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NOTES

1 This paper has benefited greatly from useful comments by D. Werbner of Manchester University and L. Nyati Ramahobo of the University of Botswana. I wish to thank them sincerely.
2 The exact number of these ethno-linguistic groups, that is communities with distinct linguistic and cultural identity, cannot easily be determined because of the difficulties in distinguishing between distinct languages from dialects, on the one hand, and cultural or ethnic differences, on the other.
3 The exact number of Khoesan languages is difficult to determine not only because most of them have not been fully described, but also because of the difficulty in distinguishing between language and dialect, especially since many of them form linguistic clusters.
4 Such a case is cited by Batibo (1992:100), in which Kizaramo, which was originally spoken by about 200,000 people, is fast giving way to Kiswahili, the national language and *lingua franca* of Tanzania.
5 The only traces are to be found in oral traditions where references to Ndebele origins has been preserved.

INTEGRATING THE BASARWA UNDER BOTSWANA'S REMOTE AREA DEVELOPMENT PROGRAMME: EMPOWERMENT OR MARGINALIZATION?

Duma Gideon Boko

INTRODUCTION

The ethnic group referred to here as Basarwa has attracted much attention and interest. Myriad conferences have been held and reports published around issues affecting them.[1] This interest in the Basarwa dates way back. Basarwa rock art, life-style and social organization have fascinated anthropologists, leading to a great deal of research.

Some of the interest has generated a lot of controversy.[2] This controversy has been widespread and varied. It covers whether the Basarwa have any concept of territoriality and, consequently, whether the land they have inhabited and roamed from time immemorial belongs to them. So serious was this aspect of the controversy that the Government of Botswana sought a legal opinion on it. The opinion advised, in part, is

> As far as I have been able to ascertain the Masarwa (sic) have always been true nomads, owing no allegiance to any chief or tribe, but have ranged far and wide for a long time over large areas of the Kalahari in which they have always had unlimited hunting rights… Tentatively, however, it appears to me that the true nomad Masarwa (sic) can have no rights of any kind except rights to hunting.[3]

The controversy has also focused on the name of the group. The appellation 'Bushmen' has been widely used in some literature.[4] The term Bushmen, while recognised to have 'acquired too much of a pejorative connotation'[5] is still preferred by Sanders who argues that the term 'need not carry a connotation of contemptuousness.[6] He maintains that,

> Unfortunately a derogatory connotation is the fate any appellation of a marginal group, even when in its original form the appellation was merely descriptive and meant no harm.[7]

The other term used in relation to the Basarwa is the Khoikhoi appellation, San, which means gatherers. The Bantu derivative, Basarwa, is the name used in this paper. The name Basarwa has itself now become something of a derogatory reference. It is widely used by the Tswana speaking population of Botswana to mean servant. In spite of this special meaning now being ascribed to the term, it was, it would appear, no more than just a derivative from the Khoikhoi appellation, San. Basarwa is also the name widely used in Botswana. It is for these reasons that it is preferred in this paper.

The number of Basarwa presently living in Botswana is estimated to be between 40,000 and 49,000.[8] The majority of these have moved away not only from their ancestral lands but also from their way of life. They now pursue a more sedentary pastoral existence, either as small cattle owners, or serfs on cattle posts owned by the more affluent Tswana speakers. Whatever conceptions exist about the Basarwa they are acknowledged to be the indigenous or aboriginal inhabitants of Botswana.[9]

It is also important to acknowledge that the Basarwa have led burdensome lives. Some of them have survived 'next to nature', relying on whatever remains to be hunted and gathered, or on food handouts from the Government in government-organised settlements.[10] Some of them have, as stated earlier, been assimilated into the mainstream of Tswana society as cattle herders working under conditions of slavery or near slavery. Their situation can only be characterised as abject poverty and deprivation. Even the official position of the Government acknowledges them to be 'the poorest of the desperately poor.'[11] The Remote Area Development Programme Report of 1986 notes that

> ...only a restricted proportion of the Basarwa are living today in mobile bands and relying upon hunting and gathering. A significant proportion in all districts are impoverished herders and farm labourers. Moreover, because of deteriorating hunting grounds, an increasing number of RADs are settling as squatters in villages. They often live under extremely difficult conditions.[12]

It was, perhaps, in response to this plight that the Botswana Government established a programme to deal with the plight of the Basarwa. The Government established, in 1974, what was known as the Bushman Development Programme. In 1975 its name was changed to Basarwa Development Programme. In 1976 the programme became known as the Extra-Rural Development Programme. The name was to change yet again in 1977 to Remote Area Development Programme, the name which has survived to date. I shall not venture into the long drawn debate surrounding the change in nomenclature. The official explanation was that a socio-economic, rather than an ethnic based definition of the programme's target group, was necessary in view of the fact that not all Botswana's poor rural dwellers were Basarwa or of Sarwa origin.[13] The examples given are the Balala and the Bakgalagadi in the Southern District, Zhu-Twasi, Mbanderu and Batawana in Western Ngamiland.[14] The concern of this paper lies in the objectives and approach evinced in the programme.

The Remote Area Development Programme has as its main objective the integration of marginalised communities into the mainstream of Botswana society. The major focus of this paper is to examine the implications of this integration for the Basarwa, especially in relation to access to land and other resources. It will also inquire whether the Remote Area Development Programme (RADP) was guided by the norms of international law regarding the treatment of indigenous peoples or ethnic minorities. This evaluation of the RADP will necessarily have to be situated within the constitutional history and genealogy of Botswana's democracy. The Constitution of Botswana will also be a part of the discussion, with the aim of establishing what special protection, if any, it affords the Basarwa.

It will be argued that Botswana's Constitution does not provide marginalised communities generally, and the Basarwa in particular, any entrenched recognition and rights as a discrete and identifiable minority. It does not protect their cultural identity and heritage. The Basarwa do not, as a result, enjoy any special rights to be affirmed and empowered under the Constitution of Botswana. The paper will urge a more heightened protection of the rights of the Basarwa.

AN OVERVIEW OF THE LEGAL DISPLACEMENT AND MARGINALIZATION OF THE BASARWA

Botswana's constitution was produced after a series of consultative discussions held in 1961.[15] The country's ethnic minorities were not part of these discussions.[16] The Constitution that was produced contains a Bill of Rights, which protects rights and freedoms of the individual.[17] It does not

recognize and protect the collective rights of the minorities. This is in spite of the fact that, even at the time the Constitution was designed, the ethnic minorities needed special mention and protection.

Regarding the specific issue of land, the marginalization of the Basarwa began around the middle of the nineteenth century, when the Tswana speaking inhabitants of what is now Botswana took to cattle farming. Land in the vicinity of Tswana settlements was appropriated without regard for the rights of the Basarwa as original dwellers of the land. The use to which the Basarwa had put the land was neither recognised nor respected by these settler Tswana communities. The tenurial systems that emerged were in accordance with the lifestyle of these dominant Tswana speaking communities. Land use now took the form of residence, which had to be permanent, grazing and cultivation.[18] The pre-existent land tenure system of the Basarwa that entailed roaming the land, hunting and gathering on it and deriving sustenance from it was ignored. Non-recognition of this tenurial system as vesting any land rights in the Basarwa amounts to a declaration that Basarwa land was uninhabited and, therefore, *terrae nullius*. To the extent that no rights were seen to exist, none could be seen to have been violated. The land was later carved up for commercial purposes, apportioned for cattle farming and wildlife conservation without any consultation with its original inhabitants. This marked the start of a long process by which the Basarwa would be ignored and disempowered.

The declaration of protectorate status over what then became known as Bechuanaland Protectorate,[19] neither changed nor halted the displacement of the Basarwa from their ancestral lands. What the protecting authority, Great Britain, did was to define categories of land holding that cemented the exclusion of the Basarwa.[20] Three categories of land tenure emerged. The first involved the securing of claims to land by the European settler communities. All the land concessions that had been 'granted' by tribal chiefs were investigated and validated by a Concessions Court established in 1893.[21] Those whose claims were recognised acquired 'freehold' title to the land. The second type of land holding came in the form of Native Tribal Reserves.[22] The demarcation of this land assumed that it was only the Tswana ethnic communities that had any claim to land. The resultant reserves were themselves a further recognition of the dominance of the Tswana and their tenurial systems. Under the Tswana model of land tenure, the chief had substantial powers over the control and administration of land. Schapera provides some sense of the centrality of the chief in the Tswana polity thus:

> The Chief, as head of the tribe, occupies a position of unique privilege and authority. He is a symbol of tribal unity, the central figure round whom the tribal life revolves. He is at once the ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people.[23]

While most of these powers no longer repose with the chief, the office of Chief still commands some important administrative function.

The remaining land formed the third category of land tenure known as Crown Land. All those communities that did not get swallowed up and incorporated into the Tswana ethnic groups faced the invidious situation of living on land that belonged to the Crown. Speaking of the precariousness of the circumstances of these people, Ng'ong'ola observes that,

> Although again, the Crown did not demand rent for the use and occupation of the land, and tribal modes

of occupation generally continued without significant perceptible changes, traditional land rights were not as protected as was the case in the reserves.[24]

The inhabitants could be removed or displaced without consultation. They would not be entitled to any compensation. The enactment of flora and fauna conservation laws underscored the precariousness of occupation of Crown Lands. Consultation with respect to hunting regulations was carried out with the chiefs in the tribal reserves. No such dispensation was extended to the communities in Crown Lands. In other words, the consultative process ignored the very people for whom hunting and gathering constituted the source of livelihood.[25] The creation of game reserves, national parks and other Wildlife Management Areas (WMAs) on land already inhabited by Basarwa further exacerbated their loss of land rights. The effect was the creation of livestock-free zones. The Basarwa who remained in occupation of some pockets of Crown Land were unable to own and keep livestock. If any of them were desirous of adopting some sedentary form of life and rearing livestock, they stood to lose even this occupation of Crown Lands. The choice was, therefore, for most of them, between improvement of their economic status by rearing livestock and losing occupation of the Crown Lands and avoidance of this type of economic activity if only to keep, for the moment, occupation of Crown Land. To the extent that such occupation was uncertain, both choices pointed to landlessness.

Independence and the Constitution did not bring about any significant changes. The three categories of land holding continued. One change was that Crown Land became known as State Land. Freehold land is now estimated to be about 5%, State Land 25% and Tribal Land 70%.[26] Another change was the enactment, in 1968, of the Tribal Land Act.[27] This Act vested all control and administration of tribal land in Land Boards established thereunder. The Act provided that,

> All the rights and title to land in each tribal area ... shall vest in the land board set [up] in relation to it ... in trust and for the benefit and advantage of the *tribesmen* of that area and for the purpose of promoting the economic and social development of all the peoples of Botswana.[28]

The Act was amended in 1993 and the word tribesmen replaced with citizen. The problem with the word 'tribesmen' included the imprecision of the word itself. The definition section of the Act explained the word to mean a citizen of Botswana who is a member of the tribe occupying the tribal area. Since tribal land was based on an understanding that regarded the eight Tswana ethnic groups as the ones entitled to land, the Tribal Act did not change anything. The situation was also compounded by the Constitution which established a House of Chiefs based on the hegemonic position of the Tswana speaking ethnic communities. The Constitution provides that,

> The House of Chiefs shall consist of–
> (a) eight ex officio members;
> (b) four elected members
> (c) three Specially Elected members[29]

As if to eliminate any doubt about the dominant position of the eight Tswana ethnic groups, the Constitution goes on to state that,

> The ex officio members of the House of Chiefs shall be such persons as are for the time being performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes respectively.[30]

There could be no clearer indication of the administrative and political marginality of the Basarwa. This is further evidenced by the fact that,

> ...even in districts where they comprise a significant fraction of the population they are virtually without representation in political bodies, including land boards.[31]

Exclusion of the Basarwa from the recognised administrative and political structures under the Constitution aids their exclusion in practice. Access to land for them was closed off.

The option available to the Basarwa under the Remote Area Development Programme seems to be assimilation into Tswana society. One of the effects of the assimilation is the abandonment by the Basarwa of their ethnicity. It is important to note that this type of assimilation would violate Botswana's international obligations. The December 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, formulates the obligation of states to protect the existence and identity of minorities.[32] Among the rights enunciated in the declaration is the right to participate effectively in cultural, religious, social and economic life as well as in the decision-making process concerning the minority to which they belong. Against the background laid out in the preceding discussion this can hardly be said to obtain in Botswana.

THE REMOTE AREA DEVELOPMENT PROGRAMME, OBJECTIVES AND ACCOMPLISHMENTS

The RADP was seen as 'part of the government's effort to enhance the well being of citizens who resided in remote parts of the country.'[33] It was decentralised in 1977 and Remote Area Development Officers (RADOs) appointed for seven of the country's ten districts. The objectives of the programme were stated in a 1978 workshop which included:

(a) Provision of social services, including education and health.
(b) Provision of physical infrastructure including water.
(c) Expansion of economic opportunities including access to land, subsistence and jobs.
(d) Ensuring awareness and protection of people's political, legal and cultural rights.

The framework within which the goals of the RADP were to be achieved was, basically, what the Government saw as rural development. This was stated in a Government White Paper as far back as 1972. It was soon realised that additional assistance would be necessary for certain segments of the rural population. These were people living in the extremely remote areas. Thus, the target group of the programme was the dwellers of the extremely remote areas.

The main physical features of the RADP are schools, hostels, boreholes for the provision of water and the establishment of small-scale agricultural schemes. It is in relation to these developments that the success of the RADP has largely been measured. The RADP has undergone several reviews.[34] It is also annually evaluated in RADP workshops the first of which took place in 1978. The major observation from these reviews and evaluations is that the RADP has made little progress in attaining its economic and political/legal goals.[35] This was, among other things, because income levels among the Remote Area Dwellers (RADs) had changed very little.[36] It was also noted that the reduc-

tion of dependency, fostering of self-reliance and the raising of awareness among the RADs about their rights were still to be realised. These observations, made in 1981, were to be reiterated in the 1990 review by Ulla Kahn. They remain valid today. The reasons for this, it is submitted, lie embedded in the very nature and approach of the RADP itself. This nature and approach can be neatly summarised as,

> ...establishing settlements, gazetting of official headmen in RAD communities, and promoting the integration of RADs in Botswana society.[37]

The establishment of RAD settlements as a broad approach is laudable. But to content ourselves only in the physical existence of such settlements without adverting our minds to the internal dynamics thereof could also be deceptive. There are problems that must be appreciated and addressed. The category collectively referred to as RADs is made up of peoples or ethnic groups with their own distinct cultural identities and practices. The way they organise their communities would differ. Grouping them together under the general rubric of Remote Area Dwellers and appointing a chief or 'headman' for the settlement into which they have been put, betrays a false understanding of the differences the RADs may have as different ethnic groups. Such an approach would not even consider how many ethnic groups have been brought together in the particular settlement and, consequently, how their administrative and political structures would be configured. A more carefully designed and sensitive settlement programme would factor in these important considerations. The RADP has simply, it would appear, treated these many ethnic groups of RADs as one homogenous community, defined only by their poverty and the remoteness of the areas they occupy. Their main need has been seen only in terms of land; any land, provided it had water, schools and other rudimentary infrastructure. Yet the annual workshops of the RADP persistently indicated the problems that had to be addressed. Ulla Kahn acknowledges these as follows:

> The report of the 1982 Remote Area Development Workshop contained recommendations concerning compensation for eviction from land held by RADs, support for minimum wage legislation in the agricultural sector and resettlement (bonno). The political rights of self-determination, fair representation and consultation were also emphasised in discussions in RADP workshops and meetings.[38]

The above recommendations were more than critical. A lot of RADs, to use the blanket reference, had been dispossessed of their land as well as access to their traditional hunting and gathering areas.[39] This had occurred during the establishment of, among others, the Ghanzi Freehold Farms. For those who took up employment in the agricultural sector there was no protection from exploitation. The absence of minimum wage legislation remains a major problem. Regarding their actual organization, the settlements could not be established into distinct districts. Thus, they were placed within the already existing districts and, sometimes villages, as little RAD or Basarwa enclaves. The districts and/or villages into which they were resettled already had their own tribal and administrative patterns and institutions. The result, for the Basarwa who came to settle, was to find themselves engulfed by the more dominant ethnic groups. They found themselves in situations of encystment.[40] The scheme of relations created can only be of master and servant. At the attitudinal level the result for the Basarwa can be aptly described on the basis of the 'rank-concession syndrome' explained as,

> ...accepting social inferiority and relative powerlessness, adopting practices of the dominant society ... and losing solidarity in the process.'[41]

The Basarwa do not enter and settle in these districts and villages as equals. They cannot be, for they do not have any district to call their own. They are only seen as some sort of 'aliens' or squatters. The socio-political matrix in these villages continues to exclude them.

Where they have been settled by themselves, the expectation in the RADP seems to be that their social organization must conform to the more 'familiar', typically Tswana, structures. For instance, they are expected to have chiefs or 'headmen'. These structures would then be 'gazetted', in other words, formally recognised and validated. This of course would appear to facilitate cooperation between them and the Tswana who would then be more comfortable dealing with these 'familiar' institutions. Whichever way one looks at it there is no denying that it advantages the Tswana ethnic groups. In this and other ways, the very programmes that should seek their empowerment marginalise the Basarwa.

THE BASARWA AND THE INTERNATIONAL LEGAL POSITION

International law recognises the indigenous people as a particularly vulnerable group. Commenting on this vulnerability, Professor Anaya states that,

> In the contemporary world, indigenous peoples characteristically exist under conditions of severe disadvantage relative to others within the state constructed around them. Historical phenomena grounded on racially discriminatory attitudes are not just blemishes of the past but rather translate into current iniquities. Indigenous peoples have been deprived of vast landholdings and access to life-sustaining resources, and they have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined.[42]

This paper has highlighted the demonstrable resonance of the above observations for the Basarwa of Botswana.

Indigenous peoples have been clearly defined by the United Nations.[43] That the Basarwa are an indigenous people of Botswana is undisputed.[44] They must, therefore, benefit from the array of international legal norms intended to protect and secure indigenous peoples. The first of these norms is non-discrimination. It is laid down in many international as well as regional legal instruments.[45] These instruments enjoin states to actively combat invidious discrimination against indigenous peoples. The norm of non-discrimination is, however, not incompatible with schemes and programmes that discriminate positively in favour of indigenous peoples. The spirit and aim of such schemes would be to redress imbalances that resulted from age-old invidious discrimination.[46] Affirmative action programmes intended to accelerate the empowerment of indigenous peoples would be in accordance with the non-discrimination precepts of international law. Furthermore, institutions and practices within a state, whose effect is to discriminate against and perpetuate the inferior status of indigenous peoples, would fall foul of international law.

The next precept is that of respect for the cultural identity of an indigenous people. This involves not only ensuring the same formal civil and political rights for indigenous peoples as other

ethnic groups in society. It also involves facilitating the development, by the indigenous peoples, of their own cultures institutions and values.[47] The advisory opinion of the Permanent Court of International Justice on Minority Schools in Albania[48] is quite instructive. It bases its analysis of the minority provisions of the European treaties, on equality considerations.[49] A 1966 UNESCO declaration underscores the intrinsic value of each culture and urges respect for the rich cultural diversity of the world.[50] This cultural integrity precept requires respect for each culture in the sense of allowing and enabling the indigenous people to practice and enjoy their culture without hindrance. Hindrance should, it is submitted, not only be construed in the narrow sense of the presence of formal impediments. It should cover all forces and practices that defeat or undermine the full enjoyment of the culture of the indigenous people. The preservation of any sites held sacred by an indigenous people becomes an important corollary of the right to cultural integrity. Language also forms a critical component of a people's culture. The need to respect and uphold an indigenous people's cultural integrity must also entail an obligation to facilitate the use and development of such a people's language. Express recognition of language rights for indigenous peoples is required.[51]

Land and natural resources are also of extreme importance to indigenous peoples. In the case of the Basarwa, their lives have been shaped by deriving sustenance from the land in terms of their hunting and gathering mode of life. It must be ensured that they do not lose access to land and natural resources. This has been widely canvassed under international law.[52] There is also a requirement that these land rights be safeguarded.[53]

From this brief overview it seems clear that the norms of international law do recognize, and enjoin the heightened protection of, indigenous peoples. Municipal legal systems are expected to accord with this international legal position.

The Relationship between International Law and the Botswana Legal System

It is important to make some brief remarks on the relationship between the Botswana Legal System and international law. The relationship between international law and municipal law can be situated somewhere between the twin-poles of monism and dualism. The monist approach involves automatic incorporation of international legal instruments into municipal law.[54] Dualism, also known as the transformation theory, is the approach followed by Botswana. The Judge President of the Court of Appeal of Botswana described this approach thus:

> Treaties and conventions do not confer enforceable rights on individuals within the State until parliament has legislated their provisions into law

In effect, international treaties and conventions do not assume automatic operation in Botswana. They must first be incorporated into domestic legislation by parliament. Presently, Botswana has ratified very few international conventions and incorporated even fewer into domestic law.[55] Questions obviously arise regarding the status of those treaties and conventions that have not been incorporated into national legislation. The Court of Appeal of Botswana dealt with these questions in the Dow case.[56] The Court noted that Botswana was a member of the comity of civilised states[57] and cannot, therefore, operate on laws and practices that violate the imperatives of the international community.[58] Resolving the dispute regarding the use of international treaties and conventions under Botswana law, Justice Ammissah states that,

> Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated its (sic) provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution.[59]

The learned judge went on to say,

> I am in agreement that Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.[60]

It remains unclear what is meant by 'obligations Botswana has undertaken'. It is submitted that the best approach would be to base the assumption of international obligations on the mere fact of Botswana's membership of the international community of civilised nations. In this way, international ratification and, in other instances, incorporation into domestic law, would further strengthen the force of such obligations. Further support for this submission is found in the General Provisions and Interpretation Act. This Act stipulates that,

> ...as an aid to the construction of an enactment, a court may have regard to ... any relevant international treaty, agreement or convention.[61]

It also bears pointing out that the celebrated judgement of the Court of Appeal in the Dow case has interpreted Section 15 of the Constitution of Botswana to outlaw invidious discrimination. The observations in that case apply to all manner and type of conduct and practices that invidiously discriminate against people on the basis of the immutable characteristics enumerated. These clearly include indigenous ethnic groups. The Constitution states that,

> ...discriminatory means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.[62]

This constitutional provision deals with issues of formal equality. It is not clear whether it can be relied upon to ground arguments for substantive equality. As presently worded, the provision would seem to be incompatible with affirmative action or any attempt to redress the effects of past injustices through positive discrimination. It is submitted, however, that it would be possible to make a tenable case under the constitution of Botswana for a more proactive approach to safeguarding the Basarwa. A more positive obligation to facilitate the enjoyment of the fundamental rights of the Basarwa as an indigenous people, and in conformity with the norms of international law, can be defended.

THE REMOTE AREA DEVELOPMENT PROGRAMME AND EMPOWERMENT

As shown in the preceding discussion, the RADP focused on the Basarwa at its inception. The change to a socio-economic as opposed to an ethnically defined target group undermined the programme's initial focus on the upliftment of the Basarwa. The intended beneficiaries of the programme were now lumped together in a manner that ignored the particular problems they faced as an ethnic group. One of the main approaches aggressively followed by the RADP is the concept of villagization. Thus integration of the marginalised ethnic communities has involved enforced villagization. This villagization is structured around a strictly sedentary way of life away from the ancestral areas of the Basarwa. It also involves permanent occupation of some clearly demarcated individual land parcels. To the Tswana speaking ethnic groups this is the only acceptable way of life. To the Basarwa it is largely an unfamiliar lifestyle.

The Basarwa lifestyle has not been characterised by occupation of individual land holdings. It has involved inhabiting of course an identifiable land area from which the group would communally derive sustenance by way of hunting and gathering. Within this land area they would roam freely in search of food. and water.[63] Their environment dictated this way of life. The Kalahari, where the Basarwa have existed, is semi arid. It does not have enough surface water readily available. The temporary settlements in the vicinity of any water point would depend on the availability and utilization of the available water. The group would then move to another water point within the vast territory it inhabits. Their tenurial system entailed roaming these territories and eking out a livelihood. The individuated rather than the group or communitarian approach to land tenure occluded entirely the Basarwa land rights. The starting point for any programme intended to uplift the Basarwa should have been an articulation of their tenurial system and recognition of its resultant land rights for the Basarwa. The approach of the colonial government, as endorsed and continued by the Government of Botswana, was wrong. Under this approach no land rights were recognised for the Basarwa.

The Remote Area Development Programme should, at the very least, have begun by documenting and openly acknowledging this marginalization of the Basarwa. It would then have clearly determined the various forces, economic, cultural and political that resulted in this marginalization and displacement of the Basarwa from their land.[64] This, it is submitted, would have enabled the programme to formulate a more empowerment-oriented approach to address the situation of the Basarwa. One of the ways that could have been explored, at least in relation to those areas in which Game Reserves and Wildlife Management Areas have been established, is to ensure the active involvement of the people displaced in the actual administration of these areas. This would ensure employment opportunities for them. In addition, they, as a people, would be entitled to some share of the profits generated in these areas. Such revenue would be channelled into projects designed with the active participation of the Basarwa themselves and aimed at their upliftment. It is submitted that this approach would recognize the Basarwa as social beings with a history deserving of respect rather than just 'natural history specimen'[65] calling for integration into Tswana life patterns. This starting point would also have forced a conscious recognition of the human rights of the Basarwa and the need to infuse these into any development strategy for their empowerment. Their obscurity under the RADP's socioeconomic approach as presently being implemented would have been avoided.

CONCLUSION

The year 2000 marks the twenty sixth year of the operation of the Remote Area Development Programme. The realization of a framework of respect for the land and other rights of the Basarwa remains elusive. There has still not been a change of approach to actively strive for the assurance of any form of ethnic visibility and respect for the Basarwa. The RADP is still preoccupied with providing basic facilities such as schools and boreholes to the 'remote area dwellers'. In a lot of instances these remote area dwellers are being removed from their ancestral lands to settlements organised under an imposed and unfriendly administrative structure. This results in further marginalization. The most current removals relate to the Central Kalahari Game Reserve (CKGR) to settlements which Basarwa find inhospitable.

What seems to emerge quite clearly is that over the last twenty-six years of its implementation the RADP has not translated into a vehicle of empowerment for the Basarwa. It has exacerbated their marginalization. It has not enabled the correction of the wrongs of the colonial and post-colonial past. The programme has simply employed the internal logic by which Basarwa displacement was carried out. The new guise for the further displacement of the Basarwa is the notion of their integration into a lifestyle that denigrates them and undermines their ethnic solidarity. The result is a settlement arrangement in which the Basarwa are engulfed by other ethnic groups whom they relate to as social inferiors.

The programme has also not been able to lend itself to adoption as an advocacy tool in the fight for a more meaningful recognition and protection of the rights of the Basarwa. It has not highlighted the Botswana constitution's lack of special protective provisions for ethnic minorities. It has also not challenged Botswana's legal system to at least deploy the potent and evocative equal protection language relied upon to outlaw sex based discrimination in Botswana's constitutional jurisprudence. In short, it has ignored the simple reality that the treatment meted out to the Basarwa in Botswana amounts to a denial of their equal protection under the law as laid down in the constitution.

It amounts to invidious discrimination which the Courts of Botswana should be willing to strike down as they did in the celebrated case of *Attorney General* v. *Dow*.[66] The Remote Area Development Programme has not brought the real concerns of the Basarwa to the fore, much less has it provided a workable mechanism to address them.

NOTES

1 See, among others, *Developing Basarwa Research and Research for Basarwa Development*, Report from a Workshop held at the University of Botswana, 17–18 September 1993 (April 1994).

2 See the Legal Opinion, *Re Common Law Leases*, 23 January 1978, quoted by Hitchcock, R. in *Kalahari Cattle Posts*, Ministry of Local Government and Lands, (October 1978), Vol. 1, p.242.

3 *Ibid.*

4 See Van Der Post, L. and Taylor, J. *Testament to the Bushmen* (Penguin Books; 1985); Sanders, A.J.G.M. 'The Bushmen of Botswana – from desert dwellers to world citizens', *Law and Anthropology* 4, 107–122.

5 Sanders, A.J.G.M. 'The Cosmic Nature of Bushman Law', *Man in Nature* Vol. 5 187–193, at p.187.

6 *Ibid.*

7 *Ibid.*
8 see Brormann
9 Hitchcock, R. (1987) 'Socioeconomic change among the Basarwa: an ethnohistorical analysis', *Ethnobistory* 34, 3, p.219
10 Ulla Kahn, et al. , *Let Them Talk: A Review of the Accelerated Remote Areas Development Programme* , (Gaborone; 1990).
11 *Ibid.*
12 p.6.
13 Gulbrandsen, O. et al., *Remote Area Development Programme,* Report submitted to the Royal Norwegian Ministry of Development Cooperation (Bergen; 1986). p.17.
14 *Ibid.*
15 See Bechuanaland Protectorate Constitutional Discussions, (1963)
16 *Ibid.* None of the participants belonged to the marginalised ethnic minorities of Botswana.
17 Sections 3–18 inclusive.
18 See Moeletsi, B. 'The San of Botswana: Legal Status, Access to Land, Development and Natural Resources', Proceedings of a Regional Conference on Development Programmes for Africa's San/Basarwa Populations (Gaborone; 1993)
19 See Bechuanaland Protectorate General Administration Order in Council, 9 May 1891.
20 See Tribal Territories Proclamation No. 9, 29 March 1899. This proclamation established and determined the boundaries of five Native Reserves, namely, Bamangwato, Batawana, Bakgatla, Bakwena and Bangwaketse. The subsequent addition of three more Native Reserves increased their number to eight; see also Bechuanaland Protectorate (Lands) Order in Council, 1904 and the Bechuanaland Protectorate (Lands) Order in Council, 1910.
21 See Ng'ong'ola, C.H. *Land Rights for Marginalized Ethnic Groups in Botswana, with Special Reference to Basarwa.*
22 See Frimpong, K. (1986) 'The Administration of Tribal Lands in Botswana', *Journal of African Law* pp.51–74.
23 Schapera, I. (1984) *A Handbook of Tswana Law and Custom.* Great Britain: Frank Cass. p.62.
24 *Supra. see* p.11
25 Spinage, C. (1991) *History and Evolution of Fauna Conservation Laws of Botswana.* Gaborone: Botswana Society. pp.26–50
26 Republic of Botswana, (1991) *National Development Plan 7, 1991–1997,* Gaborone: Ministry of Finance and Development Planning. p.293.
27 Cap. 32:02
28 Section 10(2). My italics
29 Section 77(2)
30 Section 78.
31 See Gulbrandsen, O. et al. , *supra.*
32 Adopted by General Assembly Resolution 47/135 of 18 December 1992.
33 Ulla Kahn, *supra,* p.3.
34 Wily, E. *Official Policy Towards San (Bushmen) Hunter-Gatherers in Modern Botswana: 1966–1978* (National Institute of Research; Gaborone); see also by the same author *The TGLP and Hunter-Gatherers: A Case Study in Land Politics.*
35 It was reviewed in 1986 for NORAD a Norwegian donor agency leading to the production of the report cited as Gulbrandsen *supra,* it was also reviewed by Ulla Kahn whose report has also been mentioned *supra.*
36 Egner, B. (1981) *The Remote Area Development Programme: An Evaluation Report to the Ministry of Local Government and Lands.* Gaborone. pp.3–5.
37 *Ibid.* p.6.

38 Ulla Kahn at p.4. *Supra.*
39 *Ibid.*
40 Silberbauer, G.B., *Bushman Survey Report.* (Gaborone: Government Printer; 1965) pp.114–126; see also Childers, G., *Report on the Survey/Investigation of the Ghanzi Farms Basarwa Situation.* (Gaborone, Botswana: Government Printer; 1976 and Guenther, M.G., *From Hunters to Squatters: Socio and Cultural Change among the Farm San of Ghanzi, Botswana,* in *Kalahari Hunter-Gatherers: Studies of the !Kung San and their neighbors.* Richard B. Lee and Irven DeVore (eds). (Cambridge University Press; 1976) pp.20–133.
41 For an illuminating discussion of encysted communities see Orans, M. *The Santal : A tribe in search of a great tradition.* (Detroit: Wayne State University Press; 1965)
42 Gardner, P.M., 'Foragers' Pursuit of Individual Autonomy', *Current Anthropology* Vol. 32 No. 5 (1991) 543, at 546.
43 Anaya, S.J. *Indigenous Peoples in International Law* (New York: Oxford University Press; 1996) p.3; see also Burger, J. *Report from the Frontier: The State of the World's Indigenous Peoples.* (London: Zed Books; 1987).
44 See the definition contained in the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations, U.N.* Doc. E / CN 4 / Sub. 2 / 1986 / 7 Add. 4, para. 379 (1986)
45 See Note 9 *supra.*
46 See, *inter alia,* U.N. Charter art. 1(3); Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion and Belief, G.A. Res. 36/55, Nov. 25, 1981, GAOR, 36th Session, Supp No. 51, at 171, U.N. Doc. A/36/684 (1981); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); see also Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 3(1), International Labour Conference (entered into force Sept. 5, 1990) Official Bulletin, vol. LXXII, 1989, Series A, No. 2 pp.59–70.
47 See Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the General Assembly of the United Nations by its Resolution 34/180 of 18 Dec. 1979, (entered into force 3 Sept. 1981) in *Human Rights: A Compilation of International Instruments,* United Nations, 1993, vol. 1, part 1, pp.150–163.
48 See International Covenant on Civil and Political Rights, art. 27., adopted by the General Assembly of the United Nations by its Resolution 2200 A(XXI) of 16 Dec. 1966, (entered into force on 23 March 1976) in *Human Rights: A Compilation of International Instruments,* United Nations, 1993, vol. 1, part 1, pp.41–45.
49 1935 P.C.I.J. (Ser. A/B) No. 64
50 Anaya, S.J., *supra.* At p.98
51 *Declaration of the Principles of International Cultural Cooperation,* proclaimed at the 14th session of the UNESCO conference, Nov. 4, 1966, art. 1, reprinted in U.N. Compilation of Instruments, U.N. Doc. ST/HR/1/Rev. 4, vol. 1, part 2 at 591.
52 Anaya, S.J. *supra.* p.103.
53 See ILO Convention No. 169 *supra.* art. 13(1) and 14(1).
54 *Ibid.* art. 15.
55 Brownlie, Ian. (1991) *Principles of Public International Law, 4th ed.* Oxford. 32–57; See also, Starke, J.G. (1936) *Monism and Dualism in the Theory of International Law* 16; *British Year Book on International Law,* 66–81, Dugard, C.J.R. (1971) 'Is International Law Part of Our Law?', *South African Law Journal* 135.
56 The ones that have been incorporated are the 1951 Convention relating to the Status of Refugees as well as its 1967 Additional Protocol, the four 1949 Geneva Conventions on International Humanitarian Law and the 1969 Vienna Conventions on Diplomatic and Consular Relations. The first of the above was

incorporated into domestic law by the Refugees (Recognition and Control) Act of 1967. The ones on Humanitarian Law were incorporated by the Geneva Conventions Act, CAP 39:03, while the 1969 Vienna Conventions were incorporated by the Diplomatic Immunities and Privileges Act No. 5 of 1968, CAP 39:01 of the Laws of Botswana.

57 *Supra* note 14.

58 *Ibid.* p.152

59 *Ibid.* p.153

60 *Ibid.*

61 *Ibid.* p.154

62 Section 27(1), CAP 01:02, Laws of Botswana

63 Section 15(3)

64 Schapera, I. *Khoisan Peoples of Southern Africa*, London, 1930, 75; see also Ng'ong'ola, C. 'Land Rights for Marginalized Ethnic Groups in Botswana With Special Reference to the Basarwa' (1997) *Journal of Afrcian Law* Vol. 1 at pp.2–4.

65 See Wilmsen, E.N. *Land Filled with Flies: A Political History of the Kalahari*, (Chicago: University of Chicago Press; 1989) for an elaborate and incisive discussion of this marginalization and denigration

66 *Ibid.* At p.25.

67 1992 B.L.R. 142

SELF–DETERMINATION AND MINORITIES IN BOTSWANA: THE CASE OF THE SAN PEOPLE

Kabelo K. Lebotse

> I see no reason whatever for preserving Bushmen. I can conceive no useful object to the world in spending money and energy in preserving a decadent and dying race, which is perfectly useless from any point of view, merely to enable a few theorists to carry out anthropological investigations and make money by writing books which lead nowhere.
> *Col. Charles F. Rey, Resident Commissioner, 1936. Quote reproduced in Wilmsen (1989).*

Marginalised communities have repeatedly articulated their rights in terms of self-determination and the use of the term self-determination has sent cold shivers down the spines of many governments. Some have rejected the use of the word outright. The main reason for this mixed reaction to the use of the word stems from the divergent understanding of the meaning of self-determination. We will come to the discussion of the diverging views later. For now, it will suffice to note that, notwithstanding the controversy surrounding the meaning of self-determination, self-determination as a right, has been affirmed in the United Nations Charter[1] and other major international legal instruments.[2]

The self-determination provision common to the international human rights covenant reads:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic social and cultural developments.

This analysis considers the content of the right to self-determination and the extent to which it has been extended to the San people.

Before and during colonial rule, the San have lived at the margins of Tswana society.[3] The attainment of independence did not abate their plight. Notwithstanding the fact that they retained their distinct indigenous identity, the San have suffered the imposition of government structures that have inhibited their capacity to exist and develop freely as distinct cultural communities. In this connection the Remote Area Dwellers (RADs) policy pursued by the Government will be examined. Thirty four years after Independence, the San people remain culturally denigrated, socially excluded, economically marginalised and politically under represented.

MEANING AND CONTENT OF RIGHT TO SELF-DETERMINATION

Mention of self-determination within contemporary political discourse has at times raised the spectre of destabilization and even violent turmoil. And indeed as many have observed, self-determination rhetoric has been invoked in the world of late in association with extremist political posturing and ethnic chauvinism. Earlier in this century (1918) the then US Secretary of State, Lansing wrote,

> The more I think about the president's declaration as to the right of self-determination; the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis