

11. The Constitution of Botswana, Chapter 2.
12. J. Holm & P. Molutsi (Eds) *Democracy in Botswana*, Chs 9, 10, 18, 21 & 23.
Prof. E.N. Wilmsen, "The Political History of Minorities and its Bearing on Current Policy" in *Botswana - Education, Culture and Politics*, Centre for African Studies - University of Edinburgh, p.31.
13. Ibid.

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LEGAL RECOGNITION OF TRADITIONAL LAND RIGHTS: RESEARCH NOTES AND AGENDA

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The issue of land rights for Basarwa and other non-Tswana speaking peoples in Botswana has always been topical and controversial. The need to "secure land rights of the Basarwa", for example, has on more than one occasion been identified as a major plank in proposals and programmes for improving the livelihood of deprived Basarwa communities. (1) Unfortunately the need is easier to restate than the formulation of more concrete proposals for reform. There is not much indication in the literature as to the content of the sought-after "rights", and how they may be secured. This is perhaps partly due to unfamiliarity with the legal landscape or context within which land rights are allocated and acknowledged or recognized in Botswana. One basic objective of this research is to explain and clarify this legal framework, so that perhaps much more informed and concrete proposals for reform or securing traditional land rights may begin to be formulated.

Perhaps the most well known legal indication of Basarwa land rights in Botswana is the following statement attributed to a litigation consultant for the Attorney General's Chambers in 1978:

"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 very long time over large areas of the Kalahari in which they have always had unlimited hunting rights, which they enjoy even today despite the Fauna Conservation Act. The right of the Masarwa (sic) to hunt is, of course, very important and valuable as hunting is their main source of sustenance ... Without much clearer information it is impossible to give a confirmed opinion about the Masarwa (sic). Tentatively, however, it appears to me that (a) the true nomad Masarwa (sic) can have no rights of any kind except rights to hunting." (2)

The consultant was admittedly proffering an uncertain and uninformed opinion and, hopefully, it was taken as such by those who sought it. Researchers and other commentators were, however, staggered by the lawyer's ignorance. As if to ensure that no other lawyer shall ever be so uninformed again, every anthropologist who has since cared to write on the subject has catalogued details of "Basarwa territories", occupied and utilized by particular groups and communities. We have been reminded that Basarwa have never been "true nomads", foraging and hunting over the entire wide expanse of the Kalahari. On the contrary, specific groups and communities have always identified and been associated with particular areas, in such a way that most of the researchers would not hesitate to describe them as "owners" of their land. (3)

Anthropological redefinition and redescription of Basarwa territories has been vigorously pursued to the point of concluding that Basarwa conceptions of land tenure and land ownership in fact have never been that radically different from similar ideas and conceptions of their Bantu neighbours and dominators. According to this school of anthropological thought, earlier accounts of Basarwa as pristine human foragers and hunters who have always lived in tandem with their ecological environment were not only historically inaccurate, but they also encouraged the type of legal disenfranchisement of the Basarwa which the statement of the legal consultant quoted above probably presaged. The forceful submission of this "revisionists" school of Basarwa territoriality contends:

"The only conclusion that can be reached is that San tenure has been, and continues to attempt to be, generationally stable and sanctioned by traditional native rules that are congruent with other Southern African systems...(4)

In this work it is proposed to show that such generalizations about land tenure systems may be just as unhelpful as the impugned romantic descriptions of pristine Basarwa communities in their Kalahari environment. Archival and historical research might in fact show that the genesis of the Basarwa land problem might be the failure of the colonizers to appreciate significant variations in African tenurial practices. When the legal instruments for recognition of land control and land use were evolved and formulated at the turn of the century, the convenient and ready assumption was that the "native" inhabitants of the protectorate lived under similar tribal patterns of governance, under the control of dominant or strong "Tswana" chiefs. The first concern of the colonizers was to identify and demarcate the territories of these chiefs as Tribal reserves or territories. The second concern was to validate land acquisitions and concessions which European settlers had extorted from the chiefs and tribal authorities. This was the beginning of the acknowledgement of the existence of freehold titles or "private rights of ownership" in land, and land in this category came to be classified as private or freehold land. The rest of the land became Crown lands, or lands appropriated to the Crown by virtue of it being the "protecting power." Not much thought was given to the position of the territories of the Basarwa and other minority ethnic groups in this scheme of things. Their territories and land rights were henceforth subsumed and submerged under the invented new land categories. The rights of those who came into contact with freehold land were obliterated. Those who continued to live in areas designated as Crown lands became, in legal theory, tenants at will of the Crown who could be dispossessed or deprived of their rights at a moment's notice. The remaining communities in the Tribal reserves were confirmed as subjects of their Tswana masters, with no district tribal rights of their own.

The three-fold classification of land and the resulting disenfranchisement of Basarwa and others was substantially carried over from the colonial to the post-colonial era. After independence, Crown lands became State Land, and Tribal reserves were renamed Tribal land or territories. The sizes of these categories were also appreciably adjusted in favour of Tribal land. But the legal instruments remained substantially unchanged until the enactment of the Tribal Land Act in 1968. As is well known, this Act sought to revolutionize tribal land tenure, although it was hardly so claimed at the time. First, it sought to transfer powers of administration and control from the chiefs and tribal authorities to land boards. Secondly it sought to provide opportunities for the allocation of non-tribal interests in land such as "the common law lease" of the Tribal Grazing Land Policy. For the Basarwa, however, the underlying assumption that their land rights are exercised within the overarching framework

of Tswana tribal land tenure does not appear to have been changed. They were, of course, now to be subject to the jurisdiction of the boards, and in the process of creating the new "private land" titles, their "unrecognized" rights could continue to be obliterated or subsumed.

In this context and scenario, the problem of securing Basarwa land cannot be uncomplicated. It has at least two dimensions which call for further research. Can the historical disenfranchisement be reversed and Basarwa land rights re-secured? If this is legally or politically impractical or unacceptable, to what extent can land or territorial rights be secured under the existing legal context of tribal land administration?

NOTES:

1. See, for example, Ulla Kann et al, Let Them Talk: A Review of the Accelerated Remote Area Development programme, Gaborone 1990, pp. xii to xiii, and A. Mogwe, Who was (T)here First?, Botswana Christian Council Occasional paper no. 10, 1992, pp.5-10.
2. Opinion in Re Common-law leases of Tribal Land, 23rd January 1978, reproduced in R. Hitchcock, Kalahari Cattle-posts, Ministry of Local Government and Lands, October 1978, Vol. 1, p.242.
3. Notable accounts on "Basarwa territoriality" include: R. Lee, The Kung San: Men, Women and Work in a Foraging Society, Cambridge University Press, 1979; G. Silberbauer, Hunter and Habitat in the Central Kalahari Desert, Cambridge University Press, 1981; J. Tanaka, The San Hunter-Gatherers of the Kalahari, University of Tokyo Press, 1980; M. Guenther, The Farm Bushmen of the Ghanzi District of Botswana, Stuttgart 1979; A. Barnard, Hunters and Herders of Southern Africa. Comparative Ethnography of the Khoisan Peoples, Cambridge University Press, 1992, and "Kalahari Bushman Settlement Patterns", in P. Burnham and R. Ellens (eds), Social and Ecological Systems, Academic Press London, 1979, pp.131-144; E. Cashdan, "Territoriality among Human Foragers: Ecological Models and an Application to Four Bushmen Groups, 24, 1 (1983), Current Anthropology pp.47-66; and E. Wilmsen and J. Denbow, "Paradigmatic History of San-speaking peoples and Current Attempts at Revision", 31,5, (1990) Current Anthropology pp.489-524.
4. E. Wilmsen, "Those Who have Each Other: San Relations to Land", in E. Wilmsen (ed), We are Here. Politics of Aboriginal Land Tenure, University of California Press 1989. p.65.