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THE TRIBAL LAND ACT OF BOTSWANA:  
DOES IT HAVE A PLACE FOR BASARWA

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## 1. INTRODUCTION

In 1968 the two year old Parliament of the Republic of Botswana enacted the Tribal Land Act (Cap. 32:02 of the Laws of Botswana) to govern and regulate the distribution, allocation and administration of land in tribal areas, formerly native or tribal reserves. Prior to the enactment and commencement of the Tribal Land Act (hereinafter the Land Act), land in what were then referred to as native or tribal reserves was vested in and administered by the Chief of the tribe occupying the native reserve. It was the Chief who enjoyed and exercised the powers with respect to land distribution and allocation for the benefit of his tribe.

Of all the tribes inhabiting the territory of Botswana, the British Colonial Administration recognised only eight tribes as having title to territory: these were the Bamangwato, Bangwaketse, Bakwena, Batawana, Bakgatla, Batlokwa, Bamaletle and Barolong. It is obvious that the common denominator of all these tribes is that they are all Tswana-Speaking peoples of Botswana. The non-Tswana speaking peoples were therefore considered incorporated into or subsumed in the eight groups referred to above.

The purpose of this note, however, is not to discuss the history of land tenure in Botswana but to inquire briefly whether the Botswana Parliament, when it set out to enact such an important piece of legislation, made any effort to consider or take into account the land interests, if any, of the minority ethnic groups and more particularly of the Basarwa. Or put differently, whether the Land Act has a place for Basarwa and if it does, whether Basarwa do have access to land in practice.

## 2. THE CONCEPTUAL FOUNDATIONS OF THE LAND ACT

An examination of the Land Act reveals that the Legislature assumed a Tswana model of land tenure and land use when it framed the Act. This assumption is discernible in part three of the Land Act which deals with the granting of customary land rights. Under section 13 of the Land Act, reference is made to the removal of all powers under customary law regarding, inter alia, the granting of rights to use any land from the Chief to the land board of the tribal area. Furthermore, the Land Act restricted the grants of customary land rights to members of the tribe occupying the tribal area. While the Land Act does not define what is meant by the word tribe, that word is defined elsewhere as any one of the eight tribes mentioned in the introduction. If one were to follow this definition, then all minority tribes would not qualify as tribesmen and the effect therefore would be, *stricto sensu*, to deny these groups the right

to be granted land under the customary land regime of the Land Act. The land use patterns in the Land Act are also founded on the Tswana models. Under Tswana customary land tenure, land can only be used primarily for residential, grazing and arable purposes. Occasionally, however, land could be used for hunting purposes.

That Basarwa and Batswana occupy opposite cultural poles does not require any authority. In contradistinction to Batswana, Basarwa do not (or did not?) have strong and well-organized societies with strong and well-established socio-political institutions. Basarwa need land primarily for residence, hunting and gathering. The Land Act, however, does not recognise hunting and gathering as uses for which land can be granted. Founded on the Tswana concepts of land tenure, it can therefore be argued that the Land Act, to a greater extent disregarded the land interests of the Basarwa more than those of other minority tribes.

## 3. ENTITLEMENT TO LAND UNDER THE LAND ACT

Having asserted above that the Land Act was founded on Tswana tenurial systems thus disregarding other systems especially those of Basarwa, can it be suggested that Basarwa are as equally entitled to land as other groups, particularly the dominant Tswana? This question can be answered in both the affirmative and the negative. First, the affirmative. Basarwa, like any other group in Botswana, are entitled to be granted land in a tribal area if they happen to be inhabitants of that area. This is so because the Land Act was not enacted for any particular ethnic group but for ethnic groups occupying a tribal area. Approaching the problem from this perspective, the only question which might then arise is whether Basarwa are indeed allocated land in practice.

At the National Seminar on the Review of the Policy on the Remote Area Development Programme held at Ghanzi from 31st August - to 4th September 1992, some Basarwa who participated informed the conference that they had no problems with being allocated land. Others, however, stated to the contrary. We turn now to answer the question posed above in the negative.

Section 20 of the Land Act provides that the land board should not grant any land to a person who is not a tribesman unless of course the Minister has ruled otherwise. Who then is a tribesman? The Land Act defines a tribesman as a member of the tribe occupying a tribal area but it leaves the word tribe undefined. However, section 2 of the Chieftainship Act (Cap. 41:01) defines tribe as meaning any one of the eight dominant tribes. According to this definition therefore, a Mosarwa, even though he be an inhabitant of a tribal area would, in strict terms not qualify as a tribesman because he does not fall in any one of the eight tribes. So would any member of the non-Tswana tribes. The effect of this interpretation would therefore be that Basarwa, like other minority tribes, are not entitled to land in a tribal area as of right because they are not tribesmen.

The foregoing discussion has proceeded on the interpretation of the Land Act as it stood before 30th August 1993. On this date the Land Act saw some major amendments. The word tribesman has been deleted from the Act and in its place, the word citizen inserted. The problems of interpretation alluded to above will therefore disappear and it will be clear that Basarwa are now, without any doubt, entitled to be granted land under the customary land

rights regime since the question of whether they are tribesmen or not would not arise. The only problem that would remain is whether in practice the land boards would accord Basarwa equal treatment when it comes to matters of land allocation. At the Gantsi Seminar, a representative of the Basarwa from the Kweneng Settlement complained that they encountered problems of discrimination when it came to land allocation, and that the land board would never grant or allocate a fertile or valuable piece of land to a Mosarwa. If a Mosarwa and a Motswana were to compete for a plot, then the land board would rather, in a majority of cases, give the plot to the Motswana applicant.

It is submitted that these are not problems of the land law but of implementation and attitudes of the land boards on the one hand and of the ignorance of the Basarwa on the other hand. What is required to address the problem of discrimination in matters of land allocation is that Basarwa should have some knowledge about their land rights and how such rights can be enforced. Such knowledge would have the effect of restraining any Tswana-dominated land board from practising discrimination. Educating Basarwa of their land rights can be done by way of seminars, workshops or other methods which will ensure their participation.

#### 4. SECTION 14(3)(c) OF THE CONSTITUTION AND THE TRIBAL LAND ACT

It has been pointed out in the preceding discussion that when the Botswana Parliament enacted the Land Act and founded it on the Tswana model of land tenure, it thereby failed to consider the tenurial circumstances of the Basarwa. This failure, however, depending on how the Land Act is interpreted, has not completely left the Basarwa out in the cold in so far as entitlement to land is concerned. It has also been demonstrated that the problems that Basarwa might encounter are those of discrimination arising from the attitudes of the land authorities. Unlike the Land Act which fails to address the unique circumstances of Basarwa and treats them on the same footing as other ethnic groups of Botswana, the Framers of the Constitution of Botswana had Basarwa in mind when they enacted section 14(3)(c) as read with section 14(1) of the Constitution. Section 14(1) of the Constitution deals with the freedom of movement of any person throughout Botswana. However, section 14(3) imposes certain restrictions on this freedom and it provides, inter alia, in paragraph (c):

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -- for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen." (my emphasis).

The interpretation which can, and should be attached to this Constitutional provision is that the Parliament of Botswana is empowered to make laws defining certain areas for Bushmen (Basarwa are sometimes referred to as Bushmen) and keep these areas immune from invasion by non-Basarwa groups. It is submitted that the Framers of the Constitution, recognising that Basarwa occupied a unique position and are therefore likely to be deprived of land by the dominant and well-organised groups; enacted section 14(3)(c) to protect them from such deprivation and dispossession. Now are there such laws or policies which have defined areas for the protection and well-being of Basarwa? If there are any, the Land Act is certainly not one of them and if they did exist then Basarwa would not have been reduced to squatters in the Gantsi and Kgalagadi Districts. How about the Remote Area Development Policy, does

it satisfy the provisions of the Constitution cited above? These are questions which can be answered only after investigations have been conducted.

#### CONCLUSION

To sum up, the following points can be made. First, that the Land Act (as amended) entitles every citizen of Botswana to be granted rights in land anywhere in Botswana and it does not matter whether the applicant is a Mosarwa or not. Second, that notwithstanding the amendment of the Land Act referred to, Basarwa still occupy a very weak position on account of their different way of life, and they are likely to experience difficulties in having access to land in practice. Third and finally, that the Government must, if it has not done so already, define areas, in line with the Constitution, for Basarwa to ensure that they are not overpowered by the economically and politically dominant groups.

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