

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 African 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

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pp. 111-115

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 Charter¹ 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

of impossible demands on the Peace Congress and create trouble in many lands... The phrase is simply loaded with dynamite. It will raise hopes, which can never be realised. It will, I fear, cost thousands of lives.

The major fear of the third world, the new independent states, was that, post-colonial self-determination would necessarily result in the fragmentation of the new nation states, with ethnic groups in one country seeking to secede or to join with the same ethnic groups in another country. Hector Gross Espiell wrote:

The United Nations established the right of self-determination as a right of peoples under colonial and alien domination.⁴ The right does not apply to peoples already organised in the form of a state, which are not under colonial and alien domination, since resolution 1514 (xv) and other United Nations Instruments condemn any attempt aimed at partial or total disruption of the national unity and the territorial integrity of the country.⁵

Other states have made reservations against the term self-determination in International Agreements. India made the following reservation to article 1 of the International Covenant on Civil and Political Rights (ICCPR):

With reference to Article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words, the right of self-determination appearing in [that article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states or to a section of a people or nation – which is the essence of national integrity.⁶

The other view is that under the modern rubric of human rights, international law is increasingly concerned with upholding rights deemed to inhere in human beings individually as well as collectively.

The divergent opinions regarding the meaning of 'self-determination' stems from the fact that for a period in history, international law was concerned only with the rights and duties of independent sovereigns, disregarding the face of humanity beyond the sovereign. Consequently, many people have interpreted self-determination as being concerned with populations of territories that are under conditions of classical colonialism. A good example is the Indian reservation to Article 1 of ICCPR.

The working approach of the author in so far as self-determination is concerned, is that self-determination entails a universe of human rights precepts extending from core values of freedom and equality and applied in favour of human beings in relation to the institutions of government under which they live. Self-determination requires that the governing institutional order be substantively the creation of processes guided by the will of the people governed and it requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.

This broad and open minded approach (not one fixated on equating self-determination to decolonization) has begun to find enthusiasts in the likes of the Australian Government as evidenced by the statement of the Australian Government that,

Events in all parts of the world show us that the concept of self-determination must be considered broadly,

that is, not only as the attainment of national independence. Peoples are seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater self-determination and autonomy, free from undue interference from central government.⁷

From the foregoing, it will be recognised that in discussing the concept of self-determination in relation to the San people of Botswana, the author is not advocating or implying independence in the sense of statehood or disunity. Rather, my argument is that the San people are entitled to self-determination in the sense of cultural integrity, that is, their right to develop and maintain their cultural identity in coexistence with other groups of Botswana society. They are also entitled to land and land resources, which are important to their cultural and economic survival. The advice given to the Government by the Attorney General's Chambers regarding the rights of the San to land is to say, at the very least, unacceptable:

As far as I have been able to ascertain, the Masarwa have always been true nomads, owing no allegiance to any chief or tribe, but have ranged far and wide for a very long time over very large areas of the Kalahari in which they have always had unlimited hunting rights, which they enjoy today in spite of the Fauna Conservation Act... Tentatively, however, it appears to me that a true nomad Masarwa can have no rights of any kind except rights of hunting.⁸

Though the Government argues that its policies towards the San were not informed by the this piece of legal advice, the policies and land laws passed are wholly consistent with the advice. In fact, the advice seem to have confirmed what the Government believed, for, way back in 1968 when the Tribal Land Act⁹ was promulgated, the thinking was that the San did not have land rights as the Act left the San out altogether, notwithstanding the fact that their lifestyle is such that they could not be properly catered for under the Tswana concept of land tenure. For example, under the Tswana system of land tenure there are three main uses of land *viz.*, residential, farmland (for arable farming) and cattle post (for pastoral farming). The San roam over huge stretches of land hunting or gathering. Contrary to the general belief that the San roam indeterminate stretches of land, each San group has a defined zone or area within which it does its hunting or gathering.¹⁰

The central question is, are the policies that Government has come up with in relation to the San people consistent with international law norms, more specifically their right of self-determination?

In the mid-seventies the Government introduced the Remote Area Development Programme (RADP) for 'Remote Area Dwellers' (RADs). The general objectives of Government, on the basis of RADP, were:

- (a) to provide social services, i.e., extension of basic services such as education, health, drinking water and food;
- (b) economic opportunities: e.g., access to land, water rights and so on;
- (c) political/legal rights: awareness of rights and social integration.

In some areas the RADP was implemented as a settlement scheme. The RADs were encouraged to settle in village-like settlements replicating a Tswana type set-up. This gave birth to settlements in New Xade, Kaudwane and a few in other areas. The RADP raised fundamental issues, particularly the displacement of the San people from their traditional hunting and gathering areas. They were re-

moved from areas that they had relied on for their sustenance. The introduction of the Tribal Grazing Land Policy (TGLP) did not help the situation, as rich Tswana cattle barons acquired huge tracts of land in previously San inhabited areas. The Government was not concerned with the impact of TGLP farms on the San communities. The San people were moved out of their traditional hunting grounds to so called 'service centres'.

While the policies were conceived out of good intentions, they had a very negative impact on the San people. It disrupted the San societal organization. The culture of the San is closely linked to the land so that moving them from their familiar, culturally categorised land and putting them into settlements constituted a flagrant violation of their right to their cultural life. The policy was geared more towards assimilation than helping the San to develop their culture and economic welfare as they saw fit. The Government was fixated on making them organise their lives like Tswana communities. The unpopularity of the policy proved itself when there were reports of the San leaving the settlements and return to their former habitats.

There have been conflicting reasons why the San were moved from their traditional lands situated in game reserves, notably the Central Kalahari Game Reserve. The Government advanced the reasons given above while many people suspected that the San were moved to give way to tourism and diamond mining operations.¹¹ The lack of an open, genuine and informed consultation process has not helped the situation.

The apparent failure of the policy calls for a rethinking of the policy. The San have been put in 'camps' which have turned them into perpetual destitutes. There is no salvation in sight. It is unfortunate that the 1983 Presidential Commission on Land Tenure¹² failed to pick up the issues of San exclusion when it comes to land rights. The Commission adopted the same approach as Government, of seeing land tenure through the eyes of the Tswana whereby land use can be classified under the three main categories as outlined above.

The RADP needs to be revised. The aim should be to include the San in the management and conservation of the natural resources in their traditional areas. They must be allowed opportunities to participate in the tourism industry, rather than be moved on to give way to tourism. The system of community based natural resource management, if applied properly, will promote the economic and cultural development of the San. Such an approach will be consistent with the concept of self-determination as expounded earlier. The Government must first recognise San land rights and not merely hunting rights.

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NOTES

- ¹ Article 55 of the United Nations Charter.
- ² International Covenant Economic, Social and Cultural Rights, art 1 (i), International Covenant on Civil and Political Rights art 1 (i), and the African Charter on Human and Peoples' Rights, art 20 and 21. Declaration on Principles of International law concerning Friendly Relations and Cooperation among states, G.A., Res 2625.
- ³ Wilmsen, E.N. 1989. *Land Filled with Flies: A Political Economy of the Kalabari*. Chicago: University of Chicago Press. p.272
- ⁴ Lausing, R. 1921. *The Peace Negotiations. A Personal Narrative*. London: Constable and Company, p.87
- ⁵ Quoted in Rein Mullerson, 1994. *International Law, Rights and Politics*, London: LSE. P.64
- ⁶ UN DOC. CCPR/C2/Rev. 3, 12 May 1992, p18
- ⁷ Australian Government statement to the 1991 session of the U.N. Working Group on Indigenous Population. Reproduced in S.J. Anaya, S.J. 1996. *Indigenous People In International Law*. Oxford: Oxford University Press. p.86.
- ⁸ Ministry of Local Governments and Lands, File 2/1/1
- ⁹ Cap. 32:02
- ¹⁰ Wilmsen, E.N. 1989. *Land Filled with Flies: A Political Economy of the Kalabari*. Chicago: University of Chicago Press. p.186
- ¹¹ *The Midweek Sun*, Wednesday 12th July, 2000. p1
- ¹² Report of The Presidential Commission on Land Tenure, December 1983, Printed by the Government Printer.

