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The two concepts of the right of people to self-determination and the right to development need to be explored within the context of a unitary State comprising minorities and indigenous peoples.

d) Conclusion

Despite the clearly urgent need for relevant research in the above-mentioned areas, there is also need for attention to be focused on the empowerment of the Basarwa peoples through various methods. These include empowerment through use of legal provisions to protect their human rights in accordance with both national and international law. However, law alone is insufficient and requires will for it to be realised. Government policies should be developed to reflect a commitment to human rights concepts, and the peoples of Botswana should be encouraged to actively participate in the protection of the rights of the Basarwa peoples.

References

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THE CONSTITUTION AND MINORITY RIGHTS

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1. INTRODUCTION

1.1 Constitutions have become a central feature of political and legal life in modern societies. The basic regulatory function of a constitution is to provide a fundamental law of the land from which all laws within a state derive their validity and authority. The term "constitution" is traditionally understood in two different senses, the "abstract" and the "concrete" (1). The abstract usage refers to the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulates the relations of those organs inter se. In its concrete sense, the term denotes an identifiable document (or set of documents) in which are stated the most fundamental laws of the land (i.e. - the laws of the constitution). Both of these meanings will inform our discussion.

1.2 A constitution serves various purposes. In addition to establishing and defining the basic structures of the state, the constitution also states the basic philosophy underlying a particular state (e.g. whether the state is theocratic, secular, a sovereign republic, unitary in character or a federation) (2). In this regard, a constitution is a programmatic document embodying the ideals toward which a nation strives.

At another level, the constitution is not merely a fundamental law of the land. It is a social charter or contract embodying and encompassing the aspirations of a nation. It is a contract detailing the essential conditions to be observed between those who govern and those who are governed. So fundamental is this consideration, it has been maintained that a government which violates the charter is to be rejected and/or disobeyed.

The constitution of Botswana (3) adopts the ideals of a liberal democratic state. It includes a bill of rights predicated on a commitment to the rule of law and human rights. Great emphasis is placed upon the individual and the assurance of her/his liberty, freedom and equality with fellow individuals.

Constitution-making, however, is not always a smooth process. Often the exercise is attended with the bitterest of struggles. Ultimately, what goes into a constitution is a function of the configuration of forces (political, social, cultural or economic nature) at play in the making of a state. It has been suggested by some scholars of a Marxist persuasion that the form and content of a constitution represents truce lines in the on-going class struggle.

Despite the avowed claims of equality, constitutions do not necessarily (or always) afford equal protection to all sections of the society. Disparities in material well-being often render void the promise of equality guaranteed by the constitution. This is especially the case with

those constitutions which protect the so called first generation human rights and do not treat the individual as an indivisible entity in need of comprehensive protection.

However, constitutions are still used as rallying points for the enforcement of human rights and the assertion of other claims by individuals. Yet whereas individuals can assert their rights as enshrined in the constitution, there is a limited scope for groups of individuals as such to obtain relief unless reliance is placed upon some express provision in the law.

2. MINORITIES AND MINORITY RIGHTS

2.1 There does not exist a country in the world today which is absolutely homogeneous in every respect; its citizens sharing the same language, culture, beliefs and traditions. Many countries are blessed with a rich mosaic of peoples co-existing in a social environment underpinned by equality, non discrimination, respect, and protection for the various sections of society.

Ethnic and cultural diversity has not been cherished or well regarded as a blessing in some states. In those states, peaceful co-existence has not been attained and racial and/or cultural intolerance has invariably adversely affected ethnic minorities (4). This has happened despite the adoption by the international community in general of internationally accepted standards of human rights which universally apply to all individuals irrespective of their ethnicity or other traits. (5) The United Nations Declaration on Race and Racial Prejudice states that:

"All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such." (6)

The United Nations has since its inception demonstrated an increasingly active interest in the welfare of minorities and has taken concrete steps to secure the upliftment of their human rights conditions. (7) An example in this regard is the International Covenant on Civil and Political Rights which states that:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." (8)

2.2 Defining minority rights

A universally-acceptable definition of a 'minority' is yet to be attained. The need to find an acceptable definition is made the more pressing and significant because legal dispensations are enjoyed by clearly defined categories of beneficiaries. An unfruitful search for a universal definition should not, however, be a hindrance to the protection of minorities.

Most definitions of minorities regard them as national, ethnic, religious or linguistic groups different from other groups inside a sovereign state. Further criteria distinguishing minorities are that they must be numerically smaller. Special precautions must be taken to ensure that minorities do not suffer any prejudice on account of their lack of numerical strength.

Furthermore, to require protection, minority groups must be in a non dominant position. Differences in ethnic identity, culture, language and religion must be characteristics not shared by the majority. These criteria are not exhaustive and the concept of minority ultimately is to be understood as denoting a multi-faceted relationship between a dominant and a non-dominant ethnicity and culture.

3. THE CONSTITUTION: INDIVIDUAL VERSUS COLLECTIVE RIGHTS

As already indicated, the constitution of Botswana embodies the ideals of a liberal democracy. Such ideals include the protection of the rights and freedoms of the individual. The individual is the ultimate and primary beneficiary of legal dispensations offered within the legal system. Individual values are cherished and they take precedence over other claims. Unless expressly stated in the law, groups of individuals as such are not the immediate beneficiaries although it is assumed that fulfilling the aspirations of individuals will result in a corresponding fulfilment in the aspirations of the society. The short-coming of this view is that it relegates communitarian values and interests to a status of irrelevance.

It is more wishful thinking than realistic to believe that an individual can fully attain the fulfilment of his aspirations when he is shorn of his cultural values, particularly in the case of a society such as that which prevails in Botswana. Without exception, our societies have been predicated on communitarian values and the ranking of the interests of the community over that of the individual. In this regard, for instance, communal ownership of resources such as land and water was historically accepted as the norm.

When looking at the issue of whether or not collective rights can be asserted under the constitution, it is important to bear in mind the fact that it protects individualist values. Only a limited number of rights such as freedom of assembly, freedom of conscience and trade union rights can be asserted collectively under the constitution. (9)

The rights in question, however, cut across ethnic and cultural lines. Underprivileged communities, especially ethnic minorities are not in a position to mobilise governmental powers as elaborated in the constitution for their material advancement. As a result, the central issues underpinning the survival and livelihood of ethnic and indigenous peoples cannot be adequately addressed within the framework of a constitutional bill of rights. (10)

Minorities who have not benefitted from the fruits of Botswana's independence have limited legal avenues for seeking redress, such as through court action. A successful claim could be maintained in a court of law if the litigant could point to a breach or violation of a right conferred upon him by the law. In the absence of any formal recognition in the constitution, ethnic minorities as a category are dependent on the benevolence of the government of the day and good samaritan efforts of donor agencies and non-governmental organisations for survival.

The lamentable position of minorities in Botswana has its bitter roots in colonialism. The colonial overlords were not concerned to bequeath to us a constitution which recognised the rich ethnic and cultural diversity of Botswana. Policies of the colonial administration further fragmented minority populations. Thus denied autonomy and the right to exist freely and

independently, they were largely subsumed into the dominant cultures, sometimes as serfs who constituted a convenient reservoir of labour. The relationship between the dominant majority and the minorities did not take the form of slavery or serfdom in all situations, but it was nevertheless a relationship of dominance and subservience. The said relationship existed long before the arrival of the colonial masters who were not concerned to dismantle or challenge its immoral foundations. Minority at the time often simply meant military inferiority in the battles and wars that took place for territory, cattle and other spoils. Typically, those who were last to receive guns, horses and other newly introduced instruments of power were at a disadvantage and susceptible to subjugation (11).

Some explanation has been offered concerning the imbalance in the relative strengths of the communities at the time. As Kgosi Linchwe said of Basarwa;

"They were chasing wild animals, picking wild berries and digging for roots whilst we were developing invincible armies'. (12)

This attitude has changed little and in some respects has only been somewhat sanitized. The arrival then of colonial masters meant a double colonial yoke for weaker communities.

Since we have seen from the foregoing that a minority status was not necessarily predicated on cultural and ethnic differences only, but also on military strength, it follows that a community characterised as a minority may not necessarily have been numerically inferior.

This is an important point to observe since we shall maintain that it is a perception which has crept into the provisions of our constitution. In many areas of the country therefore those communities which are dominant are not necessarily numerically superior to the non-dominant communities. This again is a critical point of departure from the generally accepted usage of the term minority. Those stronger communities which subjugated weaker communities were thereby able to enlarge their numbers and therefore achieve dominant status on the numerical strength thus achieved. Assimilation by the weaker communities into stronger communities was not only the result of military or political struggles, there were those members of weaker communities who thought assimilation to be a necessary expedient for self-advancement and economic opportunity (13).

4. THE CONSTITUTION, THE HOUSE OF CHIEFS AND MINORITY RIGHTS

The constitution of Botswana has been a great disservice to minority communities in several respects. First, because historically 'minorities' were militarily and politically weaker, they were not in a position to make any input (or any meaningful input) into the negotiations leading to the formulation and adoption of the independence constitution of 1966. Most of them were in fact denied any representation because of the then existing political set-up.

Second, the very characterisation of certain communities as minorities in view of our colonial history is untenable. Historically, designation of a community as a minority meant that the community in question could be subjugated. That also was a sufficient basis for discriminating against the said community. The present practice of labelling communities minority tribes, for instance, stems from history, both colonial and pre-colonial. The independence constitution of 1966 did not address and remedy this imbalance. In fact it appears to have confounded it.

Third, the provisions of the constitution relating to the establishment and composition of the House of Chiefs expressly distinguish between certain allegedly principal tribes entitled to automatic representation in the House of Chiefs and the so called minority tribes which are not afforded direct representation. This is a severe set back to the recognition and protection of those communities which are ethnically different from the so called principal tribes. The constitution shapes and is shaped by political opinion. A failure to recognise certain communities on an equal footing is likely to shape and endorse views which perpetuate cultural and ethnic dominance. Minority communities have expressed a desire to be culturally independent. Their exclusion from the constitution has adverse implications for their ability to use it for a mobilisation and protection of their interests. The risk of a constitution which is explicitly divisive cannot be overemphasized.

5. SOME RECOMMENDATIONS

It should be recognised that cultural diversity is a blessing to any nation. Each community in the nation has a role to play in nation building and national development. All previous and present policies which were, and are assimilationist in outlook must be abandoned in favour of policies which aim at autonomy, affirmative action and empowerment for minorities, indigenous peoples and the disadvantaged in society.

Furthermore, a strengthening of existing legal structures would provide the framework for the enforcement of rights. Action which may be taken in this regard includes constitutional amendment and other legislative measures to ensure greater equality amongst communities. In addition to legal measures, there is a need to develop a comprehensive structure of policies which would more appropriately address the specific needs of communities. Legal measures are only a small component of a comprehensive programme of empowerment.

Botswana should therefore move speedily to lay down structures which would bring every citizen within the ambit of the national goals of social justice. A harmonisation of Botswana laws with international standards would strengthen the suggested framework of empowerment.

NOTES

1. O. Hood Phillips; *Constitutional and Administrative Law* (7th Ed.) p.5.
2. S. de Smith; *Constitutional and Administrative Law* (4th Ed.) pp. 16-18.
3. de Smith, op cit, at pp. 16-19.
4. The independence constitution of 1966. It is always important to bear in mind the colonial history preceding the adoption of this constitution.
5. Minorities can be ethnic, religious, linguistic.
6. See for instance the UN Universal Declaration of Human Rights (1948).
7. Declaration on Race and Racial Prejudice (UNESCO-1978).
8. See also MINORITY RIGHTS, Fact Sheet No. 18, (United Nations) p.1.
9. Ibid.
10. Adopted by the UN General Assembly in 1966, Article 27.
11. The Constitution of Botswana, Chapter 2.
12. Ibid.

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

LEGAL RECOGNITION OF TRADITIONAL LAND RIGHTS: RESEARCH NOTES AND AGENDA

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

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

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

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