Journal of African Law, 41: 1–26

LAND RIGHTS FOR MARGINALIZED ETHNIC GROUPS IN BOTSWANA, WITH SPECIAL REFERENCE TO THE BASARWA

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INTRODUCTION[1]

Although, as the name of the country suggests, Botswana is populated mainly by Tswana-speaking peoples, it is acknowledged that the most indigenous or aboriginal inhabitants of the country are the San or Basarwa, identified and described in some of the literature as Bushmen.[2] Basarwa also have the less admirable distinction of being perceived and depicted as the most marginalized of all the ethnic groups in the country.[3] Concern about the status, and the political and economic position of Basarwa in Botswana has been expressed in numerous reports and writings, official and unofficial, and at various conferences, seminars and gatherings, national or international.[4]

On some of these occasions the question of land, or "securing land rights for the Basarwa", has been identified as a critical component in programmes for the uplifting and improvement of the position of Basarwa. Recent global activism on the rights of indigenous peoples and legal developments elsewhere in the Commonwealth on aboriginal land rights[5] have also contributed to the concentration of minds on Basarwa land problems. But this is not a recent preoccupation. The current phase of the debate in Botswana can be traced to the following legal opinion proffered in 1978 by a litigation consultant in the Chambers of the Attorney-General:

> "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

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[1] This article arose out of a verbal presentation made at a workshop on Human Rights and the Right to Development, University of Botswana, Gaborone, 27–28 February, 1995. I must record my gratitude to several colleagues who contributed to the completion of the work. Sidsel Saugestad of Tromsø University, Norway, cajoled me into thinking about Basarwa land issues and provided invaluable materials and information. Anthony Sanders of Vista University, South Africa, commented on an earlier draft and encouraged wider dissemination of my research efforts on this topic and on land tenure issues in Botswana. B. Moeletsi of the University of Botswana collaborated on a similar project for the Christian Michelsen Institute of Norway. I am of course solely responsible for the errors that might be apparent in the work, and for the views and opinions which some might disagree with.

[2] R. Hitchcock, "Socioeconomic change among the Basarwa: an ethnohistorical analysis", (1987) 34, 3 *Ethnohistory* 219.

[3] See, for example, K. Good, "At the ends of the ladder: radical inequalities in Botswana", (1993) 31, 2 *Journal of Modern African Studies* 203.

[4] See, for example, A. Mogwe, *Who was (t)here first?* Botswana Christian Council, Occasional paper No. 10, 1992, 5–10; U. Kahn et al., *Let them talk: a review of the Accelerated Remote Area Development Programme*, Gaborone, 1990, xii–xiii; and S. Saugestad, "Developing Basarwa research and research for Basarwa development", Report from a workshop on Basarwa research held at the University of Botswana, Gaborone, 1993. At least two international/regional conferences on Basarwa issues were held between 1992 and 1993; in Windhoek, Namibia, 16–18 June, 1992, and in Gaborone, October 1993.

[5] For an indication of some of writings on this overworked topic see G. Cant, J. Overton and E. Pawson (eds.), *Indigenous Land Rights in Commonwealth Countries*, Christchurch, New Zealand, 1993.

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ADVERTISING

ISSN 0221–8553.

Typeset, printed and bound in Great Britain by Latimer Trend & Company Ltd., Plymouth

JOURNAL OF
AFRICAN LAW

VOLUME 40
1996

School of Oriental and African Studies
University of London

> Conservation Act. The right of the Masarwa 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, Tentatively, however, it appears to me that the true nomad Masarwa can have no rights of any kind except rights to hunting."[6]

This admittedly tentative and uncertain assessment arguably erred as regards both the land and hunting rights of the Basarwa.[7] The Attorney-General apparently decided to withhold and withdraw the opinion, not because of these errors but because of a further, more positive suggestion that Basarwa could conceivably acquire certain land rights by prescription.[8] Although the opinion was thus not allowed to become an official, legal indication of Basarwa land rights, it appalled many researchers who came across it because of the ignorance displayed as regards Basarwa "territorial organization". Almost every anthropological account which appeared thereafter attempted to expose the superficiality of perceiving or depicting Basarwa as "true nomads", foraging and hunting over the entire and wide expanse of the Kalahari. The literature is now replete with impressive data and details on utilization by specific groups or communities of the resources of particular, definable ranges or territories. In some of the accounts identifiable groups or "bands" have been described without hesitation as "owners" of the land or particular territories.[9]

The identification and description of Basarwa "territories" and land rights has been pursued by some 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. One forceful submission of this nature contended: "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 ...".[10] According to this "revisionist" school of Basarwa territoriality, earlier accounts of Basarwa as pristine human foragers and hunters who lived *in tandem* with their ecological environment were not only historically inaccurate but also encouraged the legal disenfranchisement and dispossession of their land.

It is not the intention here to enter the fray and take sides in what has been an emotionally charged anthropological debate. A quick riposte, from a legalistic perspective, on the congruency of aspects of Basarwa territoriality and Tswana land tenure cannot, however, be resisted. It is necessary to reiterate, after a very brief appreciation of the anthropological descriptions of Basarwa territoriality, that forced comparisons and generalizations about traditional land tenure systems may not be so helpful to the Basarwa cause. This argument will also be pursued through an assessment of the contemporary legal framework as well as the historical background to that framework. It will be contended that the failure to acknowledge and accommodate under the law some of the unique and distinctive features of Basarwa land tenure and land use has been at the core of the problem of the marginalization of these people. The last segment of the article will attempt to assess the legal strategies for ameliorating the position of Basarwa, including the vexed question of invoking the doctrine of aboriginal title in Botswana.

[6] Opinion on "Re common law leases", 23 January, 1978, as quoted by R. Hitchcock, *Kalahari Cattle Posts*, Ministry of Local Government and Lands, October 1978, Vol. 1, 242.

[7] C. Spinage, *History and Evolution of the Fauna Conservation Laws of Botswana*, Gaborone, 1991, 30.

[8] Liz Wily, *The TGLP and Hunter-Gatherers: A case study in land politics*, NIR Working Paper No. 33 January 1981, 66. This aspect of the opinion was also arguably erroneous. The Prescriptions Act, Cap. 13, 01, suggests that rights may not be acquired by acquisitive prescription over State land or tribal land. The categorization of land in Botswana is taken up later.

[9] The literature on this concept is immense and overwhelming. Notable books and monographs include R. Lee, *The Kung San: Men, Women and Work in a Foraging Society*, Cambridge, 1979; M. Guenther, *The Farm Bushmen of the Ghanzi District of Botswana*, Stuttgart, 1979; J. Tanaka, *The San Hunter-Gatherers of the Kalahari*, Tokyo, 1980; G. Silberbauer, *Hunter and Habitat in the Central Kalahari Desert*, Cambridge, 1981; and A. Barnard, *Hunters and Herders of Southern Africa: Comparative Ethnography of Khoisan Peoples*, Cambridge, 1992. The following chapters and articles are also worth citing: A. Barnard, "Kalahari Bushman settlement patterns", in P. Burnham and R Ellens (eds.), *Social and Ecological Systems*, London, 1979, 134–144; E. Cashdan, "Territoriality among human foragers: ecological models and an application to four Bushmen groups", (1983) 24, 1 *Current Anthropology* 47–66; and E. Wilmsen and J. Denbow, "Paradigmatic history of San speaking peoples and current attempts at revision", (1990) 31, 5 *Current Anthropology* 489–524.

[10] E. Wilmsen, "Those who have each other: San relations to land", in E. Wilmsen (ed.), *We Are Here: Politics of Aboriginal Land Tenure*, California, 1989, 65.

Aspects of Basarwa Territoriality

One of the ironies of Basarwa research in Botswana is that although much has been written and Basarwa are truly an over-researched people, much more still needs to be known and there is ample scope for further research.[11] On Basarwa territories, there is copious and detailed literature on some of the groups and communities, but it is difficult to locate reliable comparative information on basic and general issues like the total population of Basarwa; possible "tribal" classifications; the spread and location of such "tribes" or groups within Botswana; and the extent or sizes of territories controlled by such "tribes", communities or other social units.[12]

Although Basarwa communities were at some time located in most parts of the country, the bulk of the literature is on the communities and groups in or around the Kalahari desert region, most notably the !Kung, (or Ju/'hoan), of North Western Kalahari; the Nharo and other groups of Ghanzi and Western Kalahari; the G/Wi and G//ana of Central Kalahari; and the !Xo, (or !Ko) of South Western Kalahari.[13]

The Kalahari environment obviously shaped and influenced the tenurial concepts and practices of these communities. The perceptible environmental features of the region include sandy plains, in parts covered with tree and bush savannah, and interspaced with dry fossil river valleys and depressions called pans. The area is also semi-arid and severely lacking in surface water, especially after the comparatively short rainy season, between November and April. The rainfall is also generally low, averaging between 300 and 400 mm per annum, and droughts are a frequent phenomenon.[14]

This environment was not conducive to a sedentary mode of existence. The Basarwa inhabitants were thus described as "hunters and gatherers", people who

[11] Sidsel Saugestad, "To corner the Bushman market: research paradigms and use of research on the indigenous people of Botswana", paper presented to the Norwegian Association for Development Research annual conference, Tromsø, May 1994, and "Developing Basarwa research and research for Basarwa development", report from a workshop on Basarwa research held at the University of Botswana, September 1993.

[12] R. Hitchcock, *Monitoring Research and Development in the Remote Areas of Botswana*, report to the Remote Area Development Programme, Ministry of Local Government and Lands, July 1988, 9–37 to 9–38 and 4–39, attempts to collate and present such information, but he too cannot vouch for the accuracy or reliability of some of the details.

[13] See n. 9.

[14] See Hitchcock, *Monitoring Research and Development*, Appendix 4, 30 for a basic description of these features of the region.

"roamed about in search of game and wild vegetable foods upon which they depended for their existence".[15] Hunting and gathering could not be pursued in large communities. The literature thus depicts Basarwa as organized in small communities or "bands" which controlled and exploited resources over definable ranges or territories, in patterns which were dictated by the availability of water, game and other food resources of the particular range.

Some of the ethnographic literature contains interesting but perhaps sterile correlations of some of these variables. It has been noted, for example, that the !Kung of Dobe, an area of comparatively better rainfall and some permanent water resources, foraged in more fluidly composed groups, over territories which were less exclusively claimed, and in a pattern which led to the convergence of two or more groups over a permanent water source during the dry season and dispersal during the wet season. The G/Wi in the Central Kalahari, an area possessing no permanent water holes and less abundant food resources, also lived in fluidly composed groups and in territories fairly accessible to non-members. But they apparently followed a pattern of foraging in larger groups during the wet season and dispersing into smaller units during the dry season in order to maximize the utilization of the food and water resources in the various parts of the territory. The !Xo, in the harshest environment, with no surface water and the least abundant food resources, foraged in larger territories, in more compact groups which appeared to be constantly dispersed, and were more conscious of their territories and less tolerant of strangers or non-members.[16]

In all these Kalahari communities a "band" was depicted as the principal unit of the social structure. Within a band the core unit was a family, nuclear or extended, and a band was composed of clusters of families, their visitors and friends. Band membership, and with it the right to exploit the resources of band territory, was acquired by birth or marriage or through other admission processes. Bands were more than simple patrilocal or matrilocal resident groups. Their composition could be complex and fluid. There was constant interchange of members for a variety of reasons including marriage, competition over food resources, and the resolution of conflicts and other social tensions.

It would also appear that bands generally were not led by leaders in the mould of chiefs or headmen of, for example, their Bantu neighbours. The harsh mode of existence militated against the emergence of large, permanent units under centralized political leadership. This, however, did not deter some analysts from identifying core band members who appeared to occupy positions of leadership and could be described as "owners" or controllers of particular band territories. A mark of band leadership or "ownership of territory" was the ability to give permission to non-members wishing to have access to water and other resources of the territory.[17] Given the vagaries of the environment, the sharing of resources across bands was imperative. No band or community could be

[15] I. Schapera, *Khoisan Peoples of Southern Africa*, London, 1930, 75.

[16] See Cashdan, "Territoriality among human foragers", 52–53; R. Lee "!Kung spatial organization: an ecological and historical perspective", (1972) 1, 2 *Human Ecology* 125–147; G. Silberbauer, *Hunter and Habitat in the Central Kalahari Desert*, chs. 4–5; and H. Heinz, "Territoriality among the Bushmen in general and the !Ko in particular", (1972) 67 *Anthropos* 405–415.

[17] The literature is on the !Kung of Dobe is more specific on this issue. Band leaders, identified as owners of water holes, were apparently called *K'aun*. The territory within which one or more water holes were located was called a *n'ore*. See Lee, "!Kung spatial organization", 125–147, and *Men, Women and Work in a Foraging Society*, ch. 12; and Wilmsen, "Those who have each other: San relations to land", 51–61.

assured of all its food and water requirements at all times within its own area or territory. The need to share resources was also accentuated by the flexible and fluid composition of most of the bands and the considerable degree of fuzziness in the delineation of territory boundaries.

Most of these descriptions of Basarwa territories were of course ahistorical, frozen at the time of study by the particular anthropologist. This is one of the irrefutable arguments of those who contend that the theme of ecological determinism was over-emphasized in the earlier ethnographic literature on the Kalahari Basarwa. As suggested by the "revisionists" in this debate, indeed, there might have been a better appreciation of the position of Basarwa if greater emphasis had been given to evidence of interaction and contacts between them and their neighbours.[18] However, such evidence might not support the conclusion that even the Basarwa communities which were not incorporated into Tswana polities eventually adopted tenurial rules and practices which were congruent with the rules and practices of their Tswana or Bantu neighbours. Some of the obvious differences that cannot be accounted for under such a conclusion include the political, social and spatial organization of the Tswana communities into "tribes" led by powerful rulers or chiefs, and the more sedentary occupation and utilization of land in distinct zones involving permanent location of villages in one zone, arable lands and fields in a second zone, and cattle posts and grazing fields in a third outer zone.[19]

A superficial analysis of some aspects of Tswana land tenure can indeed create the impression of similarity with aspects of Basarwa territoriality. A Tswana chief, for example, rather like a band leader, could and was often described as the "owner" of the land. It was also clearly appreciated that the land was held or controlled by the chief for the general benefit of his tribe, group or community. The tribes or communities, furthermore, were not closed social units. Possibilities existed for the co-option and admission of new members who would be entitled to share in the resources of the group. It was also apparent that some resources like grazing areas could be shared by members of distinct core groups, and they were not always precisely defined and demarcated. This also contributed to rivalries and conflicts over particular territories.

Such resemblances are not indicators of congruency in tenurial rules. These are similarities which may be detected in most African tenurial systems which are otherwise vastly different. This is partly a result of the language of analysis. It is not uncommon to encounter descriptions of African tenurial systems which employ, without much care, words and concepts like "owner", "trustee", "usufruct" or "communal land tenure". The result is almost always a fuzzy picture which resembles any other description employing these terms.[20] In the Botswana context, the search for "owners" of the land can obfuscate real differences between Tswana land tenure and Basarwa territoriality and land use practices. As the ensuing discussion will attempt to confirm, obfuscating these

[18] See Hitchcock, "Socioeconomic economic change among the Basarwa", 219–244; Wilmsen, "Those who have each other", 43–66; and Wilmsen and Denbow, "Paradigmatic history of San-speaking people", 489–507.

[19] For salient aspects of Tswana land tenure the standard and most frequently cited works are I. Schapera, *Native Land Tenure in the Bechuanaland Protectorate*, London, 1943, and *A Handbook of Tswana Law and Custom*, London, 1984.

[20] See C. Ng'ong'ola, "Land problems in some peri-urban villages in Botswana and problems of conception, description and transformation of tribal land tenure", [1992] 36, 2 *J.A.L.* 144–48.

differences has and continues to cause greater harm than was perhaps engendered by the romantic descriptions of pristine Basarwa foragers in the Kalahari environment. Indeed the historical excursion below will also suggest that romantic descriptions of Basarwa should not be overly blamed. The seeds of the problem were sown much earlier.

Land Rights in the Historical Context

Some historical accounts suggest that Basarwa communities originally developed fairly autonomous trading and hunting contacts and arrangements with their Bantu or Tswana neighbours.[21] The subjugation, domination and displacement of some Basarwa from their lands has been dated roughly from the middle of the 19th century, when cattle rearing began to replace hunting and trading in game products as the principal economic activity of the Tswana. Basarwa territories in the vicinity of Tswana settlements were taken up for Tswana cattle posts, and the subjugated Basarwa were converted into cattle-tending serfs. This was the lowest social class in "Tswanadom", whose occupants were hardly allowed upward social mobility, or property and other social or political rights.[22] Basarwa communities who escaped this form of incorporation into Tswana polities were forced to retreat further into the inhospitable sand veld interior.

This was broadly the relationship between Basarwa and their Tswana overlords at the turn of the century when colonial rule was imposed. The imposition of colonial rule was in legal terms an even more important defining moment. The relationship between Basarwa and Tswana had to be encoded under new legal and political idioms. As elsewhere in Africa, colonial rule also came with new ideas and concepts about property and land holding which had an everlasting imprint. One of the more immediate consequences of colonial rule was the imposition of a plural land tenure system under which were to be accommodated varying and conflicting claims of the State, European settlers and the colonized African communities, including the dominant Tswana communities and other minority or marginalized ethnic groups.

Recognition of "freehold" titles

One of the first tasks of the nascent protectorate administration in Bechuanaland was to place the claims of European settlers to land in the protectorate on a sound legal footing. A Concessions Court was established in 1893 to investigate and validate such land claims and other commercial concessions which had apparently been granted by African chiefs and rulers.[23]

[21] E. Wilmsen, "The political history of minorities and its bearing on current policies", in *Botswana—Education, Culture and Politics*, Seminar Proceedings No. 29, Centre of African Studies, University of Edinburgh, 1988, 31–52.

[22] K. Datta and A. Murray, "The rights of minorities and subject peoples in Botswana: a historical evaluation", in J. Holm and P. Molutsi (eds.), *Democracy in Botswana*, Botswana, 1989, 58–74.

[23] The court was established by a Proclamation of 1 February, 1893. Two important legal instruments preceded this Proclamation. First, the Bechuanaland Protectorate Order in Council of 9 May, 1891, gave the High Commissioner for South Africa the necessary powers to exercise jurisdiction within the Protectorate and to provide, by means of Proclamations, for the "order and good governance of all persons". The Bechuanaland Protectorate General Administration Proclamation of 10 June, 1891, then declared that claims to land in the Protectorate by persons of European descent will not be recognized until approved in such manner as the High Commissioner would determine.

The court approved claims to about five pieces of land ranging in size from 1,000 to 6,000 morgen.[24] The successful claimants were regarded as having acquired "freehold" titles, although this English property law concept was not part of the vocabulary of Roman-Dutch law which was chosen as the general law for the Protectorate in non-tribal matters.[25] The assumption was that a "freehold" title conferred the same entitlements as "dominium" or the "right of ownership" in the more familiar language of Roman-Dutch law. The Concessions Court and the Protectorate administration sanctioned the acquisition of these new rights in land notwithstanding subsequent protests by some of the African grantors, and the fact that some of them could not have truly intended to give away rights in land which they could hardly comprehend.[26] It was imperative for the colonial enterprise to have new forms of land holding in the Protectorate.

It should be apparent, however, that the work of the Concessions Court did not yield significant amounts of "freehold" land. Most of the land in this category came from government grants and direct government recognition of the claims of two commercial concerns, the Tati Concessions Limited and the British South Africa (B.S.A.) Company of Cecil Rhodes. The Tati Concessions Limited secured land, mineral and commercial rights in the Tati District in the north-eastern part of the country on the basis of concessions obtained from Lobengula, the Matebele chief, who was controversially recognized as the political sovereign for the area.[27]

Along the south-eastern border of the country with the Transvaal, land prised out of the control of the African communities was granted to the B.S.A. Company as part of the scheme conceived by Cecil Rhodes to extend the Mafeking to Bulawayo railway through the Protectorate. As can be gathered from most accounts of the early history of the Bechuanaland Protectorate,[28] its administration imposed an unwanted financial burden upon the colonial authorities. Cecil Rhodes was willing to underwrite some of the expenses, the *quid pro quo* being the extension the B.S.A. Company's sphere of influence to the Protectorate. The railway project was conceived in anticipation of the transfer of the Protectorate to the Company. The land involved was ironically promised by the three prominent Tswana chiefs who had gone to London in 1895 to protest about the imminent prospect of B.S.A. Company rule in the Protectorate.[29]

[24] One morgen was equal to 2.1165 English acres. Some of the well-known freehold farms of Botswana with quaint names like Ramatlabama Kuil, Crocodile Pools, Forest Hill, Traquair and Hildavale came out of the original approvals by the Concessions Court. Botswana National Archives (BNA) file HC 119 contains a report on the work of the Concessions Court.

[25] S. 19 of the Bechuanaland Protectorate General Administration Proclamation of 10 June, 1891.

[26] See BNA, file HC 119, Assistant Commissioner to Resident Commissioner, Mafeking, 31 December, 1898, and O. Selolwane, "Colonizing by concession, capitalist expansion in the Bechuanaland Protectorate 1885–1950", (1980) 2, 1 *PULA: Botswana Journal of African Studies* 85–91.

[27] See Lord Hailey, *Native Administration in the British African Territories, Part V*, London, 1953, 230–34; and R. Werbner, "Land and chiefship in the Tati Concession", (1969) 2 *Botswana Notes and Records* 6–13.

[28] See, for example, A. Sillery, *Founding a Protectorate, History of Bechuanaland 1885–1895*, London 1965, especially chs. XI–XIII: and A. Sanders, *Bechuanaland and the Law in the Politicians' Hands*, Gaborone, 1992.

[29] See Bechuanaland Protectorate (Lands) Order in Council, 16 May, 1904; and BNA files RC 2/8/1, RC 2/8/2 and RC 2/8/5; and Lord Hailey, op. cit., 200. Land for the railway project was also ironically promised without any cast-iron guarantees as to the future status of the Protectorate. The prospect of company rule remained imminent, at least until the infamous Jamieson raid in late 1895 confirmed the argument that the company was not fit to be entrusted with the administration of the Protectorate.

Legislation under which land was transferred to the two companies indicated that title would vest "absolutely" and, in addition to the right to "full, free and undisturbed possession", the grantees would also be entitled to alienate the land "for a term of years or in perpetuity, and either absolutely or by way of mortgage or otherwise . . .".[30] These were the original allocations which approximated the English "freehold" grant, and the companies in turn became the major owners of "freehold" land in the Protectorate.

Cecil Rhodes devised a second land project in anticipation of the transfer of the Protectorate to the B.S.A. Company. This involved the allocation of land to a column of Boer settlers on the Ghanzi ridge, in the western part of the country, to act as a buffer against German expansion from South West Africa. By 1898, about 37 families of the "Trekkers" were allocated farms averaging about 5,000 morgen in size.[31] They received "certificates of occupation" which disclosed that the interest granted was a "perpetual quit rent" which could however be determined for non-payment of a rent of one pound per 1,000 morgen per annum. The interest was otherwise alienable.[32] These unusual grants were converted into freeholds of the type granted to the two companies after a belated definitive survey of the area and the farms towards the end of colonial rule.

Plans to allocate the so-called Ghanzi "freehold farms" were originally formulated on basis of untenable concessions secured from Sekgoma, chief of the Tawana of Ngami. When it became apparent that Sekgoma's claims to sovereignty over the area could not be sustained, the administration adopted the argument that the land in any event was *terra incognita*, with "no legal owner".[33] The land taken up for the farms probably cut into the traditional territories of Basarwa communities of the Nharo group,[34] but the colonial authorities and other actors involved in the recognition of settler claims and the creation of freehold land were not prepared to acknowledge the political or territorial sovereignty of Basarwa who were not incorporated into the Tswana polities.

Proclamation of Native Reserves and Crown lands

The refusal to acknowledge or recognize political and territorial sovereignty of some Basarwa communities over certain parts of the country was even more pronounced in the designation of Native or Tribal Reserves and Crown lands, the other two major categories of land in the Protectorate. In 1895, when the decision to allocate land for the railway project was taken, the three Tswana chiefs who "agreed" to provide the land also agreed to identify their tribal territories for definitive demarcation. The plan was that these and other tribal territories so delineated would become exclusive tribal reserves, and any other "vacant" or "waste" lands outside the reserves would be appropriated as Crown lands.[35]

[30] Ss. 1 and 2 of Proclamation No. 4 of 1905, 7 February 1905; and s. 1 of Proclamation No. 2 of 1911, 21 January 1911.

[31] See, generally, BNA file HC 147 for the Ghanzi settlements. Different figures are given in some accounts as to the number of families or farmers allocated land or the number of farms actually laid out.

[32] BNA file S 462/8/2 confirms that some of the farms were repossessed for non-payment of rent.

[33] BNA file HC 147, Resident Commissioner, Mafeking to High Commissioner, Cape Town, 16 March, 1899.

[34] Guenther, *The Farm Bushmen of the Ghanzi District of Botswana*, 54–57.

[35] BNA file RC 2/8/1.

The complicated exercise of demarcating the tribal reserves took several years to complete. The first proclamation formally to identify Native Reserves for five of the major Tswana "tribes" was dated 29 March, 1899.[36] Four other reserves were added to the original list over a period of three decades. One was created in 1911 for the African communities in the Tati freehold area,[37] and the other three were for the smaller Tswana "tribes" in the south and south-eastern parts of the country.[38] Not all the reserves were on land acknowledged as traditionally belonging to the particular tribe. Two were proclaimed on land requisitioned from the "freehold" sector by the Crown.[39] In legal theory this meant that the native inhabitants were "tenants" occupying the land "at the will" or "on sufferance from the Crown". This legal nicety, however, was not respected or appreciated in practice. As in the other archetypal "Tswana" reserves, customary law and customary modes of occupation and use prevailed, subject to such modifications as were required for purposes of maintaining "order and good government".

The native reserves policy pursued in the Bechuanaland Protectorate was in some ways unique. The reserves generally attempted to recreate and preserve traditional territories and tenurial practices of the dominant "Tswana" tribes. Chiefs and other tribal authorities retained substantial powers of land control and administration, to the extent that even the colonial authorities were willing to acknowledge the administration's limited authority over such matters.[40] In other former British territories and dependencies, a reserves policy generally entailed creation of pockets of inadequate and unsuitable enclaves within which African communities were to be compacted in order to free more land for European occupation.[41] Such a policy also entailed transfer of title to land to the colonial authorities, so that the land could be held and administered under some kind of a trust, on behalf of the native inhabitants.[42] This was not the position in Bechuanaland.

The fact that eight out of the nine reserves were delineated for the so-called eight major Tswana "tribes" was another distinctive feature of the policy. This meant that other "minority" ethnic groups outside the designated reserves were denied the protection and autonomy over their land which the reserves policy sought to assure. Perhaps the most affected in this sense were Basarwa and Bakgalagadi communities in the western, drier parts of the country. Legal title to their lands and territories passed to the Crown under the 1910 Order in Council which redefined Crown lands in the Protectorate as including:

[36] Proclamation No. 9 of 1899. This created reserves for the Ngwato, Kwena and Ngwakwetse "tribes", from whom land was taken for the railway project, as well as for the Kgatla and Tawana.

[37] Art. 1 of Proclamation No. 2 of 1911.

[38] Proclamation No. 28 of 1909 created the Malete reserve. Proclamation No. 44 of 1933 created a reserve for the Tlokwa of Gaborone; and Proclamation No. 77 of 1935 declared that the Barolong Farms in the south should be regarded as a reserve for administrative purposes.

[39] This was the case with Tati reserve and the Tlokwa reserve. See Art. 1(1) of Proclamation No. 2 of 1911; and Hailey, op. cit., 238–239 and 312.

[40] See Hailey, op. cit., 311, and Ng'ong'ola, "Compulsory acquisition of private land in Botswana: the Bonnington Farm case," (1989) *CILSA* 299–301.

[41] See, for example, R. Palmer, *Land and Racial Domination in Rhodesia*, London, 1977, chs. 2 and 3, and C. Ng'ong'ola, "The State, settlers and indigens in the evolution of land law and policy in colonial Malawi", (1990) 23, 1 *International Journal of African Historical Studies* 50.

[42] *Tito* v. *Waddell No. 2* [1977] CH 106, 210–226 and *Town Investments Ltd* v. *Department of Environment* [1978] AC 359–382.

> "all other land situate within the limits of the ... Protectorate elsewhere than in the Tati District ..., with the exception of
> (1) Such land as is either
> (a) included in any native reserve duly set apart by Proclamation or
> (b) the subject of any grant duly made by or on behalf of His Majesty; and
> (2) the forty-one farms known as the Barolong...".[43]

Through this redefinition indigenous occupiers of vast expanses of land or territories also became "tenants at will" of the Crown, but they were in a more precarious position than the "tenants" of the Crown in the two reserves which were later proclaimed on land requisitioned by the colonial administration from the freehold sector. 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. If the land was required for other purposes, the administration did not regard itself as bound to consult the affected communities, let alone to compensate them for the loss of land rights. The fiction of *terra incognita*, first encountered in the demarcation of the Ghanzi freehold farms, was steadfastly asserted.

Subsequent evolution and implementation of fauna conservation laws also confirmed the precarious status and position of the indigenous Crown land communities. First, whereas it was regarded as expedient and necessary to consult and allow chiefs in the tribal reserves sufficient autonomy in the framing and implementation of hunting regulations, the Crown land communities or their leaders enjoyed no such privileges.[44] Yet hunting, gathering, and exploitation of various species of flora and fauna were the principal modes of land use for some of them. Secondly, when protected areas, game reserves and, subsequently, national parks, were proclaimed over significant portions of appropriated Crown lands, traditional hunting and gathering rights could not be fully "guaranteed". The underlying premise of the numerous statutes, rules and regulations was that no one had an inherent or indigenous right to hunt or gather on Crown lands.[45]

The proclamation of the largest game reserve in the Protectorate, the Central Kalahari Game Reserve, in 1961, confirmed colonial attitudes towards indigenous hunting and gathering rights.[46] The project was recommended by a "Bushman Survey Officer" who also intended it to be a sanctuary for several thousand Bushmen who had indicated their desire to carry on with their traditional mode of existence, in their environment, without encroachment or interference from other people.[47] The Officer feared that a proposal to establish a tribal reserve for the Bushmen would be vetoed by powerful settler groups or Tswana overlords who were benefiting from the labour provided by Bushmen communities displaced

[43] Art. 1 of Bechuanaland Protectorate (Lands) Order in Council, 1910. Under the earlier Bechuanaland Protectorate (Lands) Order in Council of 16 May, 1904, Crown lands were narrowly defined as "the lands abandoned by Chiefs Khama, Sebele and Bathoen" which were then passed over to the B.S.A. company in freehold as part of the railway project. The 1910 Order inelegantly included such lands within the definition of Crown lands although they were already converted or destined for conversion into freehold land.

[44] Clive Spinage, *History and Evolution of Fauna Conservation Laws of Botswana*, Gaborone, 1991, especially 26–46.

[45] Ibid., 30.

[46] Ibid., 59–60. At 52,800 square kilometres this was also apparently the largest game reserve in Africa at that time.

[47] G. Silberbauer, *Report to the Government of Bechuanaland on the Bushman Survey*, Gaborone, 1965, 132.

from and dispossessed of their traditional territories. He reckoned that the proclamation of a game reserve within which the Bushmen communities would be allowed full hunting, gathering and occupational rights would achieve the desired protection without much opposition. As suspected, the game reserve was established without problems.[48] From the subsequent regulations, however, provisions designed to secure land and land use rights of the Bushmen communities were struck out.[49] The only concession in their favour was the right to enter the reserve without first obtaining permission from the District Commissioner for Ghanzi.

Post-Colonial Developments

The system of land classification and the forms of tenure which emerged after the proclamation of the reserves and the appropriation of residual, undesignated areas as Crown lands survived without significant modifications until the attainment of independence in 1966. Freehold land at that time was about 6 per cent of the total land area of the country (estimated at 582,000 square kilometres).[50] Crown lands became State land.[51] This was about 47 per cent of the total land area. The reserves, which were redesignated as tribal territories during the colonial era, comprised about 48 per cent of the land area. Fairly recent estimates now place freehold land at 5 per cent, State land at 25 per cent and tribal land at about 70 per cent.[52] From these figures it should also be apparent that the debate on minority land rights during the post-colonial era must focus on State and tribal land. It is also necessary to take into account several constitutional provisions.

Constitutional background

Botswana attained independence under a Constitution which incorporated a fairly comprehensive Bill of Rights. The first provision in the Bill to be taken note of on land rights is section 8(1) on "protection from deprivation of property". The provision begins with the emphatic words:

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied. ..."

And the principal conditions require that the taking or acquisition must be necessary or expedient for certain specified public purposes; provision must be made for the "prompt payment" of "adequate compensation", and for the remission of compensation paid to any country of choice outside Botswana; and there must be a right of access to the High Court for the determination of disputes pertaining to the legality of the acquisition or the amount of compensation payable.

[48] Fauna Conservation Proclamation, No. 22 of 1961.

[49] Central Kalahari Game Reserve (Control of Entry) Regulations, GN 38 of 1963.

[50] For estimates of the sizes of the three main land categories at independence, see B. Machacha, "Botswana's land tenure: institutional reform and policy formulation" in Arntzen, Ngcongco and Turner (eds.), *Land Policy and Agriculture in Eastern and Southern Africa*, Tokyo, 1986, 99.

[51] State Land Act, Law 29 of 1966.

[52] Republic of Botswana, *National Development Plan 7, 1991–1997*, Ministry of Finance and Development Planning, Gaborone, December 1991, 293.

In several African countries this type of protection of property was included in constitutional instruments for the attainment of independence with the principal aim of assuring settler communities that land titles acquired during the colonial era would not be arbitrarily repossessed by the new African rulers.[53] In the context of Botswana, it can be said that the Constitution essentially secured and protected title to freehold land, regardless of the manner in which the land was originally claimed or allocated. But the ample drafting of the provision also suggested that it secured and protected "property of any description" or any "interest in or right over property of any description". It would be extremely difficult, for example, to sustain an argument that the Constitution fails to protect land or land use rights of minority ethnic groups. If the right of a particular group to hunt or forage within a particular area or territory is not "property", it must be "an interest in or right over property of any description". If such a right was to be abridged or taken away, the constitutional safeguards would have to be complied with. In the post-colonial era, therefore, the type of dispossession or non-recognition of minority land use rights which occurred during the colonial era should not recur without strict compliance with the stipulated constitutional requirements.

The second provision in the Bill of Rights which refers to land rights of a particular minority group is section 14. This provision generally seeks to guarantee or secure, primarily for citizens of Botswana, "protection of freedom of movement". In the context of the provision this refers to "the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana".[54] As is to be expected, there must necessarily be derogations from freedom of movement. The Constitution accepts that it might be necessary to impose restrictions "in the interests of defence, public safety, public order, public morality or public health...".[55] It is also acknowledged that restrictions "reasonably justifiable in a democratic society" might be imposed "on the acquisition or use by any person of land or other property in Botswana".[56] These are not untypical qualifications in a Constitution of this nature.

A peculiar and unique qualification from the protection of freedom of movement is however to be found in section 14(3)(c) which permits "the imposition of restrictions on 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". This is one of two provisions in the Bill which specifically acknowledge the special needs of Bushmen. Section 15 which attempts to outlaw discrimination and differential treatment of persons on the basis of race, tribe, place of origin, colour, creed and other factors is the second provision. A special qualification is included in the provision to permit the protection and differential treatment of Bushmen in terms of section 14(3)(c). This is in addition to permissible discrimination against persons who are not citizens; differential treatment in matters of personal law such as

[53] See Ng'ong'ola, "The post-colonial era in relation to land expropriation laws in Botswana, Malawi, Zambia and Zimbabwe," (1992) 41 *International and Comparative Law Quarterly*, 117–136.
[54] S. 14(1).
[55] S. 14(3)(a)
[56] Ibid.

marriage, divorce and devolution of property on death; or differential application of customary law to members of a particular race, community or tribe.[57]

Section 14(3)(c) provokes the thought that it was perhaps a belated recognition of the exclusive title of Bushmen communities to certain areas of the country.[58] It is a fair guess that the framers of the Constitution were mindful of the special needs of, particularly, the Central Kalahari Game Reserve Bushmen communities which, as seen above, were not fully taken care of in the framing legislation for the game reserve. But the Constitution did not advance the protection of such communities any further by merely restricting "freedom of movement" into their habitats. The most likely interpretation of section 14(3)(c) in a court of law would be that certain Bushman habitats are "out of bounds" for certain categories of persons. It is unlikely that the provision would be read as an affirmation of title to land or territories.[59] This could easily have been spelt out more clearly. One can detect in section 14(3)(c) the same reluctance to acknowledge and protect land rights of the Bushmen communities which frustrated the Bushman Survey Officer during the framing legislation for the game reserve.

State land and minority land rights

State land which, as noted above, now constitutes about 25 per of the total land area of the country, is predominantly reserved for fauna and flora conservation.[60] The total size of State land was drastically reduced in 1976 through the creation of new tribal territories in the Chobe, Ghanzi and Kgalagadi districts.[61] In this manner the incongruous status of many Africans as "tenants at will" of the Crown or the State on their own traditional lands and territories belatedly came to an end. This, however, fell short of a complete or final solution to the problem. As will be taken up later, indigenous land rights in the territories were accommodated under the overarching responsibility of land boards, the new institutions of land control in all tribal territories. The land board system of land control was constructed against a backdrop of the dominant Tswana system of land tenure. This may not be an ideal system for other ethnic groups who used land differently and did not have the social or political structures which could be readily replaced by land boards.

The creation of new tribal territories, secondly, had no impact on the land and land use rights of the communities left on the remaining portions of state land which are reserved for the national parks and game reserves. In these areas post colonial fauna conservation legislation initially attempted to grant a general

[57] S. 15(4). In terms of section 15(4)(e) it is also generally permissible to differentiate or accord privileges or advantages which having regard to the special circumstances, can be said to be "reasonably justifiable in a democratic society".
[58] B. Moeletsi, "The San of Botswana: legal status, access to land, development and natural resources", paper presented at the Second Regional conference on Development Programmes for the San People of Southern Africa, Gaborone, 7 October, 1993.
[59] This is notwithstanding judicial pronouncements suggesting that the Constitution and the Bill of Rights in particular should, where appropriate, be interpreted in a generous manner. See *Attorney-General* v. *Moagi* 1981 BLR 1; *Petrus and Another* v. *The State* 1984 BLR 14; *Dow* v. *Attorney-General*, High Court MISCA 124/90; and *Attorney-General* v. *Dow*, Court of Appeal, Civ. App. 4/91.
[60] The National Development Plan 7 indicates that National Parks and game reserves take up 16% of state land; Forest reserves take up 1% and Wild Life Management Areas take up the remaining 8%. These figures relate to what s. 2 of the State Land Act describes as "unalienated State land". There is no indication of the percentage of "reacquired State land" which is presumably predominantly used for urban land allocations in terms of the Act.
[61] The Tribal Land (Amendment) Act No. 21 of 1976.

exemption from the hunting regulations and restrictions to persons "entirely dependent ... on hunting and gathering veld produce ... where the animal is hunted for the reasonable food requirements of the hunter or of the members of the community to which he belongs. ...[62] This was later replaced by regulations requiring such persons to obtain special game licences.[63]

The utility of these special game licences is now under review.[64] They have proved exceedingly difficult to administer. One explanation for the ineffectiveness of the law on this controversial topic is the underlying premise that no one has the natural or inherent right to hunt or forage within the game reserves and national parks, and that it is a prerogative of the State to allow or permit the exploitation of the resources of this category of land. This is a continuation of colonial perceptions. This view has always been at variance with the perception of the affected communities that it is their inherent right to exploit the resources of their traditional territories in the traditional manner. Until these conflicting perceptions are sufficiently abridged, any measure or law which may take the place of the special game licences is also likely to fail.

Land tenure reform under the Tribal Land Act

The Tribal Land Act, enacted barely two years after independence,[65] was the first piece of legislation to propose substantial changes to the dominant Tswana tribal system of land tenure which had been left intact after the proclamation of the tribal reserves during the colonial era. In parliament it was suggested that the system was in need of modernization as it could not readily accommodate "modern concepts and practices in land use".[66] Other underlying and understated considerations and concerns included the perception that the system could no longer assure all Batswana of access to land, and that some "democratization" of land control and administration was necessary in a young democracy. The speed or haste of the new rulers in proposing the reforms also suggested that they appreciated that greater political control over land administration could strengthen the hand of government.

There were three main aspects to the reforms proposed under the Tribal Land Act. The first was the establishment of land boards to take over customary land administration functions and powers of chiefs and other tribal leaders. The second was the empowerment of the boards to allocate land and deal with it in a manner not known to customary law. The modernization of tenure objective was to be realized through the power and function of the boards to allocate land rights under what were termed "common law grants". The third aspect concerned expropriation of tribal lands. Tribal land was deliberately kept out of the reach of expropriation laws formulated by the colonial authorities because of the circumscription with which they approached land matters in the reserves.[67]

[62] Fauna Conservation (Amendment) Act No. 47 of 1967, quoted by Spinage, op. cit., 30.

[63] Fauna Conservation (Unified Hunting) Regulations, passed under the Fauna Conservation Act No. 1 of 1979.

[64] R. Hitchcock, "Rights and resources: the special game licence and remote area dwellers in Botswana", paper presented at the National Institute of Research and Development, NIR, University of Botswana, 1995.

[65] Act No. 54 of 1968.

[66] See Sir Seretse Khama, *National Assembly, Official Report, Hansard 23*, 2nd Session, 1st Meeting, 8–17 January, 1968, 14, and debates on the Second Reading of the Tribal Land Bill in *Hansard 25*, 2nd Session, 3rd Meeting, 6–9 August, 1968, 68–69.

[67] Ng'ong'ola, "Compulsory acquisition of private land in Botswana", op. cit., 299.

The Tribal Land Act in this respect attempted to fill in a gap which had existed for a long time in the law of expropriations.

For the purposes of this discussion only the first two aspects of the Tribal Land Act reforms need to be revisited.[68] As regards the first, the Act made provision for the establishment of "main land boards" to operate in "tribal areas" roughly corresponding to the nine tribal reserves, and for the establishment of "subordinate land boards" for "any area within the tribal area".[69] The number of main boards increased from nine to 12 in 1976 when, as noted above, land excised from State land was redesignated as Tribal Territories in Chobe, Ghanzi and Kgalagadi districts. The total number of main boards has since remained at 12, but some of the tribal areas have been redefined several times.[70] The number of subordinate boards was not fixed or predetermined in reference to particular areas. More boards could be constituted, as and when the need arose. By 1987, 36 had been constituted.[71]

The principal reason for the establishment of the main land boards was indicated thus in section 10(1):

> "All the rights and title to land in each tribal area ... shall vest in the land board set out in relation to it ... in trust 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."

Section 10(2) attempted to clarify that the vesting in the land board of rights and title to land did not include "any land or right to water held by any person in his personal and private capacity".

The specific functions of the land boards were described in distinct parts of the Act dealing with grant of customary land rights and grant of land rights under the common law. Section 13(1) in Part III, on the grant of customary rights, reinforced the description in section 10(1) of the land boards as the new custodians of tribal land. It stipulated that "all the powers vested in a chief under customary law in relation to land ... shall be vested in and performed by a land board." These more specifically included powers pertaining to granting rights to use any land; cancellation of such grants; resolution of disputes; and imposition of restrictions on the use of tribal land. Other additional functions for the main boards included policy formulation, planning and the zoning of areas for exclusive use as grazing areas or as commonage.[72] Where established, subordinate boards took over the task of considering applications for land for residential or ploughing purposes, or for grazing and other "communal uses in the village", and applications for borehole sites.[73] They were also responsible for the resolution of disputes pertaining to these matters.

Part IV of the Act reflected the modernization aspect of the law. Land boards were mandated to grant common law rights of ownership and leasehold rights which, it was presumed, could not be granted under customary law. The main

[68] For general, comprehensive reviews of the Tribal Land Act and tribal land tenure reform in Botswana see K. Frimpong, "The administration of tribal lands in Botswana", [1986] 30, 1 *J.A.L.* 51–74; Ng'ong'ola, "Land problems in some peri-urban villages in Botswana", [1992] 36, 2 *J.A.L.* 140–167; and "Ownership of Tribal Land in Botswana", [1993] 37, 2 *J.A.L.* 193–98.

[69] Ss. 3(1) and 19(1) and First Schedule to the Act.

[70] Tribal Land (Amendment) Acts Nos. 4 of 1979, 26 of 1982, 3 of 1983, 3 and 24 of 1984, 16 of 1985, and 15 of 1987.

[71] Establishment of Subordinate Land Boards Order SI 55 of 1987.

[72] Ss. 17 and 18.

[73] Reg. 5 of the Establishment of Subordinate Land Boards Order, 1973.

common law right to be granted was the leasehold. Two types of leases were provided for. In terms of section 23, a "short lease", determinable upon one month's notice, could be granted in respect of land not exceeding five acres in extent, for short-term industrial, commercial, agricultural or horticultural ventures by non-tribesmen. In terms of section 24, a "long lease" could be granted to tribesmen or non-tribesmen for such purposes and upon such terms and conditions as would be determined by the main land board. These leases were registrable under the Deeds Registry Act, thus confirming the tenurial transformation, from customary law to common law. Section 24(2) emphasized that no grant could be made under this provision without the prior consent of the Minister.

From 1975 onwards, section 24 leases were most notably used in the implementation of the Tribal Grazing Land Policy. This policy was the manifestation of the government's desire to modernize rural land tenure.[74] It was informed by the overworked modernization argument that "communal" land tenure systems do not provide sufficient incentives for individual efforts to develop land resources. In the context of pastoral, rural Botswana, it was the "tragedy of the commons" argument which impressed the government.[75] "Communal use" of tribal grazing areas was blamed for overstocking and serious denudation of resources. It was assumed that the allocation under leasehold titles of private or exclusive ranches would reduce overstocking and ameliorate the problem of land degradation.

Amendments to the Act and accommodation of minority rights

The land boards became operational in 1970. Almost immediately problems touching on most aspects of the law began to appear. In the process of attending to some of these problems some issues of concern to minority ethnic groups also became more apparent.

As regards the constitution and composition of the boards, one problem was that the land board structure did not fit easily into the social fabric of communities inhabiting the areas excised from State land who did not have structures of land administration comparable to those of Botswana. The boards had been designed to replace Tswana chiefs, headmen and overseers, and were likely to be less welcome in social systems where there were no similar characters to replace. This perhaps called for greater flexibility in the location, constitution and composition of main or subordinate land boards in some parts of the country than was permissible under the law. It also called for the accommodation in the rules and regulations for customary land grants of uses not familiar to the Tswana, such as the right to forage or hunt. These concerns, unfortunately, did not influence any of the earlier amendments to the Act which were overly concerned with the calibre and efficiency of board members and the need to

[74] The literature on the Tribal Grazing Lands Policy is voluminous and still growing. For a sample see Republic of Botswana, *National Policy on the Tribal Grazing Land Policy*, Government Paper No. 2 of 1975; R. Hitchcock, "Tradition, social justice and land reform in Central Botswana", in Werbner, *Land Reform in the Making*, 1–28; and "Water, land and livestock, the evolution of tenure and administration patterns in the grazing areas of Botswana", in J. Pickard (ed.), *The Evolution of Modern Botswana*, London, 1985, 84–121; P. Peters, "Embedded systems and rooted models, the grazing lands of Botswana and the commons debate", in B. McCay and J. Acheson (eds.), *The Question of Commons, The Culture and Ecology of Communal Resources*, Tucson, 1987, 171–194; M. Molomo, "Land reform and the tragedy of the commons in Botswana", (1989) 6, 2 *PULA* 67–73; and K. Frimpong, "A review of the Tribal Grazing Land Policy in Botswana", (1995) 9, 1 *PULA* 1–16.

[75] See E. Monu, "The tragedy or benefits of the commons? Common property and environmental protection", (1995) 9, 1 *PULA* 81–95.

exert greater political control over land administration through Ministerial appointees to the boards.[76]

Several other problems on the powers and functions of land boards in respect of customary land grants were revealed by events and developments which included an internal review of the system in 1989; a commission of inquiry into the problem of unauthorized land dealings in 1990; litigation over the same issue; and a government white paper in 1992.[77] First, section 10(1), quoted above, suggested, emphatically, that the title vested in each board was to be exercised primarily for "tribesmen" of the particular area. This was reinforced by section 20 which prohibited land boards from granting customary land rights to any person who was not a tribesman, unless he or the class to which he belonged received special Ministerial exemption. This restriction was not workable in some peri-urban areas where members of different "tribes" congregated. It also contradicted the part of section 10(1) which suggested that the trust of the land boards should also be administered for "the economic and social development of all the peoples of Botswana".

The second problem here concerned the meaning and scope of the word "tribesman". Although section 2 of the Act described a "tribesman" as "a citizen of Botswana who is a member of the tribe occupying the tribal area", no criteria were spelt out for the determination of "membership of a tribe". In the Constitution and other statutes on tribal administration the word "tribe" was used in reference to the eight principal Tswana tribes and the words "tribal community" referred to other ethnic groups.[78] To some land board members and officials this may have suggested that members of the minority ethnic groups were not tribesmen in tribal areas for the eight principal Tswana tribes and were therefore not entitled to land allocations.[79]

The third controversy concerned the full import of section 10(2) which suggested that rights held by any person in his personal and private capacity would not form part of the right and title of the land boards in accordance with section 10(1). In the celebrated *Kabelo Matlho* litigation,[80] the courts took the view that the true import of the provision was to exclude from the entire system of land board administration any land or water rights held by any person by the time the system started operating in 1970. The courts held that section 10(2) effectively recognized that certain holders of customary land retained the own-

[76] See Tribal Land (Amendment of Schedule) Orders, SI Nos. 102 of 1981, 91 of 1984 and 35 of 1986; and Establishment of Subordinate Land Boards Orders, SI Nos. 36 of 1986 and 55 of 1987.

[77] Republic of Botswana, *Report of the Review of the Tribal Land Act, Land Policies, and Related Issues*, Ministry of Local Government and Lands, Gaborone, 1989; *Report of the Commission of Enquiry into Land Problems in Mogoditshane and other Peri-urban Villages in Botswana*, Gaborone 1990; and *Land Problems in Mogoditshane and Other Peri-Urban Villages*, Government paper No. 1 of 1992. For a discussion of these reports and the litigation that arose see Ng'ong'ola, "Land problems in peri-urban villages in Botswana", 140–167; and "Ownership of Tribal Land in Botswana", 193–98.

[78] See ss. 77 and 78 of the Constitution, on the composition of the House of Chiefs; The Common Law and Customary Law Act, No. 51 of 1969; The Chieftainship Act, Cap. 41, 01; and A. Sanders, "The Bushmen of Botswana—From Desert Dwellers to World Citizens," (1989) 4 *Law and Anthropology* 118–19.

[79] Wily, *The TGLP and Hunter-Gatherers*, 67. This, to some extent, was a wrong interpretation because members of minority ethnic groups could be incorporated into Tswana tribes and be considered as tribesmen. On the other hand, many Basarwa were also incorporated into "Tswanadom" as serfs, without any claim to land rights. See Datta and Murray, "Land rights of minority and subject peoples in Botswana", 58–74.

[80] *Kweneng Land Board* v. *Kabelo Matlho and Others*, High Court, MISCA 137/1990, unreported; and Court of Appeal, Civ. App. 10/91, unreported.

ership thereof and were free to deal with and dispose of such land without the intervention of the land board with jurisdiction in the particular area. As owners, they could even sell the land, if, as the evidence suggested, the evolving customary law for the particular area comprehended such a transaction.

Apart from the questionable judicial recognition of "customary ownership" and "sales" of tribal land, this conclusion threatened to throw the land board system into chaos and disorder. It fell to parliament to reassert the right and power of the boards to administer and supervise all land dealings within their areas of jurisdiction and to attempt to resolve the other ambiguities in the Act. The Tribal Land (Amendment) Act of 1993[81] achieved this partly through a substantial rewriting of section 13 and other key provisions on the powers of the land boards in respect of customary grants in Part III of the Act. A new section 39 imposing hefty penalties for unauthorized land dealings and other transgressions was also added.

Significantly, the 1993 amendment also deleted the beguiling section 10(2) from the Act. There is now no basis for any land holder to claim that he has an interest in tribal land which is beyond the supervisory jurisdiction of the boards. This, however, did not amount to a complete clarification of the legal status of land or water rights acquired before the land boards became operational. It can only be surmised that such rights are in the nature of secure "customary rights of user" which the land boards may now interfere with, but only after strict compliance with the due process requirements of the Act and the Constitution. A related problem is that the full range of such rights is hardly known by the land boards. The implementation of the Act was not preceded or followed by a comprehensive survey of existing customary land rights. This gap in the knowledge and information available to land boards is always likely to complicate the making of customary land grants, the deletion of section 10(2) notwithstanding.

The 1993 amendment also significantly effected a substitution of the word "tribesman" with "citizen" in section 10(1) and other relevant provisions of the Act. This now entails that title to land is vested in the land boards to be held on trust for "citizens of Botswana", and citizenship, not tribal affiliation, is the primary qualification for a customary land grant in any tribal area. This has resolved the problem of tribal membership in peri-urban settings. In theory it also clarifies that members of the minority ethnic groups are entitled to customary grants even in tribal areas for the dominant Tswana tribes. The reverse situation must also be countenanced. Any citizen, including the politically dominant and powerful, can seek land or water rights from the land boards responsible for the areas or territories of minority ethnic groups. This has alarmed activists and researchers on Basarwa issues into believing that the 1993 amendment may have been a ploy to allow further penetration of remaining Basarwa territories by Tswana cattle barons in need of additional cattle post areas.[82] Given the necessary political will, this is a problem which could be controlled through the flexible constitution and composition of land boards suggested above; and through the

[81] Act No. 14 of 1993 which came into force on 8 July, 1994.

[82] Liz Wily, "Hunter-gatherers in Botswana and the land issue", (1994) 2 *Indigenous Affairs* 12.

planning and zoning of areas for exclusive allocation of land rights, and stricter application of some of the rules and regulations on allocation of land rights.[83]

The 1993 amendment also addressed some, but not all, of the issues and controversies surrounding the "common law grants" described in Part IV of the Act. First, the amendment clarified that the right of ownership may only be granted to the State.[84] All other qualified recipients must now be content with common law leases. Secondly, it removed the requirement in section 24 for prior Ministerial consent for all long leases. Citizens may now be allocated common law rights without Ministerial approval.[85] The amendment further dispensed with the need for the consent of land boards to subsequent dealings with common law grants in the following situations: where the land has been developed to the satisfaction of the board; in the case of a sale in execution to a citizen; a hypothecation by a citizen; or the devolution of the land on inheritance.[86]

The changes were designed to speed up the allocation process and to encourage further commercialization of land dealings.[87] These "improvements" in the law need not be queried in respect of long leases for industrial, commercial or residential lots in peri-urban areas. As for agricultural leases, especially those granted under the Tribal Grazing Land Policy, the arguments and assumptions behind the policy would suggest that continued official or political monitoring of the allocation process and of the observance of development covenants may still be necessary. It may not be desirable to encourage commercialization of the interests involved. Indeed, if, as suggested by some observers, the policy has not attained its declared goals,[88] consideration must be given to the termination of the leases instead of further commercialization. It must be conceded, however, that this is not likely in the present political environment. It would appear that the government has not derived the necessary lessons about the fallacy of the "tragedy of the commons" argument from the successes or failures of the Tribal Grazing Land Policy. The declared future agricultural policy awaiting implementation envisages further division and fencing of remaining customary grazing ranges.[89]

If the policy of fencing the customary grazing ranges is pursued, there will be a resurgence and reappearance of the problem of minority land and water rights on cattle-post land which has never been legally resolved and was not addressed under the 1993 amendment. The problem surfaced during the original im-

[83] The Tribal Land (Amendment) Regulations, SI No. 64 of 1994, for example, have added to the requirements for a customary grant consideration of other land rights which the applicant possesses in the tribal territory and in any other tribal territory or city or town. Land boards can be enjoined to desist from making customary grants in certain areas, and to persons enjoying similar rights elsewhere. It is arguable that the introduction of citizenship as the primary qualification for customary land grants has not removed the power of the boards to be discerning in the allocation of land rights and to plan and zone areas for particular, exclusive uses.

[84] S. 15, amending s. 24(1) of the Tribal Land Act.

[85] Ibid.

[86] S. 38(1), introduced under s. 19 of the amendment.

[87] Republic of Botswana, *Report of the Presidential Commission on Land Tenure*, Gaborone, 1983, 7–9; and *Report of the Commission of Inquiry into Land Problems in Peri Urban Villages*, 107.

[88] See, for example Molomo, "Land reform and the tragedy of the commons" passim, and compare Frimpong, "A Review of the Tribal Grazing Land Policy in Botswana", passim.

[89] See V.P. Keijsper, *The Tribal Grazing Lands Policy at the Crossroads: Fencing by Individuals in the Communal Areas of Botswana? A Position Paper*, Gaborone, May 1992.

plementation of the Tribal Grazing Land Policy.[90] One of the notorious assumptions behind the policy was that there were vast stretches of cattle-post land in tribal areas which could be zoned off as areas for the allocation of leases and commercial ranches. Preparatory work revealed that some of the designated commercial areas contained significant numbers of Basarwa communities. Exclusive ranches could not be allocated in these areas without the displacement of the communities. At least two legal opinions were sought in the matter, the second being the one quoted at the beginning of this article.[91] According to the first legal opinion, the Tribal Land Regulations provided some indication of the solution to the problem.[92] Regulation 21(4) required of each land board, when submitting a draft agreement for Ministerial consideration, to examine its register for certificates of customary land grants and certify whether or not customary rights subsist in respect of the land, and state whether or not the owner of such rights had been informed of the proposed lease and consented to it. Regulation 21(5) stated that "as long as customary rights in respect of a piece of land subsist no grant of that land shall be made which would conflict with such rights without the consent of their owner".[93] Although the regulation did not expressly so state, if consent was not obtained, or was improperly obtained, any resulting registration could be invalidated.

Regulation 21(5), read independently, could be interpreted as capable of protecting all subsisting customary rights. When read in conjunction with regulation 21(4), it would appear that the intention was to protect the customary rights registered under section 16(2) of the Tribal Land Act. The customary rights of Basarwa in land targeted for the allocation of Tribal Grazing Land Policy ranches were obviously not so registered. This may have encouraged the perception, reiterated by the second opinion quoted above, that the Basarwa had no land rights worthy of protection in the parcellation of the commercial ranches.

For a proper assessment of the true legal position on this problem, it is necessary to go beyond the Regulations and the Act itself. First, nothing in the Regulations or the main Act suggested that the vesting of title or authority over customary land in land boards *ipso facto* extinguished unwanted existing rights. On the contrary, as shown above, one possible interpretation of the repealed section 10(2) was that such rights were not only preserved but also placed beyond the administrative powers of the land boards. If this interpretation of section 10(2) by the courts was indeed wrong, still, land boards as successors in title of tribal authorities were not empowered, either by the Act or customary law, arbitrarily to cancel or extinguish such rights. After independence, any right or power of the land boards to cancel or interfere with subsisting rights was, and still is, subject to the overriding constitutional protection of "property of any kind" or "rights or interests in or over property of any kind".[94] If Basarwa "rights

[90] Hitchcock, *Monitoring Research in the Remote Areas of Botswana*, 2–13 to 2–20; and, generally, Wily, *The TGLP and Hunter-Gatherers*.

[91] Wily, *The TGLP and Hunter-Gatherers*, 66.

[92] Ibid., 52

[93] These regulations were renumbered as regulations 20(3) and 20(4).

[94] S. 8 of the Constitution, described above. It may be noted that s. 13(2) of the Act gave land boards the power to cancel grants, including those "made prior to the coming into operation" of the Act. But this had to be done on specific grounds enumerated in s. 15 which did not include the requirement of the land for Tribal Grazing Lands Policy allocations. And even these provisions did not attempt to authorize unconstitutional cancellations.

of user," or the customary rights of any person or community, are proprietary rights, it is legally and constitutionally untenable for any land board to suggest that the allocation of a common law grant would extinguish "all customary rights in the area".[95] This must be drawn to the attention of every land board, and the overriding constitutional requirements integrated into the Tribal Land Regulations, before any further steps are taken under the controversial proposed policy of fencing the commons by individuals.

The 1993 amendment to the Tribal Land Act dealt with other issues which may be noted, briefly, for the sake of completeness. One of these may indeed be pertinent to the question of subsisting customary rights where tribal land is requisitioned for the allocation of common law leases. This is the question of compensation for "privately owned customary right" taken over by the State or extinguished for public purposes. Section 33(1) of the Tribal Land Act originally mandated the land board concerned to grant the deprived occupier "a right to use land elsewhere of equivalent value to the land" taken over by the State. Section 33(2) further stipulated that the deprived occupier would additionally be entitled to compensation for the value of standing crops and for the value of unexhausted improvements effected to the land. The problem with the principal measure of compensation for land rights so expropriated was that the allocation of land of "equivalent value" by the land board could not always be assured, especially where the resources of the board were finite.[96] This also raised the moot point as to whether the deprived occupier was thereby assured of "prompt payment of adequate compensation" as required by section 8 of the Constitution which, as hinted above, draws no distinction between common law and customary or tribal land rights in the prescription of the requirements for a valid expropriation.[97]

The new section 33 introduced by the 1993 amendment attempted to clear these ambiguities by stipulating that the deprived occupier "may be granted the right to use other land, if available, and shall be entitled to adequate compensation from the State", where applicable, for the value of standing crops taken over; the value of improvements, the cost of resettlement, and "for the loss of right of user of such land". The constitutionality of this new measure may not now be in doubt, but the outstanding issue here is whether adequate compensation will be assessed in reference to parameters used in expropriation of common law rights which refer to the "market value" of the land.[98]

The other notable innovation introduced under the 1993 amendment, but yet to be implemented, concerns dispute resolution. A new section 40 provides for the establishment, by Ministerial Order, of a land tribunal or land tribunals to entertain appeals from land board decisions which, under the old arrangement, must be taken to the Minister. As the overall executive head of the system, who was also predominantly responsible for the composition of the boards, the Minister could not be perceived as an impartial arbiter. The creation of land tribunals to take over his role in dispute resolution would be a welcome alternative to allowing direct access to the formal courts.

[95] Notices published by the Tawana Land Board on the allocation of Tribal Grazing Lands Policy ranches in the Haina Veld area so claimed in 1990.

[96] *Report on the Review of the Tribal Land Act*, 22–23.

[97] *Report of the Presidential Commission into Land Problems in Peri-Urban villages*, 88–89.

[98] Ng'ong'ola, "Compulsory acquisition of private land in Botswana", 302–308.

Legal Strategies for Securing Basarwa Land Rights

This issue must first of all be explored within the context of the existing legal framework and land classification system. Given the small size of freehold land and the legal nature of a freehold title, prospects for securing Basarwa land rights within this category cannot be encouraging. A freehold title is essentially exclusive and absolutist. The holder has the greatest possible interest in the land, and lesser interests may only be accommodated with his permission or licence. This is partly why Basarwa on some of the Ghanzi freehold farms came to be regarded as "squatters" although the farms were originally carved out of some of their traditional territories.

One possible strategy for regaining secure land rights for Basarwa or other "squatters" on freehold land would be to invoke the law of prescriptions. The Prescriptions Act of Botswana indicates that a possessor of land for a continuous period of 30 years may claim the right of ownership.[99] But the requirements laid out for this form of acquisition of ownership are at the same time difficult to comply with and legally uncertain.[100] Only a very slack and careless owner who does not attempt to defend his land from encroachments for such a long period may provide the opportunity. For such a valuable and prized form of property in the country, one can guess that there would not be many such careless owners.

If the law of prescriptions does not offer much hope for securing land rights for Basarwa or other squatters on freehold land, it may generally be more expedient for the government to attempt to resolve any "squatter problem", if it exists, through compulsory acquisition of the affected land. But this can be an exceedingly expensive process because of the constitutional requirement for the "prompt payment of adequate compensation".[101] It is therefore unlikely to be government's preferred solution to the problem.

Basarwa and other indigenous communities on State land may be in a marginally better position (although rights may not be acquired by prescription over State land).[102] This is because, as a matter of policy, the State as the holder of legal title can choose to ignore the "illegality" of any occupation of State land. This is what the Protectorate administration did when Crown lands were originally appropriated. The State can also choose to legitimatize the position of indigenous occupiers, as it has done in the past, through the conversion of State land into tribal land. This may indeed be regarded as a more direct and effective strategy for securing land for Basarwa than reliance upon the derogation from the protection of freedom of movement in section 14(3)(c) of the Constitution. The main constraint, however, is that State land is now a finite resource, and most of it, as noted earlier, is earmarked for fauna and flora conservation and other environmental concerns.

The limited prospects for securing land rights for Basarwa on the freehold farms and State land inevitably lead to greater focus on tribal land and the governing legislation, the Tribal Land Act. In spite of its shortcomings, the system of land board administration put in place by this Act is likely to survive well into the 21st century, after enduring for the last quarter of this century. For the purposes of securing Basarwa rights within this system, it is necessary to

[99] S. 3 of Proclamation 76 of 1959, Cap. 13, 01.
[100] See Silberberg and Schoeman's *Law of Property*, 3rd ed. Durban, 1992, 223–237.
[101] Ng'ong'ola, "Compulsory acquisition of private land in Botswana", 308–315.
[102] S. 14(3) of the Prescriptions Act.

isolate three categories of Basarwa. First, there are those located in areas designated under the act as Tribal Territories for the dominant Tswana "tribes". This group includes Basarwa who were incorporated as serfs into the lower strata of "Tswanadom" and generally not regarded as entitled to land or property rights by their Tswana overlords. Their precarious position has in theory been addressed by the replacement of tribal affiliation with citizenship as the primary qualification for a customary land grant. This group of Basarwa should not now be denied land rights in certain tribal areas under the pretext that they are not "tribesmen" or "full members" of the dominant tribe of the area.

To reinforce this positive development, allocation rules and procedures and other aspects of the land boards system must now be made "Basarwa friendly". The allocation rules, for example, must be adjusted to accommodate forms of land tenure and use not familiar under the Tswana model upon which the Act was based. The search must also begin for more concrete ways of sensitizing land boards to the rights and needs of Basarwa and other marginalized ethnic groups. This must include and involve flexible constitution and more representative composition of the land boards.

These changes and adjustments can also be recommended for the second category of Basarwa, found or located in tribal areas where they or other minority ethnic groups dominate and not incorporated into the traditional Tswana polities. For this group, the constitution and composition of responsive, representative and localized land boards might be the antidote to the growing concern that the citizenship qualification for a customary land grant will lead to the appropriation of lands or territories still available to them by the more powerful groups of citizens. The problem may also ultimately require legislative reform to provide for exclusive allocation of land rights in certain areas. This form of discrimination in favour of marginalized and under-privileged ethnic groups would not be contrary to section 15 of the Constitution and does not deserve to be vehemently decried for political reasons.

It is also necessary to educate and sensitize land boards in the affected areas and everywhere of the constitutional protection of existing or subsisting rights in tribal land. The Constitution does not discriminate between rights subsisting in the various categories of land. It does not permit arbitrary expropriation or extinction of all kinds of proprietary rights and interests. There is no doubt that indigenous land rights of Basarwa and other ethnic groups are proprietary in nature. Land boards have no inherent power to extinguish these rights in the process of making customary or common law grants without strict regard to the "due process" and compensation requirements of the Constitution. Allocations made disregarding subsisting Basarwa land rights can conceivably be challenged as unconstitutional and set aside. This is also the position as regards the third category of Basarwa, whose rights and interests were apparently ignored in the allocation of some Tribal Grazing Land Policy leases.[103] There is no obvious legal principle to pre-empt a reconsideration of allocations which were unconstitutionally made, even after the passage of several years. It must be conceded, however, that practical and political considerations would weigh heavily against this strategy for securing land rights for Basarwa. It is not difficult to imagine that a government controlled by cattle-owning interests would attempt to stop any litigation of this nature.

[103] Wily, "Hunter-gatherers in Botswana and the land issue", 12.

This leads to the outstanding question of this discussion and the last legal strategy to be considered for securing Basarwa land rights. The question is whether there is another basis for asserting Basarwa land rights beyond the Tribal Land Act and the Constitution. In the wake of recent legal developments in the Commonwealth, especially the outcome of the *Mabo* litigation in Australia,[104] the question has arisen as to whether Basarwa land rights can be asserted or protected on the basis of the priority of their existence in the country.[105] This is not the occasion for a comprehensive discussion of the doctrine of aboriginal title and its place in the jurisprudence of Botswana or Southern Africa. For our purposes it will suffice to make a few preliminary observations about the growth of this doctrine and to take note of aspects of the *Mabo* case which suggest that the doctrine might be of limited utility to the cause of Basarwa.

The first preliminary observation is that the doctrine has been developed under Anglo-American "common law" and British colonial jurisprudence. Its place and role within the Roman-Dutch common law heritage of Southern Africa is not entirely certain.[106] The doctrine, secondly, has emerged in reference to the colonial law of so-called settled colonies, not the protectorates of Africa. Thirdly, demands for the recognition and protection of aboriginal rights in some of these countries have been reinforced by treaty provisions, agreements and, lately, by legislation.[107] In the case of Basarwa we are dealing with people who were not even accorded due political recognition by the colonial authorities. The relevant agreements were concluded only with the leaders of the dominant "Tswana tribes".

In *Mabo's* case the Australian High Court contributed to development of the doctrine of aboriginal title by holding (by a majority of six to one), that the annexation of the Murray Islands to the State of Queensland in 1879 did not by itself extinguish the customary or native title of the indigenous inhabitants to their lands.[108] The prevailing position before this was that the acquisition by the British Crown of Sovereignty over any Australian colony necessarily extinguished native title. Sovereignty gave the Crown "radical title" to land with which it could appropriate land to itself or alienate it to other holders. The extension of the Crown's sovereignty therefore meant that no one held land absolutely; all land was held of or from the Crown. The holding that native title survived the imposition of sovereignty contradicted this so-called doctrine of tenure which is regarded as fundamental to the English law of property. The Australian High Court confirmed that there is another source of title to land other than a Crown grant.

[104] *Mabo* v. *Queensland* (No 2), (1992) 107 ALR 1; 175 CLR 1; and [1993] 1 LRC 194.

[105] This the underlying theme of Alice Mogwe's report with the catchy title *Who Was (t)here first?* cited above.

[106] See T.W. Bennett, "Historical land claims in South Africa", paper presented at the International Colloquium on Property Law at the Threshold of the 21st Century, Maastricht, The Netherlands, August 1995, 9–14.

[107] See E. Stokes, "The Treaty of Waitangi and the Waitangi Tribunal: Maori claims in New Zealand", in G. Cant et al. (eds.), *Indigenous Land Rights in Commonwealth Countries*, 66–80; L.R. Hiatt, "Aboriginal land tenure and contemporary claims in Australia", in Wilmsen, *We Are Here*, 99–117; and E. Young, "Aboriginal land rights in Australia: expectations, achievements and implications", (1992) 12 *Applied Geography* 146–161.

[108] For my brief observations on this case I have relied on the summary of the judgment in (1993) 19, 1 *Commonwealth Law Bulletin* 45 and benefited from a succinct review by P. Butt, "The Mabo Case and its aftermath: indigenous land title in Australia", paper presented at the International Colloquium on Property Law at the Threshold of the 21st Century, Maastricht, The Netherlands, August 1995.

The court also discounted another popular concept of colonial jurisprudence. This is the assumption that the Crown's sovereignty and radical title to land was often acquired over vacant or waste lands or *terra nullius*. If the native title of the Murray Islanders survived the imposition of the Crown's sovereignty, there was no *terra nullius*. In colonial jurisprudence the concept of *terra nullius* was often invoked in reference to vacant lands as well as to lands inhabited by communities regarded by colonial authorities as "barbarous and uncivilized", and lacking in "mature" forms of social organization. The court discounted both versions. Historical and other facts about the Murray Islands did support the first version, and the enlarged version of *terra nullius* was unjust and discriminatory and denigrated indigenous social systems.

Although native or customary title was not extinguished by the imposition of colonial rule, the court acknowledged that it could be extinguished by subsequent deliberate acts of the State in the exercise of sovereign power. The court suggested that a Crown grant in fee simple could have such an effect, although perhaps not the appropriation of the land by the State for uses which were not incompatible with the enjoyment of the native title. The dedication of land for a reservation or a national park, for example, did not necessarily extinguish title. The court was somewhat divided on whether subsequent extinction of native title other than through a clear and unequivocal legislative act could be "wrongful" and give rise to compensatory damages. The majority felt that it could not. The court in this respect appeared to uphold at least one familiar principle of colonial jurisprudence under which judicial review of the exercise of administrative or executive power by colonial administrators was severely discouraged.[109]

If the doctrine of aboriginal or native title as developed by this case were to be accepted as part of the Roman-Dutch common law heritage of Botswana, it is more than likely that the banishment of the fiction of *terra nullius* would be endorsed. It would be acknowledged in this regard that not all lands appropriated by the Crown in Bechuanaland were "vacant or waste". Crown lands in some parts of the Protectorate were appropriated with visible or clear Basarwa rights which, in terms of the concept, would have survived the appropriation. If the affected communities could prove the continued existence of their rights or titles, they would be entitled to demand full and proper respect for those rights and titles. It is not entirely certain from the *Mabo* case how native title could be effectively or conclusively proved. In Botswana the passage of time from the date of the first proclamation of Crown lands would complicate the exercise. Furthermore, any number of deliberate acts of the State in the exercise of sovereign power could have extinguished any surviving titles. The allocation of Crown lands under freehold, leasehold or quit rent grants, for example, would have had such an effect. It is a moot point whether Basarwa titles would have been extinguished by the numerous legislative measures on fauna and flora conservation. If not, the doctrine would be useful to the Basarwa cause only to the extent that the State would be compelled to take full cognizance of Basarwa rights in its management of national parks, game reserves and other resources

[109] In *Nyali* v. *Attorney General* [1952] 1 Q.B. 15, for example, the colonial courts propounded the "Act of State" doctrine under which colonial officers in the African colonies or protectorates were protected from the consequences of failure to carry out their duties properly, in accordance with the law.

on State land. The State would still have the power or ability to extinguish Basarwa rights, through deliberate acts, but this time as long as constitutional provisions and constraints are complied with. The doctrine of aboriginal title would otherwise be of little use in the correction of past injustices and reclamation of original Basarwa rights or titles lost to the freehold or state land sectors.

Journal of African Law, 41: 27–42

MYTH AND REALITY OF LAW, LANGUAGE AND INTERNATIONAL ORGANIZATION IN AFRICA: THE CASE OF AFRICAN ECONOMIC COMMUNITY

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INTRODUCTION

The contemporary African international community is afflicted by a linguistic dilemma. On the one hand, the African elites are constrained to accept the imperative of adopting the inherited colonial languages in order to gain easy access to the global international community currently dominated by the linguistic condominium of the erstwhile imperial powers. On the other hand, these African elites, propelled by nationalistic sentiments, express in legal instruments a sanguine hope of promoting their indigenous tongues to the rank of official/working languages, not only on the national, but also on the continental scale. This would appear necessary in order to avoid cultural or linguistic suicide. However, in concept and practice, the whole idea seems to have remained in the realm of myth.

Describing the "myth and reality of colonial legacy in Nigerian education", Michael Omolewa observed: "The issue of language was . . . one of the problems that was not given adequate consideration".[1] Why? Because "leaders were guided by emotions . . .". That observation prompted two pertinent questions: was the country prepared to colonize the English language and turn it into a vehicle for welding together the various ethnic and language-groups in the country? Or, was the nation hoping to impose one of the languages of the larger groups on the nation?[2] These probing questions are also applicable to the rest of Africa.

The myth of promoting African languages must have been one of the motivating factors for including them on the list of official media of communication in some African international organizations. Thus, whenever African states with different colonial backgrounds establish international organizations, they conventionally adopt a multilingual policy for the choice of their official/working languages. This is well illustrated by Article 29 of the Charter of the Organisation of African Unity (OAU) (1963) and Article 58 of the Economic Community of West African States (ECOWAS) Treaty (1975). The African Economic Community (AEC) Treaty (1991) has followed that tradition. Article 97 of the AEC Treaty stipulates that the working languages of the community should be the same as those of the OAU as defined in Article 29 of its Charter. These are African languages, English and French (Portuguese and Arabic were subsequently added as shown below).

However, it has emerged that, in the OAU and ECOWAS fora, no African language (apart from Arabic) has actually been used as an official/working language. There is therefore a gulf between myth and reality, that is, between

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[1] M. Omolewa, "Myth and reality of the colonial legacy in Nigerian Education 1951–84", in T.N. Tamuno et al. (eds.), *Nigeria since Independence: The First 25 Years*, Vol. 3, Ibadan, 1989, 9–34.

[2] Ibid., 18.