, and Ovambo have moved thousands of cattle onto San lands. Since this process is completely unregulated, even unlawful, there is no good information on its scope: we do not know how many outsiders and how many cattle, have moved into N#u Jaqna Conservancy. It is an unregulated process that has pushed the San to the margins of their lands, inhibiting efforts of the San to start or continue their own small stock farming operations. Cattle moved directly from Ovambo and Kavango herds are communal cattle, raised outside of the red line. But Herero cattle mainly live on the commercial farm side of the red line.

Few San have cattle of their own, but there are some San cattle farmers. Other San have small stock farming operations. There is a tourist camp at Omatako, but other than this, the San have basically no other means of income at all in this area.

The Development of small scale resettlement farming units in N#u Jaqna Conservancy

Admittedly, the government's land reform programme is vital in addressing the skewed land ownership Namibia has inherited at Independence. However, the wisdom of introducing small scale resettlement in the N#u Jaqna conservancy, has to be questioned, as any such development could have a devastating effect on the San community's livelihood in the N#u Jaqna Conservancy.

Firstly, it is not clear whether the Ministry of Lands and Resettlement has, conducted an environmental assessment on the potential impact that small scale farming might have on the area or whether the Ministry is planning to do so. It is further also not clear whether the Ministry is planning to conduct a cost benefit analysis as to whether small scale farming would be more beneficial to the community than future income generated from conservancy activities.

Secondly, and ironically, the National Resettlement Policy provides that the San should be one of the prime beneficiaries of the resettlement process. The Policy states that “members of the San Community have endured exploitation and discrimination at the hands of their fellow citizens throughout history. At present the San are in the hands of farmers in both communal and commercial areas...they are marginalized and subjected to unfair labour practices and inadequate shelter.” It is currently unclear whether the San community in this area would be the main beneficiaries of the small scale resettlement farming. A number of San expressed their concern that they will not benefit from this resettlement development and that they would become the farm workers of those who “come from the outside” to settle in the conservancy.

Thirdly, should the proposed resettlement development go ahead, it could set a precedent for land issues in Namibia’s Conservancies, and would be directly in conflict with other Government (particularly Ministry of Environment and Tourism) policies on Conservancies. For example, section 31(4) of the Communal Land Reform Act states that, ““before granting a right of leasehold (i.e. of small scale farms on communal land) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature Conservation Ordinance, 1975, a board must have due regard to any management and utilisation plan framed by the conservancy committee concerned in relation to that conservancy, and such (communal land) board may not grant a right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilisation plan.”

Therefore, the protection that conservancies enjoy in terms of the communal land reform act is that the Ministry's actions should have due regard to the existing laws of the country and the objectives of our lawmakers should be fulfilled.

Fourthly, and finally, the allocation of rights of leasehold for agricultural purposes by the Land Boards may only be granted in an area which has been designated as such in terms of section 30 of the said act and which states as follows:

- (1) Subject to subsections (3) and (4) and section 31, a board may, upon application, grant to a person a right of leasehold in respect of a portion of communal land, but a right of leasehold for agricultural purposes may be granted only in respect of land which is situated within a designated area referred to in subsection (2)
- (2) The Minister, after consultation with the Traditional Authority and the board concerned, must designate by notice in the *Gazette*, in respect of the communal area of each traditional community, an area within which that board may grant rights of leasehold for agricultural purposes”.

The designation should therefore clearly be done after consultation with the traditional Authorities and the land boards concerned. In principle such areas can therefore not be arbitrary declared as such and specifically where the communities are opposed to such areas. And this is exactly what the San community of N#a Jaqna Conservancy demands; they are not against development initiatives in their area. All they are asking is to participate and be consulted on decisions that would impact on their future.