



This publication provides an overview of status and trends regarding the constitutional, legislative and administrative protection of the rights of indigenous peoples in South Africa.

This report provides the results of a research project by the International Labour Organization and the African Commission's Working Group on Indigenous Communities/Populations in Africa with the Centre for Human Rights, University of Pretoria, acting as implementing institution. The project examines the extent to which the legal framework of 24 selected African countries impacts on and protects the rights of indigenous peoples.

*This report was researched and written by K Bojosi (with comments by Alice Mogwe incorporated).*

For an electronic copy of the other 23 country studies and the overview report of the study, see [www.chr.up.ac.za/indigenous](http://www.chr.up.ac.za/indigenous)

Country Report of the Research Project by  
the International Labour Organization and the African Commission on Human and Peoples' Rights on  
the constitutional and legislative protection of  
**the rights of indigenous peoples:**  
**Botswana**

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# **BOTSWANA: CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS PEOPLES**

K Bojosi (with comments by Alice Mogwe incorporated),  
*Botswana: Constitutional, legislative and administrative provisions concerning indigenous peoples*

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## Part I: Introduction to indigenous peoples, the country and its legal system

### 1 Indigenous peoples in the country

#### 1.1 Basic situational overview

In Botswana, the Basarwa identify themselves as indigenous peoples.<sup>1</sup> There are an estimated 50 000 to 60 000 Basarwa in Botswana, which is approximately three per cent of the country's population.<sup>2</sup> At independence the government of Botswana adopted a policy of non-racialism which de-emphasized ethnicity. As a result, the official population census makes no reference to ethnicity.<sup>3</sup> Basarwa inhabit essentially all parts of Botswana.<sup>4</sup>

Basarwa regard themselves, as indeed historians suggest, as the earliest inhabitants of large parts of Southern Africa, including the territory that is present-day Botswana.<sup>5</sup> Furthermore, they are considered linguistically, culturally and even physically distinct from the rest of the population of Botswana. For example, they have been described as shorter in height and as 'yellowish' in complexion, with narrow eyes and high cheekbones.<sup>6</sup> However, these physical distinctions are mostly found in colonial literature and in reality the majority of Basarwa do not exhibit any physical characteristics distinguishing them from the rest of the population. Furthermore, although they are composed of distinct tribes with distinct languages, all their languages are characterised by the 'click' sound.<sup>7</sup> Traditionally, they depended on hunting and the gathering of wild

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<sup>1</sup> This is the name that these communities are known by in Botswana. However, they are also known internationally as the Khoisan or Bushmen.

<sup>2</sup> Report of the Working Group on Indigenous Populations/Communities Commission to the Republic of Botswana, 15 – 23 June 2005 (Working Group Report of Botswana).

<sup>3</sup> Republic of Botswana Central Statistics Office 2004, 'Wildlife Statistics 2004' available at <http://www.cso.gov.bw/> (accessed 18 February 2008).

<sup>4</sup> QN Parsons 'The Evolution of Modern Botswana: Historical Revisions' in LA Picard (ed). *The Evolution of Modern Botswana* (1985) 27; Government of Botswana 'The Relocation of Basarwa from the Central Kalahari Game Reserve' <<http://www.gov.bw>> (accessed 18 February 2008).

<sup>5</sup> GB Silberbauer Report to the Government of Bechuanaland on the Bushmen Survey (1965) 7 (Bushman Survey).

<sup>6</sup> A Sillery *Botswana A Short Political History* (1974) 9.

<sup>7</sup> Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Botswana 15 – 23 June 2005 12.

fruits and berries for their livelihood. Furthermore, because of the harsh climatic conditions of the territories they occupied, they tended to be nomadic and the majority did not rear livestock.<sup>8</sup> Politically, they are believed to have been generally less centralised than their Bantu counterparts, and were organised in small groups or bands with no political centralised leadership in the mould of chiefs as among the Bantu.<sup>9</sup> However, all these statements are generalisations and studies tend to be contradictory. For example, revisionist researchers suggest that the Basarwa were as politically organised as the Tswana, with leaders in the mould of chiefs.<sup>10</sup> Furthermore, there is evidence indicating that some Basarwa groups became sedentary and reared small stock long before the arrival of the more dominant Tswana groups.<sup>11</sup>

The above notwithstanding, the economic, social and political lifestyles of Basarwa have been altered over the years. Their contact with the powerful and politically centralised Tswana, the imposition of British rule and climatic changes all directly impacted on the Basarwa. Contact with the Tswana meant a gradual assimilation into Tswana chiefdoms, often resulting in the less politically organised Basarwa occupying subordinate positions in the highly-stratified Tswana chiefdoms. This was a fate essentially suffered by all politically less-centralised and militarily weak non-Tswana ethnic groups, such as the Wayei, Hambukushu, Kgalagadi and Kalanga, albeit to varying degrees.<sup>12</sup>

The imposition of British rule meant the imposition of European political, economic and legal institutions which had an adverse impact on the social, economic and political lifestyle of the Basarwa and other ethnic groups including the Tswana. For example, laws were promulgated to create wildlife conservation areas, the individualistic European land tenure system was introduced which essentially dealt away with the communal land tenure system common among Basarwa and other African ethnic groups, and laws were

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<sup>8</sup> Bushmen Survey (n 5 above).

<sup>9</sup> C Ng'ong'ola and B Moeletsi 'The legal framework for the assessment of land rights for Basarwa and other marginalised ethnic groups in Botswana' Report Prepared for the CHR, Michelson Institute, Gaborone, 9.

<sup>10</sup> As above, 7.

<sup>11</sup> T Tlou *A History of Ngamiland 1750 to 1906: The Formation of an African State* (1985) 11.

<sup>12</sup> Sillery (n 6 above) 9.

promulgated to institutionalise and legalise Tswana political hegemony, not just over the Basarwa but over other non-Tswana ethnic groups as well.<sup>13</sup> Climate change coupled with the above meant a decline in animal populations available for hunting and less land and natural water resources available to accommodate the foraging lifestyle of the Basarwa.

As a result of the above, a study conducted in the 1970s concluded that the Basarwa were then already far removed from the nomadic, pristine human foragers depicted in popular literature. The Basarwa were instead an increasingly impoverished, landless ethnic group largely dependent on government poverty-alleviation policies.<sup>14</sup> This viewpoint is important because it grants a purchase on the thinking behind government policies and laws impacting on the Basarwa and also on the government's attitude towards recognising the Basarwa as indigenous peoples. Firstly, the government views the San issue as simply a 'development' or economic problem. While a developmental approach is not problematic, in itself, the model adopted by the government is problematic because it is not people-centred. Secondly, an understanding of political institutions and the legal framework introduced during British rule which are still intact is crucial to crafting practical recommendations for legal and policy reform.

The Basarwa consider themselves to be politically, socially and economically marginalised. Indeed, there is evidence to suggest the Basarwa are at the bottom of the economic, political and social strata in Botswana.<sup>15</sup> The Basarwa are recognised by the African Commission on Human and Peoples' Rights (African Commission) as an indigenous people, and is the only group in Botswana self-identifying as an indigenous people in terms of the international understanding of that term.<sup>16</sup> Nevertheless, the

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<sup>13</sup> This is discussed under the section land and natural resources below.

<sup>14</sup> L Wily 'Settlement as a strategy for securing land for nomads: An examination of Botswana government's current programme of settling the Kalahari San' Pastoral Network Paper, 7c.

<sup>15</sup> I Mazonde 'Equality and ethnicity: How equal are San in Botswana' in RK Hitchcock and D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004) IWGIA Document 110, 138.

<sup>16</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (IWGIA) (2005) 16.

government of Botswana does not recognize the Basarwa as indigenous peoples on the basis that all 'Batswana'<sup>17</sup> are indigenous to Botswana.<sup>18</sup>

## **1.2 Main human rights concerns of indigenous peoples**

The human rights concerns of indigenous peoples in Botswana may be grouped into the following, namely: leadership, education, culture, discrimination and land rights and development model. In essence, indigenous peoples in Botswana are unhappy with the lack of official recognition of their traditional leaders in the same way that Tswana traditional leaders are recognised. Furthermore, indigenous peoples are not keen on education, largely due to fears that the government education policy is geared towards destroying their culture and assimilating them into Tswana society, because the use of Tswana language as a medium of instruction in schools places indigenous (and other non-Tswana speaking) students at a disadvantage, and because education does not always respond to their needs. Indigenous peoples believe that government policies, including the education and traditional leadership policies, are discriminatory. Lastly, indigenous peoples believe that government development policies are a threat to their existence, are aimed at assimilating them into Tswana society and are designed largely without the input of indigenous peoples.<sup>19</sup>

## **2 Background to the country**

### **2.1 Pre-colonial history**

As already stated, the Basarwa are generally believed to be the first inhabitants of the territory that is now Botswana. Conventional histories which suggested that Bantu groups moved into Botswana around the 17<sup>th</sup> or 18<sup>th</sup> century have been challenged by evidence pointing to Bantu life in the Kalahari dating much further back, and in east-central Botswana dating back to the 13<sup>th</sup> or 12<sup>th</sup> century or earlier.<sup>20</sup> The Tswana are one of the

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<sup>17</sup> The term Batswana is normally used in two senses. It is used to refer to the original speaking people. However, it is normally used in official discourse to refer to the people of Botswana.

<sup>18</sup> Report on the Third Workshop on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples, Gaborone, Botswana, 18 - 22 February 2002. E/CN.4Sub.2/AC.4/2002/4.

<sup>19</sup> Working Group Report of Botswana (n 2 above) 17-19.

<sup>20</sup> Parsons (n 4 above) 28.

three subdivisions of the Sotho group of the Bantu family.<sup>21</sup> Conventional history suggests that Batswana migrated from the north at the time of Bantu migrations into southern Africa. The first of these Tswana groups are thought to be the Kgalagadi who apparently settled in eastern Botswana and intermingled with the Basarwa.<sup>22</sup> With time the Barolong arrived, pushing the weaker Kgalagadi further into the Kalahari Desert.

Subsequent intertribal disputes fragmented the Barolong into smaller tribes who fanned out into various parts of Botswana. These splinter tribes assimilated other tribes, mostly non-Tswana, who in the main accepted the political hegemony of the 'principal tribe'. From these developed a genre of ethnicity in which the assimilated tribes would be regarded as part of the 'principal' tribe whilst at the same time maintaining their distinct ethnic identity. Thus, for example, the Ngwato which grew to become the largest tribe in Botswana was composed of the original Tswana group (principal tribe) that broke away from the Barolong splinter groups and other groups, like the Kalanga, Kaa, and the Tswapong.<sup>23</sup> As were other militarily weak ethnic groups, the Basarwa were assimilated into this medley of ethnicity. As a result the Basarwa and other smaller ethnic groups were for a long time regarded merely as components of these Tswana tribes.<sup>24</sup> It was this kind of political organisation that existed in Botswana when colonial rule was imposed. It was also from this history that the concept of 'principal tribes' evolved in Botswana and was institutionalised by the British through their so-called indirect rule policy.

## 2.2 Colonial history

Formal British rule was imposed in 1884 over the southern part of Botswana and the following year over the northern part. This was as a result of Britain's desire to guard against German and Boer expansions from the west and south respectively, and not because Tswana chiefs sought protection from the British.<sup>25</sup> As a result the British settled

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<sup>21</sup> Sillery (n 6 above) 6.

<sup>22</sup> Sillery (n 6 above) 7. Today it is not uncommon to refer to the Basarwa and Bakgalagadi as if they form part of a single group.

<sup>23</sup> As above, 9.

<sup>24</sup> ES Munger *Bechuanaland A Pan-African Outpost or Bantu Homeland* (1967) 7.

<sup>25</sup> LA Picard 'From Bechuanaland to Botswana: An Overview' in Picard (n 4 above) 10.

a number of Boer families in the Ghanzi area in western Botswana to act as a buffer against the Germans. The Ghanzi area was almost exclusively occupied by Basarwa and Bakgalagadi. The Boer families were granted freehold leases over these lands as if the land was previously unoccupied.<sup>26</sup> However, this was in line with the British policy of indirect rule in terms of which local traditional political institutions were used to rule over native populations. As a result, only native populations which were in political control were recognised as tribes and as having distinct political territories. Consequently, the country was divided into administrative tribal territories which simply mirrored the existing Tswana-controlled territories.<sup>27</sup> This, in essence, formalised the prevailing idea that there are eight principal tribes in Botswana, all of which are Tswana.

This policy was institutionalised in 1919 when the Native (later Africa) Advisory Council was established to provide a forum for the chiefs to debate the activities of the Protectorate government. No non-Tswana chiefs were admitted into this Council until the 1940s when representatives from Ghanzi, Chobe and the Francistown areas participated, but even then only as sub-chiefs.<sup>28</sup> This was in line with the pre-colonial political arrangement in terms of which the leaders of non-Tswana groups assimilated into the 'principal tribes' were regarded as 'sub-chiefs' subordinate to the 'paramount' Tswana chief. At independence, the African Advisory Council was transmuted into the House of Chiefs, but maintained its constitutive philosophical precepts.

### **2.3 Post-colonial history**

Multi-racial elections were held in 1965 and Botswana became independent on 30 September 1966. Independence brought a number of political changes whilst maintaining important institutional frameworks. These political changes were carried out within the context of the government's policy of creating a non-racial, non-tribalistic nation in which different ethnic groups would be regarded as a single Tswana nation.<sup>29</sup> The

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<sup>26</sup> M Guenthe *The farm Bushmen of the Ghanzi District* (1979) 55-56.

<sup>27</sup> Bechuanaland Protectorate Proclamation 9 of 1899 and Bechuanaland Protectorate Proclamation 28 of 1909.

<sup>28</sup> Sillery (n 6 above) 127.

<sup>29</sup> QKJ Masire *Very brave or very foolish: Memoirs of an African democrat* (2006) 47.

manner in which this objective was achieved was to transfer administrative, judicial and executive powers from Paramount Chiefs to the new state government. Prior to that, executive, administrative and judicial functions resided with the Chief subject to the control of the colonial government.<sup>30</sup> For example, powers over the allocation of land moved from chiefs to independent Land Boards. Nevertheless, the colonial land tenure system in terms of which land was divided into crown (later state) land, tribal land and free-hold was maintained. Similarly, whilst mineral resources such as lands were previously under the control of individual tribes, at independence mineral rights were vested in the state discussed under land and resources.<sup>31</sup> Furthermore, political power over local matters within a tribal territory (which became administrative districts at independence) was transferred to the local government.<sup>32</sup>

#### **2.4 Current state structure**

The government is composed of three main organs, namely, the executive, the legislature and the judiciary. The executive is responsible for initiating national policy and is composed of the Cabinet and headed by the President.<sup>33</sup> The judiciary is charged with interpreting the laws and ensuring that the laws passed by the legislature and the policies adopted by the executive do not contravene the Constitution.<sup>34</sup> The legislature is made up of the President and the National Assembly.<sup>35</sup> Botswana is a constitutional democracy and adopts a parliamentary system of government. To this end the country is divided into constituencies for electoral purposes, and general elections, both parliamentary and local government, are held every five years.<sup>36</sup> The country adheres to the British first-past-the-post electoral system in terms of which each constituency returns one member to the National Assembly. Although this electoral system is universally recognised, it has its shortcomings in multi-ethnic societies characterised by unequal relations. This results in

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<sup>30</sup> As above, 61.

<sup>31</sup> This is discussed under the section land and natural resources.

<sup>32</sup> Masire (n 29 above) 63.

<sup>33</sup> Chs 4 and 5 Constitution of Botswana; Ch 1 of the Laws of Botswana.

<sup>34</sup> Secs 57 and 96 Constitution of Botswana.

<sup>35</sup> Sec 57 of the Constitution of Botswana.

<sup>36</sup> Electoral Act, Ch 02:09 of the Laws of Botswana.

marginalised groups, such as indigenous peoples, being unable to return representatives to the National Assembly.

## **2.5 Role of media and civil society**

Civil society in Botswana is generally regarded as free and vibrant.<sup>37</sup> NGOs have played a central role in promoting the rights of indigenous peoples in Botswana. For example, in the past a number of indigenous peoples and non-indigenous peoples NGOs formed a loose coalition called the Negotiating Team (NT) which participated in negotiations leading to the Basarwa's relocation from the Central Kalahari Game Reserve (CKGR).<sup>38</sup> Leading indigenous peoples NGOs include First Peoples of the Kalahari, Working Group on Indigenous Minorities in Southern Africa (WIMSA), D'kar Trust and KURU Development Trust. Non-indigenous NGOs which have nevertheless played a role in promoting the rights of Basarwa are DITSHWANELO – The Botswana Centre for Human Rights, the Botswana Council of Churches and Botswana Council of Non-Governmental Organisations. The media is generally free in Botswana and has played a major role in creating public awareness of indigenous peoples' human rights particularly through reporting of court cases and the publication of commentaries in the newspapers.<sup>39</sup> However, there have been reports of government attempts to curtail access of the media to the Central Kalahari Game Reserve.<sup>40</sup>

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<sup>37</sup> L Freehouse Botswana 2004 <http://www.freedomhouse.org>.

<sup>38</sup> Ditshwanelo The Botswana Centre for Human Rights 2006 'Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination' 68<sup>th</sup> Session' available at <http://www.ditshanelo.org.bw> (accessed 17 February 2008). The Basarwa/San members of the NT had been chosen by their own communities to represent their interests and made up the CKGR Committee which was a part of the NT. There were 14 members. The NGOs all had one representative. All the members (the CKGR Committee and the Basarwa/San-based NGOs – Kuru, FPK and WIMSA) had voting rights except for the non-Basarwa/San-based NGOs (BCC, DITSHWANELO and BOCONGO (The Botswana Council of Non-Governmental Organisations)). The non-Basarwa /San members were non-voting and played an advisory role. When specific discussion was held with the government about critical land use issues, the non-Basarwa/San members did not attend the meeting (by agreement within the NT). Those negotiations were done by the Basarwa /San members.

<sup>39</sup> This case received extensive media coverage from both private and government media. See for example The Daily News 'Sesana won't testify in CKGR case' 03 December, 2004; S Corry 'Diamond Mining in the CKGR' The Sunday Standard, 16 September 2007. See generally [www.sundaystandard.info](http://www.sundaystandard.info); [www.mmegi.bw](http://www.mmegi.bw) and [www.gov.bw](http://www.gov.bw) for media reports on indigenous peoples in Botswana.

<sup>40</sup> Afrol News / IRIN, 'Botswana state media "muzzled" in San expulsion affair' 26 October 2006 [www.afrol.com](http://www.afrol.com).

### **3 Background to the legal system**

#### **3.1 Legal system**

The general legal system of Botswana is a fusion of Roman-Dutch law and English common law.<sup>41</sup> This legal system was introduced by the Bechuanaland Protectorate General Administration Order 1891 which extended the laws then obtaining in the Cape Colony as at 10 June 1891 to Bechuanaland.<sup>42</sup> Be that as it may, Botswana has always maintained a dual legal system, comprising customary law and common law.<sup>43</sup>

#### **3.2 Sources of law**

##### **3.2.1 The Constitution**

Botswana adheres to the principle of constitutional supremacy in terms whereof all acts of government and laws passed by the government may be struck down if found to be in contravention of any of the rights enshrined in the Constitution. The Constitution has a Bill of Rights which provides for basic fundamental rights and freedoms, such as the right to life, equality, personality, protection from torture and inhuman and degrading treatment and freedom of association and conscience.<sup>44</sup> The Bill of Rights is modelled along the 1950 European Convention for the Protection of Human Rights and does not provide for socio-economic rights. The Constitution has in the past been relied on by indigenous peoples to protect their rights.<sup>45</sup> Although the government of Botswana generally respects the decisions of the courts, there are reports that the government has not fully complied with the decision of the High Court in the *CKGR* case.<sup>46</sup>

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<sup>41</sup> A Molokomme 'Reception and Development of Roman-Dutch Law in Botswana' (1985) 1 *Lesotho Law Journal* 121.

<sup>42</sup> Sec 19.

<sup>43</sup> B Otlhogile 'Criminal Justice and the Problems of a Dual Legal System in Botswana' (1993) 4 *Criminal Law Forum* 521 – 533.

<sup>44</sup> Chr II Ch 1 Laws of Botswana.

<sup>45</sup> *Sesana and Others v Attorney General* Misc No. 52/2002 (Unreported judgment handed down on 13 December 2006) (*CKGR* case).

<sup>46</sup> This decision is discussed later. For reports of non-compliance with the judgement see Survival

### 3.2.2 Customary Law

Customary law exists side by side with civil law, provided that the latter is not deemed repugnant to morality.<sup>47</sup> This is a legacy of British colonial rule, whose policy it was to respect native laws as long as they were not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.<sup>48</sup> The Common Law and Customary Act defines customary law as ‘rules of law which by custom are applicable to any tribe or particular tribal community’.<sup>49</sup> Notionally, therefore, the law recognises the customary laws of indigenous peoples in Botswana. However, in practice the customary law that is recognised is that of the Tswana tribes.<sup>50</sup> This is because the indigenous peoples were, and still are regarded as components of the Tswana tribes or tribal communities. Furthermore, unwritten customary law is administered by chiefs and sub-chiefs, the majority of whom are from Tswana tribes.<sup>51</sup> In this regard, in practice the customary laws of indigenous peoples are not recognised.

### 3.2.3 Common Law

Another source of law in Botswana is the common law which is a medley of both Roman-Dutch and English common law. In 2006 the High Court of Botswana specifically endorsed an English common law principle in terms of which colonial annexation does not automatically terminate ‘native title’ and found that the Basarwa had native title to the land within the Central Kalahari Game Reserve which they were unlawfully deprived of by the government.<sup>52</sup>

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International ‘A Survival International Report to the Human Rights Committee’ 14 January 2008 [www2.ohchr.org/english/bodies/hrc/docs/ngos/survival2008.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/survival2008.pdf) (accessed 31 March 2009).

<sup>47</sup> Customary Courts Act 1969 and sec 4 of Common law and Customary Act (Cap. 16:01).

<sup>48</sup> Botswana CERD Report 86.

<sup>49</sup> Sec 4(1).

<sup>50</sup> I Schapera ‘The ‘Tswana Polity’ and ‘Tswana Law and Custom’ (1938) *Journal of Southern African Studies* 12:75-87.

<sup>51</sup> This point is discussed in more detail under access to justice.

<sup>52</sup> CKGR case 339 (per Phumaphi J).

### 3.2.4 Legislation

Legislation is another major source of law. It may grant or take away rights. Thus, for example, the transfer of mineral resources from individual tribes to the state was given effect by legislation. However, legislation must not be in contravention of the Constitution otherwise it may be struck down by the High Court upon application.

### 3.3 Court structure

The Court of Appeal is at the apex of the Botswana court structure. However, it is the High Court, with its unlimited original jurisdiction, which plays significant role in the protection of rights, including the rights of indigenous peoples. The Constitution specifically gives the High Court jurisdiction over all matters in which there are allegations of violations of the rights enshrined in the Constitution.<sup>53</sup> The Magistrates Courts of varying jurisdictional powers are below the High Court. In terms of the Botswana's dual system, customary courts exist alongside civil courts, with limited jurisdiction over civil and criminal matters. The highest customary court is the Customary Court of Appeal, against whose decisions appeals lie to the High Court.

### 3.4 Status of international law

Botswana, like most common law countries, adheres to the dualist system of law in terms of which international law does not form part of domestic law, unless explicitly incorporated into domestic law.<sup>54</sup> However, the Interpretation Act requires the courts to take into consideration any relevant international agreements laid before it when interpreting acts of Parliament.<sup>55</sup> In practice the courts in Botswana have interpreted this section to refer to conventions that have been ratified.<sup>56</sup>

### 3.5 Ratification of UN, ILO and regional instruments

Instrument	Date of deposit of ratification/accession
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<sup>53</sup> Sec 18 Constitution of Botswana.

<sup>54</sup> O Tshosa *National law and international human rights law: Cases of Botswana, Namibia and Zimbabwe* (2001) 63; DDN Nsereko *Constitutional Law in Botswana* (2002) 45.

<sup>55</sup> Sec 24 Ch 01:01 Laws of Botswana.

<sup>56</sup> *Attorney-General v Unity Dow* [1992] B.L.R. 110,170.

ICCPR	8 September 2000
ICESCR	Not ratified
Optional Protocol to ICCPR	Not ratified
CERD	20 February 1974
Art 14 of CERD	Not ratified
CEDAW	13 August 1996
Protocol to CEDAW	17 November 2006
CRC	14 March 1995
Protocol to CRC- Armed Conflict	October 2004
Protocol to CRC - Sexual Exploitation	24 September 2003
Genocide Convention	Not ratified
Slavery Convention 1927	Not Ratified
Supplementary Slavery Convention 1956	Not ratified
CAT	8 September 2000
Art 22 of CAT	Not ratified
CMW	Not Ratified
Art 77 of CMW	Not Ratified
Convention on Biological Diversity	Ratification 12 October 1995

<b>Convention</b>	<b>Date of ratification</b>
ILO 29 (Forced Labour)	Ratification 5 June 1997
ILO 105 (Abolition of Forced Labour)	5 June 1997
ILO 100 (Equal Remuneration)	Ratification 5 June 1997
ILO 111 (Discrimination in	Ratification 5 June 1997

Employment and Occupation)	
ILO 107 (Indigenous and Tribal Populations)	Not ratified
ILO 169 (Indigenous Peoples)	Not ratified
ILO 138 (Minimum Age)	Ratification 5 June 1997
ILO 182 (Worst Forms of Child Labour)	Ratification 3 January 2000

<b>Instrument</b>	<b>Date of deposit of ratification/accession</b>
African Charter	17 July 1986
African Charter on the Rights of the Child	10 July 2001
Protocol on the Rights of Women	Not ratified
Protocol on the African Court	Not ratified
Convention on Nature and Natural Resources, 1968	Not ratified
Revised Version of Convention on Nature and Natural Resources, 2003	Not ratified
OAU Refugee Convention 1969	4 May 1995
Cultural Charter for Africa	Not ratified

### **3.6 Status of communications and state reporting**

Although Botswana ratified the African Charter on Human and Peoples' Rights (African Charter) in July 1986, it is yet to submit a state report to the African Commission in terms of article 62 of the African Charter. However, in June 2005 the African Commission's Working Group on Indigenous Peoples in Africa (Working Group on Indigenous People) conducted an official country visit to Botswana and made certain recommendations to the government of Botswana. These include adopting a participatory approach when formulating development policies with a bearing on Basarwa,<sup>57</sup> taking measures to incorporate international Conventions into the domestic law of Botswana,<sup>58</sup> ratifying International Labour Organisation (ILO) Convention 169,<sup>59</sup> the adoption of affirmative action measures to assist the Basarwa to develop political representation and the provision of quota representation for Basarwa at various levels of the political ladder,<sup>60</sup> and reformulating education policy to accommodate mother-tongue education for the Basarwa.<sup>61</sup> The African Commission has urged Botswana to comply with article 62 and indicated in its report the measures that need to be adopted to implement the recommendations contained in the report of the Working Group on Indigenous People of its mission to Botswana.

In 2002 and 2006, Botswana submitted detailed periodic reports to the Committee on the Elimination of All Form of Racial Discrimination (CERD Committee). However, in 2002, the CERD Committee expressed reservations on the sparse information provided by Botswana regarding the ethnic and linguistic composition of its population and recommended that more precise information be included in the next report on the ethnic and linguistic composition of the population.<sup>62</sup> The CERD Committee also noted that Botswana's objective to build a nation based on the principle of equality for all has been implemented in a way detrimental to the protection of ethnic and cultural diversity.<sup>63</sup> the

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<sup>57</sup> Working Group Report of Botswana 53 para 16.9.

<sup>58</sup> Working Group Report of Botswana 53 para 16.8.

<sup>59</sup> Working Group Report of Botswana 53 para 16.7.

<sup>60</sup> Working Group Report of Botswana 52 para 16.5.

<sup>61</sup> Working Group Report of Botswana 51 para 16.1.

<sup>62</sup> Committee on the Elimination of Racial Discrimination 'Concluding Observations: Botswana' CERD/C/61/CO/2, 23 Aug., CERD, Geneva (2002) para 8.

<sup>63</sup> As above.

CERD Committee also noted, with concern, Botswana's reluctance to recognise the existence of indigenous peoples in Botswana. The CERD Committee has urged Botswana to review its policy regarding indigenous peoples and to take into consideration the way in which the groups concerned perceive and define themselves. In this sense then the CERD Committee puts emphasis on self-identification and specifically urged Botswana to have regard to its General Recommendations 8 of 1990 and 23 of 1997 on the rights of indigenous peoples.<sup>64</sup>

### **3.7 National human rights institutions**

Botswana has no institution with the specific and sole mandate of promoting and monitoring human rights. Botswana has been urged by the CERD Committee to establish such an institution.<sup>65</sup> However, section 18 of the Constitution of Botswana specifically gives the High Court jurisdiction over applications brought by persons claiming violations of any of their rights enshrined in the Bill of Rights. This provision has been utilised by indigenous peoples.<sup>66</sup> Whilst this is an important measure to protect human rights, it has its shortcomings. Firstly, litigation in the High Court is long, cumbersome and extremely expensive. In a country where there is no legislative provision for legal aid this is a serious hindrance in the protection of human rights. Secondly, the High Court is more concerned with *protecting* as opposed to *promoting* human rights.

In 1995, the government of Botswana established the Office of the Ombudsman which is principally mandated to investigate complaints, lodged by members of the public, of injustice or maladministration in the public service.<sup>67</sup> Section 3(3)(b) of the Ombudsman Act provides that the Ombudsman 'shall not in any case be precluded from conducting an investigation in respect of any matter by reason only that it is open to the aggrieved person to apply to the High Court for redress under section 18 of the Constitution (which relates to redress for contravention of the provisions for the protection of fundamental rights and freedoms)'. The Ombudsman has interpreted this provision as giving the

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<sup>64</sup> As above, para 9.

<sup>65</sup> As above, para 21,

<sup>66</sup> In the *Kamanakao* and *CKGR* cases.

<sup>67</sup> Ombudsman Act.

Office of the Ombudsman jurisdiction over human rights violations. In fact, the issue of the relocation of indigenous peoples from the CKGR was initially reported to the Ombudsman and the latter undertook to commence investigations. However, a subsequent application to the High Court ended the Ombudsman's involvement.<sup>68</sup> It is worth noting, though, that there is no specific provision in the Ombudsman Act for the promotion of human rights.

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<sup>68</sup> Working Group Report of Botswana 22.

## Part II: Legal protection of indigenous peoples in Botswana

### 1 Recognition and identification

The African Commission's Working Group on Indigenous People has adopted a pragmatic approach by not defining 'indigenous peoples' because there is no global consensus on a single universal definition.<sup>69</sup> As a result the Working Group on Indigenous People has outlined the major characteristics relevant to identifying indigenous peoples and communities in Africa. These characteristics are that their cultures and ways of life differ considerably from the dominant society and they suffer from discrimination as they are regarded as less 'developed' and less advanced than other more dominant sectors. A key characteristic for most groups that identify themselves as indigenous peoples is that the survival of their ways of life and cultures, which are under threat of extinction, depends on access and right to their traditional lands and natural resources thereon.<sup>70</sup> The Working Group on Indigenous People specifically states that the question of aboriginality is not significant in itself and that the principle of self-identification is the key criterion for identifying indigenous peoples.<sup>71</sup> The principle of self-identification is preferred by indigenous peoples themselves and is also emphasised by leading organisations working on indigenous issues, such as the ILO and United Nations (UN) Agencies such as the CERD Committee.<sup>72</sup> Although the CERD Committee's Recommendation 8 refers to an individual's self-identification as opposed to group identification, it has been referred to by the CERD Committee as a basis upon which group identification should be used as a fundamental criterion.<sup>73</sup>

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<sup>69</sup> IWGIA The African Commission on Human and Peoples' Rights (2006) *Indigenous peoples in Africa: The forgotten people? The African Commission's work on Indigenous Peoples in Africa* 9.

<sup>70</sup> African Commission (n 60 above) 10.

<sup>71</sup> As above, 11.

<sup>72</sup> Thus for example, art 1(2) of ILO 169 states that self-identification as indigenous or tribal shall be regarded as a fundamental criterion; similarly, CERD's position is that an individual's identification as a member of a particular racial or ethnic groups or groups, that such identification shall be based upon self-identification by the individual concerned, Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of racial or ethnic groups based on self-identification (Thirty-eighth session, 1990), U.N. Doc. A/45/18 at 79 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 200 (2003).

<sup>73</sup> CERD para 9.

The government regards the concept of indigenous peoples as ‘separatist’.<sup>74</sup> As a result there are no specific laws promulgated to protect indigenous peoples as such. Similarly, there are no laws or official policies for the recognition and identification of indigenous peoples. On the contrary, the express policy is to regard all ethnic groups in the country as indigenous to the country. This in part stems from the policy of non-racialism adopted at independence. This policy is manifested in practice in a variety of ways. One way is the lack of disaggregated data and precise information about the ethnic and linguistic composition of the population.<sup>75</sup> Despite the government’s policy, the Basarwa identify themselves as indigenous peoples and have been recognised as such by the African Commission. As pointed out in Part 1 of this report, the Basarwa are generally regarded as possessing different physical, cultural and linguistic characteristics from those of the Bantu ethnic groups in Botswana. Furthermore, it is generally acknowledged that in Botswana Basarwa are generally subject to marginalisation and discrimination largely deriving from their perceived backwardness.<sup>76</sup>

It is important to note, however, that the government policy of underplaying ethnic diversity has not prevented the government from promulgating laws and adopting policies which are essentially for the benefit of certain ethnic groups, more particularly the Basarwa. For example, the Constitution of Botswana adopted at independence expressly limited the constitutional freedom of movement of individuals if this was necessary for the protection or well-being of Bushmen or Basarwa.<sup>77</sup> This provision was specifically

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<sup>74</sup> Working Group Report of Botswana 23.

<sup>75</sup> n 52 above.

<sup>76</sup> Mazonde (n 15 above) 138.

<sup>77</sup> Sec 14(3): Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -  
(a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Botswana and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society;  
(b) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Botswana;  
(c) for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen;

insisted upon by the British colonial government to protect the Basarwa, particularly those living in protected areas. However, this provision was removed from the Constitution in 2005 after several Basarwa living in the CKGR brought an application before the High Court in order to stop the government from relocating them from the CKGR.<sup>78</sup> The government's official reason for the deletion of this provision was apparently to make the Constitution ethnically neutral.

Similarly, in 1974 the government established the Bushman Development Programme which was essentially geared towards improving the economic and social conditions of the Basarwa. This programme was later renamed the Remote Area Development Programme (RADP), apparently to remove an ethnic dimension from it. The stated objectives of RADP are empowering remote area dwellers (RAD) and marginalised minorities, not only the Basarwa.<sup>79</sup>

## **2 Non-discrimination**

The twin principles of equality and non-discrimination are some of the core claims of indigenous peoples the world over.<sup>80</sup> Article 2 of the African Charter provides for the right of every individual to the enjoyment of all the rights and freedoms guaranteed in the Charter without distinction of any kind such as race, ethnic or other status. The grounds upon which an individual may not be denied the enjoyment of the rights in the African Charter are clearly not exhaustive. This article evidently protects individuals belonging to groups that identify themselves as indigenous peoples from discrimination on the basis of their ethnicity. The Basarwa are therefore protected by this provision. The protection provided for in this article could still be used for the benefit of the Basarwa even if they did not identify themselves as indigenous peoples. Similarly, the article protects individuals belonging to the Basarwa ethnic group even if they are not recognised as indigenous peoples by the government of Botswana.

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(d) for the imposition of restrictions upon the movement or residence within Botswana of public officers; or  
(e) for the removal of a person from Botswana to be tried outside Botswana for a criminal offence or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law in force in Botswana of which he has been convicted.

<sup>78</sup> Constitution (Amendment) Act 2005.

<sup>79</sup> Working Group Report of Botswana Report 22.

<sup>80</sup> African Commission (n 71 above) 17.

Section 3 of the Constitution of Botswana provides for the entitlement of every individual to fundamental rights and freedoms whatever his race, place of origin, political opinions, colour, creed or sex.<sup>81</sup> The section does not expressly prohibit discrimination. However, the Court of Appeal has interpreted section 3 of the Constitution as a guarantee of the equal protection of the law for all.<sup>82</sup> This in essence means that section 3 protects the individual against discrimination. Section 3 specifically refers to the individual. However, section 15(1) specifically provides that ‘no law shall make any provision that is discriminatory either of itself or in its effect’. This section is broad enough to prohibit discrimination not just against the individual but against a group.<sup>83</sup>

The CERD Committee has expressed the concern that the definition of discrimination provided under section 15 does not explicitly prohibit discrimination based on descent and national or ethnic origin, nor indirect discrimination.<sup>84</sup> However, although section 15 may not expressly refer to descent, national or ethnic origin, section 15(3) provides that discrimination means affording different treatment to different persons on the basis of their race, tribe, place or origin, political opinions, colour or creed. This is broad enough to cover descent, national or ethnic origin. In any event, the Court of Appeal of Botswana has observed in the *Dow* case that the grounds upon which discrimination is prohibited are not exhaustive. In deciding whether or not descent, national or ethnic origin are covered by section of the Constitution, it is important to have regard to section 24 of the Interpretation Act which specifically empowers the courts to have regard to relevant international agreements in interpreting domestic laws, including the Constitution. In the premises it is submitted that sections 3 and 15 protect groups that identify themselves as indigenous peoples, like Basarwa, against discrimination.

The constitutional provision that forbids discrimination contains a number of exceptions which impact both positively and negatively on indigenous peoples. Section (4)(e)

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<sup>81</sup> The fundamental freedoms referred to in this section include life, liberty, security of the person and the protection of the law; sec 3(a) Constitution of Botswana.

<sup>82</sup> *Attorney-General v Dow* (n 56 above).

<sup>83</sup> *Kamanakao and Another v Attorney General* [of Botswana] MISCA 377/99 (*Kamanakao* case).

<sup>84</sup> n 52 above, para 7.

permits the government to accord privileges or advantage to members of any of the groups named in section 15 if, having regard to the special circumstances of the members of the particular group, the treatment 'is justifiable in a democratic society'. This exception effectively allows for affirmative action which may facilitate the redressing of past and continuing imbalances to bring marginalized communities like indigenous peoples to a level where they can exist on an equal footing with the others.<sup>85</sup> Unfortunately this provision has not been fully utilised by the government. In instances where the government had adopted affirmative measures such as the RAD they have been rendered ineffective by the government policy of non-racialism which results in indigenous peoples competing with, and losing to, other ethnic groups.<sup>86</sup>

Section 15(4)(c) and (d) allows discrimination on the basis of ethnic origin or tribe in matters of personal and customary law. Ironically, this provision appears to have been inserted to respect customary law which may discriminate against persons not belonging to a particular tribe. Section 15(9) allows for the implementation of discriminatory laws in force before the coming into operation of the Constitution. This is clearly one of the vestiges of the colonial era through which the colonial government ensured that the Constitution did not serve to disturb the colonial legal *status quo*. Unfortunately most of the discriminatory laws against specific ethnic groups, including Basarwa, were promulgated during the colonial era and therefore predated the Constitution.

The effect of this is that such discriminatory laws are protected by section 15(9). This came to the fore in the *Kamanakao* case. In that case, the applicants claimed, among numerous other things, that the provisions of the Tribal Territories Act of 1933<sup>87</sup> discriminated against non-Tswana tribes like the Wayeyi and Basarwa. In the main the Tribal Territories Act demarcates the country into tribal territories and limits tribal territories to Tswana groups only, the so-called eight principal tribes in Botswana. The High Court agreed with the applicants that the Tribal Territories Act was discriminatory

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<sup>85</sup> Nsereko (n 57 above) 267.

<sup>86</sup> This is addressed in more detail below.

<sup>87</sup> Ch 32:03 Laws of Botswana.

but held that it was protected by section 15(9)(a) of the Constitution.<sup>88</sup> Similarly, the Chieftainship Act<sup>89</sup> which only recognised the chiefs of the so-called eight main tribes was held to be protected by the same section.<sup>90</sup> As a result, non-Tswana tribes like the Basarwa are regarded as not having ‘chiefs’ like their Tswana counterparts. This is patently discriminatory.

The CERD Committee observed that the exclusionary clauses in section 15 of the Constitution fall short of article 1 and 3 of the Convention on the Elimination of Racial Discrimination (CERD).<sup>91</sup> The provisions are also not in consonance with article 3 of ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) which provides for the right of indigenous peoples and tribal peoples to enjoy human rights and fundamental freedoms without hindrance.<sup>92</sup> The net effect of the provisions of the Constitution above is that they hinder the enjoyment of the human rights and fundamental freedoms of indigenous peoples.

There are other policies and laws that discriminate against indigenous peoples and communities in Botswana. They are merely listed in this section and discussed in detail in the following sections. Setswana and English are the only recognised national and official languages despite the fact that there are numerous other languages in Botswana. Similarly, only Setswana and English are the official medium of instruction in government schools in Botswana.<sup>93</sup> Some important laws in Botswana protect the rights of the eight Tswana-speaking groups and fail to accord the same recognition and protection to indigenous communities. These laws include laws pertaining to cultural and ethnic identity, chieftaincy (which impinge on participation, consultation and

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<sup>88</sup> *Kamanakao* case 52 (per Nganunu J).

<sup>89</sup> Ch 41:01 Laws of Botswana.

<sup>90</sup> *Kamanakao* case 47 (per Nganunu J).

<sup>91</sup> CERD 2002 (n 66 above) para 10.

<sup>92</sup> Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, *entry into force* 5 September 1991. It is important to note that Botswana has not ratified this Convention.

<sup>93</sup> This discussed under the section ‘Education’.

representation) and land which impact on resources, culture, resources and territorial integrity.<sup>94</sup>

Similarly, the Tribal Territories Act demarcates the country into territories which map and have the names of the eight Tswana-speaking tribes and four state lands. The effect of this Act is to recognise the group rights to land of the eight Tswana-speaking tribes whilst the same recognition is not accorded to indigenous peoples. The customary laws of indigenous peoples are subsumed within the customary laws of the Tswana groups to which the non-Tswana groups are assumed to belong. In this regard indigenous peoples are denied access to justice under their own customary laws and institutions.<sup>95</sup>

Discrimination may take a horizontal dimension. This is discrimination not emanating from state laws, policies or institutions but discrimination perpetrated by individuals or one group against another. There are laws that criminalise horizontal discrimination on the basis of race, tribe or place of origin. For example, section 92(1) of the Penal Code<sup>96</sup> makes it a criminal offence to utter or publish words showing hatred, ridicule or contempt for any person on the basis of, among other things, race, tribe or place of origin. Section 94(1) of the Penal Code criminalises discrimination and discrimination for purposes of that section means treating another person less favourably or in a manner different to that which one treat any other person on the basis of race, colour, nationality or creed. Unfortunately the penalties for these offences are a meagre P500.00 which is a little under \$100. The sections are old and beg for a review to make the penalties relevant to present circumstances. There are other laws that may be used to protect indigenous peoples from discriminatory treatment or abuse. For example, section 7 of the Societies Act prohibits the registration of societies or organisations with the express or implicit objects of racism or racial discrimination. Section 7 of the Companies Act<sup>97</sup> has a similar

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<sup>94</sup> These include secs 77-79 of the Constitution of Botswana and sec 2 of the Chieftainship Act, which was abolished and replaced by the Bogosi Act 9 of 2008.

<sup>95</sup> This is discussed under the section 'Justice'.

<sup>96</sup> Ch 08:01 Laws of Botswana.

<sup>97</sup> Ch 42:02 Laws of Botswana; sec 4 Registration of Business Names Act; ch 42:02 Laws of Botswana has a similar provision.

provision which denies registration of a company with an unlawful purpose, which in Botswana would include discrimination.

### 3 Self-management

One of the core claims of indigenous peoples is self-management which provides the means through which peoples can assume control of their own lives and destinies and gain a greater recognition of their distinct cultures, traditions and customs as well as greater control over their own economic, social and cultural development.<sup>98</sup> There are overlaps between the right to self-management and participation and consultation because participation and consultation may be invaluable means through which peoples can assume greater control over their economic, social and cultural development. However, as shall be seen in the next section, the right to participate in terms of article 13 of the African Charter is often equated with the narrow right to vote, which is often couched in individualist terms. Similarly, although the right to self-determination under article 20 of the African Charter provides for a group right, its association with the individual's right to participate under article 13 has led to the view that the collective right to self-determination is satisfied if the individual members of a particular group are accorded the right to participate in terms of article 13.<sup>99</sup> However, as shall be shown in the next section, the right to participate may sometimes not suffice in multi-ethnic societies where elections only result in the marginalisation of the economic, social and cultural interests of other ethnic groups. For this reason, indigenous peoples also place much emphasis on the right to self-management to augment the right to participate in the government of the broader society.<sup>100</sup>

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<sup>98</sup> ILO *ILO Convention on Indigenous and Tribal Peoples, 1989 (169): A Manual* (2003) (ILO Manual).

<sup>99</sup> *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995); KN Bojosi and GM Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 382.

<sup>100</sup> Art 5 UN Declaration provides for the rights of indigenous peoples to maintain and strengthen their political, cultural and economic institutions while maintaining the right to participate fully in the political and economic life of the state. Art 7(1) of ILO 169 provides for the right of indigenous peoples to

It will be shown in the next section that the Constitution of Botswana provides for a highly centralised form of government. This form of government is in accord with the government policy of underplaying ethnic diversity. In this way the laws that regulate the composition of the government which determines the economic, social and political development of the country do not factor in the ethnic diversity of the country. As such, no provision is made in such laws either to devolve some measure of self-management on the different groups in order to determine their own destinies which may not necessarily be in accord with those of the broader society.

In recent years indigenous peoples have increasingly expressed the desire to control their own economic, social and political destinies whilst still maintaining their membership of the broader Botswana society. Similarly, the government has in recent years passed laws and introduced programmes and policies that grant a limited right to economic self-management. Such programmes have coalesced into the Community Based Natural Resource Management (CBNRM).<sup>101</sup> The CBNRM formally commenced in 1993.<sup>102</sup> It permits eligible communities management rights over a tract of land which normally exceeds 100 000 ha.<sup>103</sup> It is generally recognised that the communities likely to be eligible are the Basarwa communities and statistics do indicate that the majority of villages that opted for CBNRM are predominantly Basarwa.<sup>104</sup> The programme does not pass ownership rights to the community but simply confers on the community the right to manage and benefit from the land's resources.<sup>105</sup> The programme was not designed to pass group land rights to communities but rather to promote more effective local level

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decide their own priorities for the process of development and also to participate in the formulation, implementation and evaluation of plans for national and regional development which may affect them.

<sup>101</sup> See generally JW Arntzen 'An Economic View of Wildlife Management Areas in Botswana' CBRM Support Programme.

<sup>102</sup> Final Report of the Review of the Community-Based Natural Resource Management in Botswana vol 1: Main Findings A Study Carried out for the National CBNRM Forum, September 2003, CBNRM Support Programme Occasional Paper 14.

<sup>103</sup> M Taylor 'The Past and Future of San Land Rights in Botswana' in RK Hitchcock and D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004).

<sup>104</sup> M Taylor 'CBNRM and pastoral development in Botswana: Implications for land rights' Paper for presentation at Workshop on Environment, Identity and Community Based Natural Resource Management: Experiences of the San in Southern Africa, Friday 1st December 2006 Oxford University African Studies Centre and African Environments Programme 9.

<sup>105</sup> Taylor (n 103 above) 162.

conservation on the assumption that affording local people an opportunity to directly benefit from natural resources would encourage more active conservation.<sup>106</sup>

The CBNRM benefited from a nation-wide land-use planning exercise that was kick-started in the 1970s when the Tribal Grazing Land Policy (TGLP) was introduced. The TGLP is discussed more fully under the land rights and natural resources section. However, relevant to the CBNRM, land that was zoned as 'reserved areas' under TLGP was eventually used to accommodate communities living outside the traditional village structure and had relied heavily on hunting and gathering for subsistence, which were predominantly Basarwa. The government eventually decided that natural resources management would be the appropriate land-use option for these 'reserved areas' and they became Wildlife Management Areas (WMAs). These WMAs provide the land and resource base for the CBNRM.

Before the introduction of this programme only individual community members could apply for game licenses to hunt for personal consumption certain game as permitted by the Wildlife Conservation and National Parks Act of 1992. However, a series of legislation and government papers were adopted to facilitate group self-management over land and natural resources.<sup>107</sup> In the main these legislation and government white papers attempt to grant a measure of self-government to local communities over wildlife and other natural resources. Most WMAs were sub-divided into Controlled Hunting Areas (CHAs). Each CHA has a wildlife hunting quota which is designated by the Department of Wildlife and National Parks (DWNP). Eligible communities may form a representative Quota Management Committee (QMA) which, if recognised by the DWNP, may then manage the hunting quota for the whole community. It is up to the QMA to decide how to divide up the quota among families and ensure that the quota is adhered to. Eligible communities may also form trusts and develop a Land Use Plan (LUP) and use it to apply to a responsible Tribal Land Board for a lease over a CHA. If a lease is granted then the

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<sup>106</sup> Taylor (n 104 above) 9.

<sup>107</sup> These are: Wildlife Conservation Policy (1986); National Conservation Strategy (1990); Tourism Policy (1990); Tourism Ac (1992); Wildlife Conservation and National Parks Act (1992); Draft Wild WMA Regulations (1998); and Draft CBNRM Policy (1999).

Trust would act on behalf of the community, and with the permission of the Land Board, to sublease use of their land and hunting quota to a tourism company for commercial, photographic or hunting safaris.<sup>108</sup> It is important to note, however, that the CBNRM is not limited to wildlife-based projects but also extends to veld product-utilisation and cultural activities.<sup>109</sup>

There are a number of problems with the CBNRM. First, it falls short of international standards that call for measures that allow indigenous peoples to take control of their own lives and destinies and gain greater recognition of their cultures and take more 'control over their own economic, social and cultural development'.<sup>110</sup> This is because the CBNRM does not utilise indigenous peoples' own traditional political and social institutions. Thus, for example, they have to create and register recognised legal institutions like trusts.<sup>111</sup> Furthermore, the government has shown an inclination to impose its own ideas of how communities should manage the land. This may well be because one of the fundamental goals of the programme is conservation of natural resources.<sup>112</sup> Secondly, a lack of sufficiently-educated people in these communities means that they are unable to appreciate the intricate legal requirements necessary to make use of the CBNRM. In such an event they have to rely on other people in order to utilise this programme.<sup>113</sup> Third, is that since ethnicity is not one of the requirements of eligibility, members of more dominant communities have increasingly settled in these areas. The result is not only competition for resources, but the reproduction of the unequal relations that exist between dominant groups and the Batswana. As shall be seen in the section on land and natural resource rights, ownership and control of lands and natural resources vest in the state. However, it is generally agreed that the CBNRM has

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<sup>108</sup> As above.

<sup>109</sup> Final Report of the Review of the Community-Based Natural Resource Management in Botswana, vol 1: Main Findings, A Study Carried out for the National CBNRM Forum , September 2003, CBNRM Support Programme Occasional Paper No 14, 16.

<sup>110</sup> n 98 above.

<sup>111</sup> T Gujadhur "It's good to feel like we own land": The people's view of community land rights under CBNRM in Botswana' CBNRM Support Programme Occasional Paper 3 3.

<sup>112</sup> National CBNRM Forum 'The Way Forward for CBNRM in Botswana' A Discussion Paper of the National CBNRM Forum (2005) 6.

<sup>113</sup> Taylor (n 97 above) 11.

provided a legal framework for the Basarwa and other eligible communities to gain a limited form of communal control over large tracts of land. In fact, the CBRNM is seen by the Basarwa themselves not only as an opportunity to regain a form of land rights, but also to gain a political voice and motivate for rights beyond those over land.<sup>114</sup>

#### **4 Participation and consultation**

Indigenous peoples regard participation as an important part of their struggle towards the full enjoyment of their human rights.<sup>115</sup> Several international human rights instruments provide for the right to political participation, albeit in varying forms.<sup>116</sup> This right has been largely equated with the right to vote.<sup>117</sup> In the *Constitutional Right Project* Communication, the African Commission tied the right of peoples to self-determination under article 20(1) to article 13(1) by noting that it ‘...is the counterpart of the right enjoyed by individuals under article 13(1)’.<sup>118</sup> Article 25 specifically refers to the right to take part in the conduct of public affairs, either directly or through freely-chosen representatives and to be elected in genuine periodic elections. Article 25 is also framed in terms that clearly indicate that the right belongs to an individual.<sup>119</sup> The problem with

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<sup>114</sup> As above 9.

<sup>115</sup> Eg, at the 1999 Arusha Conference, indigenous peoples demanded adequate representation in all relevant national or international bodies that may be established as well as in all future conferences. See Para 18.3 of the Arusha Resolutions. The Conference was entitled ‘The Conference on Indigenous Peoples from Eastern, Central and Southern Africa’ and was held in Arusha, Tanzania from 18-22 January 1999. The proceedings and resolutions of the conference are reported in International Work Group for Indigenous Affairs *Indigenous Affairs 2/99*.

<sup>116</sup> Eg, art 25 ICCPR, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 1966 available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm) (accessed on 16 March 2008); article 3 of First Protocol to the European Convention on Human Rights, available at <http://www.hri.org/docs/ECHR50.html> (accessed on 6 March 2007) and article 23 of the American Convention on Human Rights, available at <http://www.cidh.org/Basicos/basic3.htm> (accessed on 16 March 2008); art 13(1) of the African Charter provides that every ‘citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law’.

<sup>117</sup> Thus, for example, in *Jawara v The Gambia* (the *Jawara* communication) the African Commission held that the banning of former ministers and members of parliament was a contravention of their rights to freely participate in the government of their country under art 13(1) of the African Charter, Para 67 ; similarly, in *Constitutional Rights Project and Another v Nigeria*, (*Constitutional Rights Project* communication) the African Commission held that the right to participate in government entails, among other things, the right to vote for one’s choice and that a corollary of the right to vote is that the results of the free representation of the will of the citizens are respected. (2000) AHRLR 191 ACHRR 1998, communication para 50.

<sup>118</sup> *Constitutional Rights Project* communication, para 52.

<sup>119</sup> S Wheatley ‘Non-discrimination and equality in the right of political participation for minorities’ (2002) 3 *Journal on Ethnopolitics and Minority Issues in Europe* 1.

viewing the right to participate through the narrow libertarian view of the right to vote is that for indigenous peoples and other marginalised communities this may not be sufficient.

Botswana, generally acknowledged to maintain a democratic form of government, adheres to this model.<sup>120</sup> The Constitution guarantees every individual citizen who has attained the age of 18 the right to vote, without any distinction on the basis of race, national or ethnic origin.<sup>121</sup> The Electoral Act is a piece of legislation promulgated to consolidate the Constitution with respect to the conduct of elections for the National Assembly and local councils. There are practical and contextual problems with the electoral laws. First, as shall be shown under the right to education, Basarwa are the least educated ethnic group in Botswana which means in practice very few of them would meet the English-language requirement of the Constitution.<sup>122</sup> Secondly, given the discrimination against, negative perceptions about and the contempt with which Basarwa are held, their chances of success in national elections are very minimal given their relatively few numbers and the subordinate position that they have historically occupied within tribal territories of the Tswana groups. It is therefore hardly surprising that, since independence, there has never been a member of the Basarwa ethnic group in the National Assembly.

The Electoral Act makes no reference to race or ethnicity as criteria for voting or standing in elections. Section 58(2)(b) of the Constitution provides for four specially-elected members of the National Assembly nominated by the President and elected by the National Assembly. The government of Botswana acknowledges that this provision is a potential mechanism through which affirmative action could support broader

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<sup>120</sup> Since independence elections, which have been widely hailed as free and fair, have been held every five years. B Osei-Hwedie and D Sebudubudu. (2004) 'Botswana Country Report' The South African Institute of International Affairs, Johannesburg; EISA 2004 'EISA Election Observer Mission Report: Botswana' 16, EISA, Johannesburg.

<sup>121</sup> Sec 67(b) as amended by Constitution (amendment) Act 18 of 1997; similarly, every citizen has the right to stand for elections to the National Assembly provided he/she is 'able to speak, and, unless incapacitated by blindness or other physical cause, to read English well enough to take an active part in the proceedings of the Assembly). Sec 61 of the Constitution.

<sup>122</sup> Mazonde (n 15 above) 140.

representation of marginalized groups.<sup>123</sup> However, this has never happened and in practice the provision is utilised to appoint members of the ruling party who had either lost elections or are being introduced into politics.

What emerges from the above is that general international human rights provisions on the right to participation may not be sufficient for marginalised communities such as indigenous peoples in multi-ethnic societies. For this reason, international instruments for the protection of indigenous peoples call on states to facilitate the maintenance of traditional institutions and the participation of indigenous peoples in such institutions.<sup>124</sup> Indigenous peoples have the right to participate and be consulted in the formulation of policies, laws and decision-making processing affecting them.<sup>125</sup> This participation is achieved through indigenous peoples' own traditional or representative bodies.

In Botswana there are laws which provide for traditional or customary institutions that could facilitate the participation of indigenous peoples or marginalised communities in Botswana. The Constitution of Botswana provides for the House of Chiefs (since the passing of the Bogosi Act, referred to as 'Ntlo ya Dikgosi'), which is part of the National Assembly. The significance of the House of Chiefs is that under section 88 of the Constitution, the National Assembly must consult the House of Chiefs before passing any bill with respect to tribal organisation or tribal property, the organisation, administration and powers of customary courts and customary law. In this way membership to the House of Chiefs is crucial because the House has the power to impact on issues that are important to indigenous communities. Non-Tswana groups themselves see membership to the House of Chiefs as important in at least two ways. Firstly, it is a constitutional recognition of the very existence of the particular tribe. Secondly, membership to the House of Chiefs ensures participation in the formulation of laws with respect to tribal

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<sup>123</sup> Botswana CERD 2006 Report para 221.

<sup>124</sup> Art 5 UN Declaration on the Rights of Indigenous Peoples (providing for the right to maintain and strengthen the political, cultural and economic institutions); Article 6 (1) of ILO 169 provides for the right of indigenous peoples to be consulted by governments in the application of the Convention. This provision calls for consultation 'whenever any measure which may have a direct effect on indigenous peoples is being explored, planned or implemented'.

<sup>125</sup> ILO Manual 18.

organisation/property and participation in the development of the customary law of indigenous communities.<sup>126</sup> This has far-reaching practical effect for indigenous peoples concerning the development and usage of their customary laws.

Another significance of the House of Chiefs is that government normally consults through the *Kgotla*, with the government informing the chief of the impending visit of a Member of Parliament, Minister or government officials. Similarly, where the government wishes to solicit the views of the people on a particular issue, the *Kgotla* is used as a forum for doing so. The *Kgotla* was traditionally a forum which served as a court, an administrative body and also a legislative body. The *Kgotla* was and is still presided over by a chief. The House of Chiefs was therefore established to be the link between the Parliament and the people.

There are two basic problems with the House of Chiefs. It has a stratified membership in terms of which permanent membership is reserved for chiefs of Tswana Tribes.<sup>127</sup> The 2005 Constitutional amendment maintained this structure of the House of the Chiefs.<sup>128</sup> Chiefs from Tswana-speaking areas are designated in accordance with their custom of permanency and hereditary at the District level (called *dikgosi*). The elected *Dikgosi* of non-Tswana territories of Chobe, Ghanzi, Kgalagadi and North-east are not regarded as Paramount Chiefs whose position is hereditary like those of Tswana Chiefs.<sup>129</sup> Therefore, although they now have automatic membership to the House of Chiefs, they are not

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<sup>126</sup> Reteng Shadow Report 8-9.

<sup>127</sup> As noted above, the composition of the House of Chiefs was challenged in the *Kamanakao* case on the basis that it was discriminatory and in violation of sections 3 and 15 of the Constitution of Botswana. The High Court agreed but held that since the discriminatory composition of the House of Chiefs was enshrined in the Constitution, the High Court could not declare it unconstitutional; In 2000 the President of the Republic of Botswana established a Commission of Inquiry called the Balopi Commission. The Balopi Commission recommended that secs 77, 78 and 79 of the Constitution should be amended to eliminate what were assumed to be 'perceptions' of exclusion. Republic of Botswana (2000) 'Report of the Presidential Commission of Inquiry into secs 77, 78 and 79 of the Constitution of Botswana', Botswana Government Printer, Gaborone.

<sup>128</sup> Secs 77-79 Constitution (Amendment) Act 2005. The amendment simply merged the *ex officio* members (who were previously chiefs of the principal eight Tswana chiefs) with specially elected members (from the four regions of Chobe, Ghanzi, Kgalagadi and North East) to constitute a tier of twelve members who have automatic membership to the House of Chiefs.

<sup>129</sup> Reteng Shadow Report 6.

viewed as representing any particular tribe because they are not designated according to their traditions and customs. They are in effect political appointees. Thus, for example, despite the new amendments indigenous peoples do not have their own recognised traditional leader in the House of Chiefs appointed according to their own custom and tradition. Although a Bosarwa, Rebecca Banika, was appointed to the House of Chiefs, she was not appointed as a traditional leader of the Basarwa but merely as a sub-chief of the Chobe sub-district. The CERD Committee has observed that the amended Constitution reproduces the discriminatory position relating to the partition of ethnic groups in the House of Chiefs.<sup>130</sup>

Another problem with the House of Chiefs - and this is the justification the government invokes for the unequal membership - is that historically the Basarwa did not have traditional leaders in the mould of Bantu chiefs, although some San groups did appoint leaders.<sup>131</sup> However, although chiefs and the House of Chief are not strictly indigenous political institutions, most San groups recognise the importance of these institutions in the societies in which they live. They recognise that they need to establish political institutions that would facilitate their participation in decision-making processes that affect them at the local level. These institutions could then serve as their own traditional political, cultural and economic institutions to ensure participation at both local and national levels of participation. Section 21 of the Bogosi Act empowers the Minister to recognise a chief appointed by a tribal community. The Act may be criticised for at least two reasons. First, the recognition is purely discretionary and the Act is silent on the factors that the Minister may take into account in exercising such discretion. However, it is an established principle of common law in Botswana that an administrative officer's discretion should be exercised reasonably, otherwise the decision could be set aside by the court.<sup>132</sup> This means that if an indigenous group appoints a chief, then the Minister would have to act reasonably in deciding whether or not to recognise such a chief. This means that if the appointment is not recognised then the reasons for such non-recognition

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<sup>130</sup> Botswana CERD Report 2006 para 10.

<sup>131</sup> WIMSA 'San Representation and Leadership' [http:// www.wimsanet.org/](http://www.wimsanet.org/).

<sup>132</sup> *Arbi v Commissioner of Prisons and Another* [1992] Botswana Law Reports 246.

would have to be stated and may be subjected to scrutiny by the High Court. Second, the Act may be criticised for being silent on the rights and status of a chief recognised under section 21.<sup>133</sup> This is important given that the Constitution ranks chiefs for purposes of membership to the House of Chiefs. Nevertheless, the Act provides an opportunity for indigenous groups to appoint leaders who may be recognised as chiefs.

The Working Group of Indigenous Minorities in Southern Africa (WIMSA) and the San in Southern Africa ‘came together in order to set up the concept of San Councils in order to provide a more democratic and participatory approach for all San in southern Africa’<sup>134</sup>. The aim of the National San Councils is to foster unity among San communities. In this way they can serve as recognised traditional institutions established by the indigenous peoples themselves according to their own procedures. National San Councils may not be traditional indigenous peoples’ institutions but they are pragmatic responses to deal with social realities of the societies and times in which they exist.<sup>135</sup>

The Botswana San Council was to be officially launched in 2006 but the delays in its launch have been attributed to the lack of support from San organisations in Botswana.<sup>136</sup> This Council could be a font for consultation and participation in the formulation and implementation of development projects. The challenge is to ensure that the council, its objectives and its composition are at the request of the indigenous peoples themselves and are not imposed from the outside. In South Africa, the South African San Council engaged in negotiations to be part of the House of Chief in South Africa immediately after it was established.<sup>137</sup> This could be a model for Botswana. In Botswana, the government has since independence devised five-year National Development Plans (NDPs) to inform and guide its development policies. Prior to each new development

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<sup>133</sup> For a criticism of the Act see The Multicultural Coalition of Botswana, Alternative Report to the Human Rights Council, July 2008 (on file with author) 2-3.

<sup>134</sup> WIMSA (n 130 above).

<sup>135</sup> In South Africa, for example, the South African San Council (SASC) was established in 2001. Its main priorities set in 2004 were to establishing locally based offices, providing training to SASC members, securing access rights to heritage sites for San, building links with museums and parks, identifying other San groups in southern Africa and negotiating entrance to the House of Chiefs in South Africa (as above).

<sup>136</sup> WIMSA Annual Report 2004-2005, 56.

<sup>137</sup> As above.

plan, district-level extension teams hold meetings in which the villagers present proposals for incorporation in the upcoming development plan. Each village has elected members for a Village Development Committee (VDC), a body charged with leading development programmes at village level. Village extension teams consult villagers through these VDCs. The problem is that these consultations are always conducted through *Kgotla* meetings which tend to exclude indigenous peoples and the VDCs tend to be dominated by members of the more dominant communities.<sup>138</sup> This is because, traditionally, the *Kgotla* is a highly stratified forum in which participation depends on status. Thus, participation in the *Kgotla* is dominated by males and members of the Tswana groups. This is reflected even in the physical seating arrangement in terms of which men occupy the front rows, sitting on stools or chairs whilst women and members of indigenous groups occupy the back rows.<sup>139</sup> The Botswana San Council could be a solution to these shortcomings by serving as a consultative body for purposes of development plans on issues that directly affect indigenous peoples.

A major concern for indigenous peoples is that development projects that are meant for them are often formulated without their input and as such tend to fail because they do not factor in the indigenous peoples' cultural specificity.<sup>140</sup> As a result, building capacity among the San has been a core aim of Basarwa in Botswana. The University of Tromsø/University of Botswana Collaborative Programme for San Research and Capacity Building (the collaborative programme) was established in 1996 with the overarching aim of promoting research focusing on the cultural, historical, social, economic and legal situation of the San. The research, which ended in December 2008, was participatory in nature and was closely connected to San communities, focusing on the impact of policies and programmes on communities, land issues, language, literacy, culture and education. The research aspect of the collaborative programme has produced publications of great value not only for those who are interested in San issues, but also for

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<sup>138</sup> T Mompati and G Prinsen 'Ethnicity and participatory development methods in Botswana: Some participants are to be seen and not heard' (2000) 10 *Development in Practice*.

<sup>139</sup> As above.

S Saugestad 'Developing Basarwa research and research for Basarwa development' (1994) 10 *Anthropology Today* 20-22.

policy makers.<sup>141</sup> The activities of the collaborative programme include conferences such as an International conference on Research for Khoe and San Development in 2003 which, amongst other things, aimed at encouraging the San people to influence research agendas and government development policy agendas.<sup>142</sup> These conferences serve as crucial forums to forge international networks on San issues and offer the target groups the opportunity to participate in the formulation of development strategies meant for their benefit. This programme is seen as an important mechanism to facilitate informed consultation and participation in development processes and projects.

## **5 Access to justice**

Access to justice is a fundamental claim of indigenous peoples. Article 7 of the African Charter provides for the right of every individual to have his cause heard. The right includes the right to appeal to competent national organs against acts violating fundamental human rights.<sup>143</sup> The right also includes the right to be presumed innocent until proven guilty by a competent court or tribunal;<sup>144</sup> the right to a defence, including the right to be defended by counsel;<sup>145</sup> and the right to be tried within a reasonable time by an impartial court or tribunal.<sup>146</sup> The article clearly provides for access to justice in both civil and criminal cases.

A violation of a fundamental human right may fall within the realms of civil and criminal law. Thus, for example, forced relocation from traditional lands without their consent would be a violation of indigenous peoples' rights, although not constituting a criminal offence. Article 7(1)(a) of the African Charter provides for the right to appeal to a competent organ in such circumstances. However, the right to a fair trial which includes

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<sup>141</sup> University of Botswana. Office of Research and Development Research Report. Gaborone; (2005) 34.

<sup>142</sup> Speech by Minister of Local Government, Honourable M R Tshipinare, marking the Official Opening of an International Conference on Research for Khoe and San Development, University of Botswana, 9 September 2003. Available at <http://www.gov.bw/docs/SPEECH%20BY%20MINISTER%20Tshipinare.rtf>.

<sup>143</sup> Art 7(1)(a) African Charter.

<sup>144</sup> Art 7(1)(b) African Charter.

<sup>145</sup> Art 7(1)(c) African Charter.

<sup>146</sup> Art 7(1)(d) African Charter.

the right to be heard within a reasonable time and to legal representation, seems to be envisaged for criminal trials. The CERD Committee's General recommendation 31 of 2005 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System provides for a fair trial in criminal cases. Section 10 of the Constitution of Botswana provides for a broad right to a fair trial. This includes the right to a fair hearing within a reasonable time, by an independent and impartial court of law;<sup>147</sup> the right to be presumed innocent until proven guilty;<sup>148</sup> and the right to legal representation at the accused's expense.<sup>149</sup> The Constitution therefore provides for a fair trial in criminal cases. However, in practice this right is severely compromised, especially with respect to indigenous communities. This is so because the majority of indigenous peoples live in villages where they are subject to the criminal jurisdiction of customary courts over offences like theft, assault and other misdemeanours.<sup>150</sup> The criminal law applied in these courts is English criminal law.<sup>151</sup> The problem with this is that chiefs who preside over these courts have no legal training and attorneys have no right of audience before these courts.<sup>152</sup> As a result the majority of indigenous peoples are denied access to justice because of the violation of the principle of a fair trial.

The government of Botswana has acknowledged that the country faces a backlog of cases due to manpower constraints in the administration of justice. This has a negative impact on the efficient dispensation of justice.<sup>153</sup> Furthermore, the right to legal representation is rendered meaningless because the Constitution does not provide for legal aid. In a country with high unemployment rates and disturbing economic disparities this means that the majority of indigenous peoples are denied this right.

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<sup>147</sup> Sec 10.

<sup>148</sup> Sec 10(2)(a) Constitution.

<sup>149</sup> Sec 10(2)(d) Constitution.

<sup>150</sup> Sec 12 of The Customary Courts Act Ch 04:05 of the Laws of Botswana.

<sup>151</sup> Sec 2 of the Penal Code, Ch 08:01 of the the Laws of Botswana; sec 276 of the Criminal Providence and Evidence Act ch 08:02 of the Laws of Botswana.

<sup>152</sup> Sec 32 Customary Courts Act; DG Boko 'Fair trial and the customary courts in Botswana: Questions on legal representation' 11 (2000) *Criminal Law Forum* 445-460.

<sup>153</sup> Botswana CERD Report para 185.

The state provides *pro deo* counsel to indigent accused persons charged with capital offences such as murder. There are problems with this system. There is no constitutional obligation for its sustenance and the tariffs set for *pro deo* representation are so low that most attorneys are reluctant to engage in *pro deo* work.<sup>154</sup>

The official language in Botswana is English and therefore the language of the courts in Botswana is English. The problem is that there are high illiteracy levels in Botswana amongst indigenous peoples.<sup>155</sup> The offshoot of this is that many indigenous peoples are denied justice because their trials are conducted in a foreign language. The Constitution of Botswana provides in section 10(2)(b) and (f) that a person charged with a criminal offence must be informed thereof as soon as reasonably practicable, in a language that he or she understands, and must be provided, free of charge, with the services of an interpreter if necessary. In practice, in all criminal cases where an accused does not understand the language of the court, free interpretation is provided. Furthermore, section 5(2) of the Magistrate Court Act provides for interpretation from English to a language understood by the parties. However, in civil proceedings the parties may be required by the presiding Magistrate to bear some or all of the costs of interpretation where the language understood by the parties or witnesses is not ordinarily spoken within the area of jurisdiction of the court.<sup>156</sup> This would happen in a case in which the language in question is a language that is not spoken by any ethnic group in Botswana. In practice interpretation is provided to parties to civil litigation.

However, the guarantees for a fair trial or access to justice in civil matters are not adequately provided for in the Constitution of Botswana. Section 18 of the Constitution merely provides that any person alleging that any of his or her rights enshrined in the Constitution may apply to the High Court for redress. The section does not provide for similar guarantees for a fair trial as in criminal cases in terms of section 10 of the Constitution. For example, there are no guarantees of a trial within a reasonable time,

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<sup>154</sup> As above 32.

<sup>155</sup> Mazonde (n 15 above) 140.

<sup>156</sup> Botswana CERD Report para 192.

there is no guarantee of legal representation and the government has no policy for securing *pro-deo* representation as is the case in criminal matters. The effect is to severely reduce the practical effect of section 18, especially for poor indigenous communities.

Access to the High Court is regulated by an elaborate and complicated set of rules which makes access to the High Court impossible without legal representation. As a result many indigenous peoples are unable to access these courts.<sup>157</sup> The CERD Committee has found that many Basarwa experience difficulties in accessing common law courts because of the complexities and expenses involved, and recommended that the government should introduce legal aid especially for disadvantaged ethnic groups.<sup>158</sup> In the *CKGR* case in which a Basarwa community successfully challenged its relocation from the Central Kalahari Game Reserve, the community relied entirely on aid from international donors. This had several negative effects. First, a backlash against the community which was viewed as unpatriotic for collaborating with foreigners. Second, the case dragged on for a period of four years, mostly at the request of the community since they had to postpone the case to secure funding for their case.

Most of the shortcomings of the laws of Botswana with respect to the right to access to justice stem from the fact that the legal system in Botswana is essentially western and therefore foreign to indigenous peoples, as it is to the majority of people in Botswana. This could be mitigated by a recognition of traditional systems of justice or customary laws. The UN Declaration provides for the right of indigenous peoples to prompt decisions in disputes with the state and other parties through just and fair procedures.<sup>159</sup> The same article provides for the rights of indigenous peoples to effective remedies for the infringement of their rights and also for such decisions to have regard to indigenous peoples' traditions, rules, customs and legal systems. This essentially calls for the recognition of indigenous means of justice and dispute resolution. Although Botswana

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<sup>157</sup> Botswana CERD Report 2006 paras 182-184.

<sup>158</sup> CERD 2006 paras 4, 14.

<sup>159</sup> Art 40 of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) AL/6/L.67, 7 September 2007.

recognises a dual legal system in which the western system of justice exists side-by-side with customary law, the failure to recognise the cultural specificity of indigenous peoples means that in practice the only recognised customary justice system is that of the dominant Tswana groups. This denial of justice is one of the practical manifestations of *Tswanadom* which views indigenous peoples as mere components of Tswana groups. As a result it is assumed that Tswana customary law includes non-Tswana customary law. The leading text on customary law which is heavily relied upon by courts, academics and the government as the embodiment of customary law makes reference to only a few select Tswana tribes.<sup>160</sup> Similarly, the non-representation of non-Tswana tribes in the House of Chiefs means that non-Tswana groups are unable to inform the development of their own traditional forms of justice and law.

## **6 Culture and language rights**

The right to culture is one of the core claims of indigenous peoples.<sup>161</sup> The African Commission held in the *Malawi African Association* Communication that language is an integral part of culture. In Botswana English is the official language and Setswana (language of the Tswana people) is the national language.<sup>162</sup> This has resulted in institutionalising and legalising a Tswana cultural hegemony. The suppression of non-Tswana languages in Botswana takes different forms. For example, the medium of instruction in schools is only English and Setswana, whilst the state media uses only English and Setswana. Parliament also uses predominantly English. There have been moves by some parliamentarians to have Setswana adopted as an official language in Parliament.

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<sup>160</sup> I Schapera *A Handbook of Tswana Law and Custom* (1938).

<sup>161</sup> African Commission on Human and Peoples' Rights (2006) *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa* Copenhagen: IWGIA 10; art 8 of the African Charter provides for the freedom of conscience and the guarantee of the profession and free practice of religion; Article 17 of the African Charter provides for the right of the individual to freely take part in the cultural life of his community and specifically imposes an obligation on the state to promote and protect morals and traditional values recognized by the community. Art 17(2) African Charter; art 17(3) African Charter.

<sup>162</sup> Botswana CERD Report 135.

It is important to note that the government of Botswana does not actively prevent the use of indigenous languages. In fact, non-Tswana ethnic groups freely use their languages and many have in fact established societies to promote their cultures and languages.<sup>163</sup> Furthermore, the government does not deny the existence of non-Tswana languages. However, in light of articles 5, 8 and 13 of UNDRIP, it is not enough that the government does not hinder the use of non-Tswana languages. The government is under an obligation to *facilitate* the enjoyment of the right to culture of indigenous peoples in the same way it sponsors Tswana culture through the use of Setswana as a national language and through the use of Setswana in the national media. The use of Setswana in schools means the government is actively involved in the development, preservation and maintenance of the Tswana culture and its transmission to future generations whilst not doing the same for indigenous cultures.

In recent years the government of Botswana has slowly been giving recognition to the existence and importance of cultural diversity in Botswana. For example, the National Policy on Culture acknowledges the diversity of cultures in Botswana.<sup>164</sup> Furthermore, A Framework for a Long Term Vision for Botswana (Vision 2016) gives recognition to the fact that Botswana has a diverse culture and notes that Botswana has failed to enlist the social and cultural diversity of the country in a shared vision of the country.<sup>165</sup> The government is also engaged in efforts, through its ministries and departments, to promote different cultures. For example, the Department of Youth and Culture was established to promote and preserve Botswana's rich and diverse cultural heritage. Fundamentally, this department also provides financial support to non-governmental projects for cultural activities and the arts.<sup>166</sup>

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<sup>163</sup> Eg, the Society for the Promotion of Ikalanga Language (SPIL), Kamanakao Association, Lentswe la Batswaping and Pitso ya Batswana. There is also an umbrella association for the 'minority' groups known as Reteng.

<sup>164</sup> Republic of Botswana National Policy of Culture October 2001 para 3.1.

<sup>165</sup> Vision 2016 8.

<sup>166</sup> Botswana CERD Report paras 371-372.

Similarly, the Department of National Museums, Monuments and Art Galleries in the Ministry of Labour and Home Affairs has a Mobile Museum Extension Project for schools and local communities which aims at educating school children on the cultural patterns and diverse ethnicities which make up Botswana.<sup>167</sup> Commendable as these efforts may be, there is still a lot that needs to be done in terms of adopting constitutional, legislative and policy measures to ensure that Botswana meets its obligations with respect to the right to culture. It is important that the right to culture is enshrined in the Constitution. It is important to give express recognition in the Constitution to the country's cultural diversity. In that way the government's efforts to promote indigenous peoples' cultures would be seen not as a benevolent gesture on the part of the government but as legal obligations on the government and as corresponding rights which may be enforced by beneficiaries. The inadequacies of a lack of a specific right to culture and its various manifestations were revealed in the *Kamanakao* case. In this case the applicants argued, among other things, that the failure and refusal by the state to use the Yei language as a medium of instruction was discriminatory and in violation of the right to equal protection of the law in terms of sections 15 and 3 of the Constitution. The applicants sought an order from the High Court compelling the government to include the Yei language in the school curriculum. The High Court agreed with the applicants but refused to grant the order sought on the grounds that doing so would be going beyond its powers. The High Court held that matters such as the school curriculum were within the purview of the executive branch of the government and therefore outside the purview of the judiciary. If the right to culture and its manifestations such as language were specifically enshrined in the Constitution, then granting an order to enforce the right would be perfectly within the powers of the High Court in terms of section 18 of the Constitution (to order compliance with the provisions of the Constitution). Although the Yei do not identify themselves as indigenous peoples, the *Kamanakao* case is relevant to the situation of indigenous peoples. First, neither the Yei language nor indigenous languages are recognized in Botswana. Therefore, the result of the case directly affects indigenous people and all other non-Tswana ethnic groups whose languages are not

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<sup>167</sup> Botswana CERD Report para 375.

recognised in Botswana. Secondly, in recognition of the relevance of the decision to all non-Tswana ethnic groups, the Yei and others have since created an umbrella body called Reteng to advocate the recognition of their cultural rights.<sup>168</sup>

An important safeguard against the destruction of culture is ensuring that indigenous peoples are not assimilated into other groups or societies in a way that would result in the destruction of their cultural identity. This is precisely the objective behind articles 5 and 8 of the UN Declaration<sup>169</sup> and article 22 of the African Charter which cumulatively guarantee indigenous peoples the right to cultural development and protection from assimilation. Article 8 of the UN Declaration recognises that forced assimilation and destruction of culture may take different forms and therefore the article specifically puts an obligation on states to prevent and provide redress for any act that is aimed at depriving indigenous peoples of their cultural integrity and ethnic identity,<sup>170</sup> any act that is aimed at dispossessing them of their lands, territories and resources,<sup>171</sup> any act of forced population transfer aimed at or having the effect of undermining or violating their rights,<sup>172</sup> or any act of forced assimilation or integration.<sup>173</sup> This is a broad article which touches on a wide gamut of aspects of culture and focuses on the prevention of the destruction of the many facets of culture. Article 13 of the UN Declaration focuses on guaranteeing the right of indigenous peoples to maintain, develop and transmit their culture to future generations. It specifically refers to the right to transmit to future generations their histories, oral traditions, philosophies and writing systems and places an obligation on states to adopt effective measures to ensure the enjoyment of this right.<sup>174</sup>

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<sup>168</sup> Solway, J and Mayati-Ramahobo, L 'Democracy in process: Building a coalition to achieve political, cultural and linguistic rights in Botswana' 38(3) (2004) *Canadian Journal of African Studies* 603 – 621.

<sup>169</sup> Art 5 of the UN Declaration provides for the right of indigenous peoples to maintain and develop their distinct political, legal, social and economic institutions.; art 8 of the UN Declaration provides for the right of indigenous peoples not to be subjected to forced assimilation and destruction of their culture.

<sup>170</sup> Art 8(2)(b).

<sup>171</sup> Art 8(2)(c).

<sup>172</sup> Art 8(2)(d).

<sup>173</sup> Art 8(2)(e).

<sup>174</sup> Arts 13(2) and 13(3) UN Declaration.

In Botswana, the stated government policy of creating a single non-racial and non-tribalistic society has resulted in the adoption of policies that aim at integrating non-Tswana groups into the Tswana in a way that results in their loss of cultural identity. This is not only limited to the non-recognition of non-Tswana languages but also extends to, as shall be seen in the next sections, education policies, political participation and development paradigms that are geared towards assimilating non-Tswana in Tswana society.

## **7 Education**

Education is a fundamental right enshrined in many international human rights instruments.<sup>175</sup> Article 17 of the African Charter demonstrates that the right to education goes beyond the right to have access to education but includes the right to have access to education that reflects the culture and traditional values of the community to which the individual belongs. For indigenous peoples this is particularly important because instead of being a liberating and empowering resource, education is often used to destroy the culture and moral fibre of their communities because education policies often fail to take cognisance of their cultures and traditional values.<sup>176</sup> In assessing the extent to which the laws and policies of Botswana respect, protect and promote the right to education it is important to look at the manner in which the education policies in Botswana are reflective of the cultural diversity of Botswana society.

The Constitution of Botswana does not provide for the right to education. However, Botswana has for many years provided free primary and secondary education and the education system is regarded as one of the most successful formal education systems in

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<sup>175</sup> Art 17 of the African Charter provides for the right of every individual to education. It also provides that every individual may take part freely in the cultural life of his community (Arts 17 (2)) and 17(3) and also places an obligation on the state to promote and protect morals and traditional values recognized by a particular community.

<sup>176</sup> In this respect Part IV of ILO 169 provides for the right to education and the nature and content of this right and the manner in which this right may be given effect to. Art 26 imposes an obligation on states to ensure that indigenous peoples have the opportunity to acquire education at all levels on equal footing with the rest of the national community; art 27 provides for the development of education programmes in cooperation with indigenous peoples and also recognizes the right of indigenous peoples to establish their own educational institutions (art 27 (1) and art 27(3)).

Africa.<sup>177</sup> Despite these efforts by government to provide universal education, indigenous children do not reap the full benefits of education. The government policy that identifies all citizens as having a Tswana ethnic identity means that most government policies are aimed at assimilating non-Tswana groups into the Tswana ethnic group. The education policy reflects this general policy in many ways.<sup>178</sup>

The medium of instruction in public schools from primary level to secondary level are Setswana and/or English. These languages are also listed among the core subjects for citizens in the country by the Curriculum Blueprints for Primary and Secondary Education and the 1994 Revised National Policy on Education. What this means is that all citizens have to study these languages and pass examinations in order to progress up the education ladder. The policy means that indigenous children (and other non-Tswana children) are denied the right to education in their mother-tongue. The denial of this right has far-reaching implications for indigenous peoples. Setswana and English are their second and third languages whilst their first language is normally one of the languages spoken by the Khoisan peoples.<sup>179</sup> This immediately places them at the disadvantage of having to study in a language they are not familiar with.<sup>180</sup> This is discriminatory in that the government sponsors Setswana and English whilst it does not do the same for indigenous languages.

The government of Botswana is aware of the need to teach non-Tswana indigenous languages in schools. Indeed, the Revised National Policy on Education has recommended the teaching in mother-tongue in areas where a particular language is dominant. It also recommended the teaching of either a local language or French as a subject at the secondary school level.<sup>181</sup> This is commendable but falls short of

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<sup>177</sup> 'For Benefit of All: Mother Tongue Education For Southern African Minorities' A Comprehensive Summary Report from a Regional Conference on Multilingualism in Southern African Education, held in Gaborone, Botswana, 1-2 June 2005 25 ('For Benefit of All').

<sup>178</sup> As above.

<sup>179</sup> Botswana CERD Report para 339.

<sup>180</sup> The government itself recognises the disadvantage faced by indigenous children as a result of its failure to provide education in their native tongues; as above.

<sup>181</sup> As above, para 337.

international standards. First, the Policy does not identify a local language that may be taught as an optional subject and secondly, this would be limited to secondary level only. In this way even if this policy is implemented it would mean that non-Tswana children are disadvantaged at the primary level. Significantly, the Revised National Policy has to date not been implemented.<sup>182</sup> The CERD Committee has recommended that the government of Botswana introduce mother-tongue education. However, the CERD Committee has noted this in itself would not be sufficient. It is important for the government to change its education curricula to reflect the history, culture and traditions of non-Tswana ethnic groups.<sup>183</sup>

A related problem with the government education policy is that it fails to reflect the culture, history and aspirations of indigenous peoples. This derives not only from the government policy of homogenisation but also from the adoption of the British system of education. For example, the use of English as a medium of instruction is a product of this influence.<sup>184</sup> Another problem which derives from the British influence and impacts negatively on indigenous children is the model of centralised institutions in education.<sup>185</sup> As a result the selection of teachers, curriculum, examination writing and grading are all controlled by the government through the Ministry of Education.<sup>186</sup> This centralised form of education is problematic. For one thing, it leads to a focus on the needs of the Tswana because this system is primarily led by people from the dominant Tswana tribal group.<sup>187</sup> As a result the education system fails to take into account the culture of indigenous peoples which values peace, non-violence, and free interaction between adults and children. Traditional Basarwa education is informal and incorporated into the everyday lives of Basarwa children.<sup>188</sup>

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<sup>182</sup> For the Benefit of All 26.

<sup>183</sup> CERD 2006 para 15.

<sup>184</sup> RW Wagner 'An Endless Desert Walk: Perspectives of Education from the San in Botswana' Graduate School of Education Publications University of Pennsylvania (2006) 8.

<sup>185</sup> J Meyer, J Nagel and C Snyder 'The expansion of mass education in Botswana: Local and world society perspectives' (1993) 37 *Comparative Education Review* 471.

<sup>186</sup> As above.

<sup>187</sup> Wagner (n 184 above) 8.

<sup>188</sup> Wagner (n 184 above) 12.

The government justifies its failure to introduce non-Tswana indigenous languages as core subjects and as mediums of instruction on the grounds of a lack of qualified teachers, the low level of development of the language and a lack of available reference material and books required.<sup>189</sup> The government further argues that because there are over 25 local languages in a population of only 1.7 million, this would be costly for the government.<sup>190</sup> In recent years, indigenous peoples, with the assistance of civil society, have engaged in attempts to develop their languages and orthography. For example, the Naro Language Programme in D'kar, with the supports of the Netherlands Reformed Church, has developed orthography, a Naro dictionary and Naro language primers for adult literacy classes.<sup>191</sup> Similarly, a Kwedam dictionary and orthography have been developed with the result that the indigenous languages of the Naro and Khewdam have been developed to a state where they can be introduced as languages of instruction in schools.<sup>192</sup> The success of these indigenous endeavours at developing their languages will depend on the government's willingness to support them and implement the 1994 Revised Policy.

A majority of indigenous people benefit from a government development policy called the Remote Area Dwellers Programme (RADP) which was previously called the Bushman Development Programme. This is discussed in the section on socio-economic rights. In main, the programme seeks to bring basic facilities such as schools and health care to people living in remote areas.<sup>193</sup> In some instances indigenous settlements are so small that they cannot accommodate a small village school. In such a case, children from these areas have to walk long distances of up 14 km to attend schools.<sup>194</sup> In some areas the schools are too far away for children to walk to on a daily basis, sometimes as far as 70 km from their homes.<sup>195</sup> As a solution to this the government has built hostels so that

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<sup>189</sup> Botswana CERD 2006 Report para 338.

<sup>190</sup> As above.

<sup>191</sup> For Benefit of All 26.

<sup>192</sup> As above, 26.

<sup>193</sup> M Bolaane and S Saugestad 'Mother-Tongue: Old Debates and new initiatives in San Education' *Indigenous Affairs*, IWGIA, 1/06, 48.

<sup>194</sup> Wagner (n 184 above) 11.

<sup>195</sup> As above, 13.

very young children (sometimes as young as seven years old) spend the school term in hostels away from their parents. This has resulted in very high levels of desertion: about 81.5 per cent of children in remote areas.<sup>196</sup>

There are a number of reasons for this. Children spend long periods away from home, something which Basarwa children and parents find unacceptable and contrary to their culture. Furthermore, the hostels are inhospitable and have insufficient provision of care.<sup>197</sup> Non-Tswana children, especially Basarwa, are often objects of abuse from both Tswana teachers and children in these hostels. Whereas corporal punishment is an integral part of Tswana culture and therefore considered necessary in schools, it is contrary to Basarwa culture and is disapproved of by Basarwa children and parents.<sup>198</sup> All these factors converge to result in Basarwa children dropping out of schools in these remote areas. As a result there is a staggering 77 per cent illiteracy rate among the Basarwa.<sup>199</sup>

The biggest obstacles to the enjoyment of the right to education by indigenous peoples in Botswana are acute discrimination, poverty, a lack of mother-tongue instruction, language barriers preventing parental involvement, abuse, travelling long distances to school, the school hostel system, misunderstanding of San culture and a mistrust of the education system itself. All of these are a direct result of the Botswana education policy described above.<sup>200</sup>

## **8 Land, natural resources and environment**

The right to land, natural resources and the preservation of the environment are core claims and concerns of indigenous peoples. Land and natural resources are not only of economic value but are also important for the continued existence of indigenous

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<sup>196</sup> Botswana CERD 2006 Report para 340,

<sup>197</sup> Bolaane and Saugestad (note 193 above) 49.

<sup>198</sup> R Hitchcock (2000) *Education, language, and cultural rights in Botswana Southern Africa*. Paper presented at the James E. Smith Midwest Conference on World Affairs, University of Nebraska, Kearney, Nebraska 3.

<sup>199</sup> Mazonde (n 15 above) 139.

<sup>200</sup> WIMA 'Education' [www.wimsanet.or/](http://www.wimsanet.or/).

peoples.<sup>201</sup> The combined effect of articles 14 and 21 is to guarantee all forms of property, including land, and to provide for means by which it may be recovered and compensation provided in the event the right is encroached upon. Whilst article 14 does not specifically refer to the right as a collective right, there is no doubt that the articles impose an obligation on the state to guarantee collective proprietary rights. Further, article 21 clearly protects collective rights. The protection of the collective right to land and natural resources is particularly important because access to land and natural resources has a direct bearing on the very identity and existence of people. As well, land and natural resources are often linked to the culture and traditional way of life of peoples.<sup>202</sup> The environment often forms part of and is closely related to land and natural resources. The right to a satisfactory environment favourable to the development of all peoples is guaranteed under article 24 of the African Charter.

Article 26(1) of UNDRIP provides that indigenous peoples have the right to their lands, territories and resources.<sup>203</sup> The combined importance of articles 26, 27 and 28 lies not only in the recognition of the rights to land, territories and natural resources but also in the protection and recognition of indigenous peoples' traditions, customs and land-tenure systems. This is important because those land rights recognized in post-colonial countries are often alien and do not give recognition to indigenous peoples' traditions, customs and land-tenure systems. Furthermore, the articles put emphasis not only on traditional land-tenure systems but also on traditional processes of adjudication and redress. The articles require of states to obtain free, prior and informed consent before taking lands from indigenous peoples.

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<sup>201</sup> Art 21 of the African Charter provides for the right of all peoples to freely dispose of their wealth and natural resources. It further provides that the right shall only be exercised in the exclusive interest of the community. Art 21(2) goes further to provide that in the event of spoliation the dispossessed people shall have the right to the lawful recovery of their property and to an adequate compensation.

<sup>202</sup> Para 3.2, 7 CCPR General Comment No 23 (Article 27: The right of minorities): 08/04/94. CCPR/C/21/Rev.1/Add.5.

<sup>203</sup> Art 26(2) calls on states to recognise and protect these lands, territories and resources with due respect to their customs, traditions and land tenure systems. Arts 27 and 28 are geared towards providing mechanisms for adjudicating land claims and for restitution of lands. Art 28 gives indigenous peoples the right to redress by means including restitution and compensation in cases where indigenous peoples' lands, territories and resources have been taken, used or confiscated without their free, prior and informed consent.

## **8.1 A brief history of dispossession and land-tenure in pre-independence Botswana**

The 'land problem' in Botswana can be traced to the late Nineteenth Century with the proclamation of Botswana as a British Protectorate. As pointed out in the first section, by the time Bechuanaland was proclaimed a protectorate, almost the entire territory of the present-day Bechuanaland was under the control of the principal Tswana tribes. The Principal Tswana tribes were composed of other non-Tswana groups who had either been conquered or had attached themselves to the Tswana groups. These Tswana groups were the Bangwato (in the central part of the country), the Batawana (in the north-west), the Bakwena (in the south-west), the Bangwaketse (in the south), the Bakgatla, Barolong, Balete and Batlokwa (all in the south and south-east). The other tribes such as the Basarwa, the Wayei, the Kalanga and the Kgalagadi were regarded as mere components of these groups. This did not, however, mean that the non-Tswana groups were regarded as landless because they often had territories or lands marked for their occupation.<sup>204</sup>

The British institutionalised this pre-colonial tribal arrangement. They divided the country into eight administrative districts to coincide with the principal eight Tswana tribal territories. These administrative districts were named after the Tswana tribes and the chiefs were used to administer the districts on behalf of the British, subject to the administrative control of the colonial government. The Tribal Territories Act was passed and re-enacted in 1933 for these purposes.<sup>205</sup> In addition to the Tribal Territories, the Act also carved out Crown Lands which belonged to the British Crown although occupied by non-Tswana ethnic groups. These were the Ghanzi, Kgalagadi, Chobe, and the Tati Concessions (North East).<sup>206</sup> The Ghanzi and Kgalagadi were mainly occupied by the Basarwa and the Bakgalagadi, whilst the Chobe and North-east were occupied by the Subiya and Kalanga respectively. However, the Basarwa were and still are found in all parts of the country.

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<sup>204</sup> Botswana CERD 2006 Report para 125.

<sup>205</sup> Hailey *Native Administration in the British African Territories* (1953) 238-255.

<sup>206</sup> Arts 1 Bechuanaland Protectorate (Lands) Order in Council of 1904 and Bechuanaland Protectorate (Lands) Order in Council of 1910.

It is important to note that whilst the eight main tribes were generally recognised as independent, the non-Tswana tribes were not. Thus, the non-Tswana tribes living upon the Crown lands were regarded as politically subject to one of the Tswana tribes. For example, the Basarwa and Kgalagadi were regarded as being part of the Batawana, the Bangwato, the Bangwaketse and the Bakwena, depending on which tribal authority they were in proximity to.<sup>207</sup> In this scenario indigenous peoples were not recognised as having independent collective rights to land or territory, their rights were merely those of the larger Tswana tribe they were regarded part of.

It is important to note that despite this tribal organisation, no land problem or landlessness as a general rule existed in pre-colonial Botswana, even for groups regarded as inferior like the Basarwa.<sup>208</sup> Traditionally land was held by the chief in the name of the tribe and every individual had the right to sufficient land and resources for sustenance.<sup>209</sup> Land was allocated to people for various reasons, including residence, arable agriculture, grazing, hunting, and so on. For hunting and grazing purposes, blocks of land were often set aside for use by groups and not individuals.<sup>210</sup> In this way indigenous peoples had access to land and other natural resources. This was more so in the pre-colonial era when the main sources of livelihood for all ethnic groups were arable farming, livestock and hunting and gathering.

The proclamation of the Protectorate introduced major changes with regards to land. First, the way in which land was viewed was slowly altered. The general European colonial policy was to encourage individual land ownership and the commercialisation of land.<sup>211</sup> Secondly, the traditional land tenure system was slowly changed. Traditionally, most societies in Botswana and elsewhere in Africa managed and maintained land on a communal basis.<sup>212</sup> This traditional use of land was regarded as wasteful and antithetical

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<sup>207</sup> QKJ Masire (n 29 above) 72.

<sup>208</sup> RK Hitchcock *Kalahari Communities: Bushmen and the Politics of the Environment in Southern Africa* (1996) 27.

<sup>209</sup> As above 27.

<sup>210</sup> As above 28.

<sup>211</sup> I Schapera (1943) *Native Land Tenure in Bechuanaland Protectorate*.

<sup>212</sup> Hitchcock (n 208 above) 27.

to the colonial policy of economic development.<sup>213</sup> The new system divided land into three, namely tribal land, crown land (later state land after independence) and freehold land. Tribal land belonged to the whole tribe and was held in trust by the chiefs. Crown land belonged to the crown and freehold land was land that could be privately owned.<sup>214</sup>

## **8.2 Land law and policies in independent Botswana**

This land tenure system was maintained at independence, except that the Land Boards replaced chiefs with respect to tribal land, and the state replaced the Crown with respect to Crown land. Tribal land is held in trust for the tribes and administered and allocated by Land Boards for each tribal territory. Freehold land is land owned by private entities whilst state land is owned by the state.<sup>215</sup>

### **8.2.1 Freehold and tribal land grazing land policy**

The introduction of a new land tenure system had a profound effect on land ownership for all tribes, especially indigenous peoples. For example, the introduction of freehold private land ownership meant a dispossession of indigenous communities of large tracts of land. In the 1890s a number of Boer families were settled in the Ghanzi area, mainly occupied by the Basarwa and Bakgalagadi, and freehold farms were allocated for this purpose.<sup>216</sup> The Basarwa were displaced from fertile land and their land carved into farms for white farmers, known as the Ghanzi farms.<sup>217</sup> This continued after independence with the introduction of Tribal Grazing Land Policy (TGLP) which converted land-tenure from communal to leasehold with the aim of promoting better land management and conservation.<sup>218</sup>

In pursuance of these aims grazing land was to be divided into three zones namely, commercial, communal and reserved. In the commercial zones blocks of rangeland would

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<sup>213</sup> JC Smuts, *Africa and Some World Problems* (1930) 82.

<sup>214</sup> Eg, Proclamation 4 of 1905 and Proclamation 2 of 1911.

<sup>215</sup> Tribal Land Act and State Land Act.

<sup>216</sup> Ng'ong'ola and Moletsi (n 9 above) 14.

<sup>217</sup> *CKGR* case 360 (per Phumaphi J).

<sup>218</sup> Republic of Botswana (1975) National Policy on Tribal Grazing Land Government Paper 1 of 1975.

be subject to leasehold rights. Large-scale cattle-owners were encouraged to move into these commercial zones in which fenced ranches would be established with the hope of better land management. In communal zones the basis of land tenure would remain essentially the same with communal rights to graze livestock. The reserved zones would be land reserved for future use.<sup>219</sup> TGLP ranches were established mainly in the Northwest, Ghanzi and Kgalagadi areas which have significant numbers of Basarwa communities. The establishment of freehold ranches is a continuing process. The TGLP was based on an erroneous notion that Botswana is a cattle country and thus ignored indigenous peoples systems of land-use. This notion rests on the fact that the dominant Tswana group is considered to be cattle-owning or herding. The Basarwa or San were never cattle owners and their traditional land-use systems were therefore not given due consideration.

### **8.2.2 State land, national parks and native title**

The creation of crown lands and game reserves had an adverse effect on indigenous peoples. For example, in 1910 an Order-in-Council created certain lands in Botswana as Crown land. These included an area that is now called the Central Kalahari Game Reserve (CKGR). This area is primarily occupied by Basarwa and there is ample evidence that they occupied this area long before it was declared Crown land.<sup>220</sup> The proclamation did not say anything on the rights of people who may have been living in those Crown lands except those whose titles derive from or were recognised by His Majesty in previous Proclamations.<sup>221</sup> The CKGR was established by Resident Commissioner's Notice 33, dated 14 February 1961, and was issued pursuant to section 5(1) of the Game Proclamation of 1948. At the time of its creation there were suggestions that the CKGR should be created as a sanctuary for both wildlife and the Basarwa residing within it.<sup>222</sup> However, in the end it was created solely as a game reserve. For example, section 5(2) of the Game Proclamation outlawed hunting in the Game Reserve. However, it is clear that the colonial authorities anticipated that the Basarwa residing

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<sup>219</sup> Hitchcock (n 208 above ) 30.

<sup>220</sup> *CKGR* case 329 (per Phumaphi J) 329.

<sup>221</sup> As above.

<sup>222</sup> Bushmen Survey (n 5 above).

within the CKGR would continue undisturbed. For example, section 14(2) of the Game Proclamation gave the Resident Commissioner discretion to grant special permission to hunt for specific purposes. Furthermore, the colonial government knew that the Basarwa hunted in the CKGR contrary to the Game Proclamation but allowed the practice to continue.<sup>223</sup>

### **8.2.3 Relocation of indigenous Peoples from ancestral lands: The case of the Central Kalahari Game Reserve**

In 1986 the government of Botswana adopted a policy in terms of which the Basarwa residing in the CKGR would be relocated to settlements outside of the reserve.<sup>224</sup> The government's reason for this is the need to bring these Basarwa communities closer to 'developments' and also that their presence was a threat to the wildlife populations within the reserve.<sup>225</sup> After numerous discussions with the Basarwa in the CKGR, the government finally decided to go ahead with the relocations in 2002. Most residents of the CKGR had actually long ago been relocated and had been compensated, however, some of them had returned.<sup>226</sup>

The government took measures to enforce its decision to relocate, which decision the government insisted was consensual. Some residents of the CKGR sought an order from the High Court declaring the government's decision to relocate them unlawful. The High Court had to make a ruling on the following:

- (a) Whether termination of basic and essential services (health, food and water etc) was unlawful and unconstitutional;
- (b) Whether the Government was obliged to restore the services. On these issues the Court ruled that the termination of services was neither unlawful nor unconstitutional. It also decided that the Government was not obliged to restore basic and essential services.
- (c) Whether before 2002, the residents were in possession of the land which they lawfully occupied;

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<sup>223</sup> CKGR case 109 (per Dibotelo J).

<sup>224</sup> Report of the Central Kgalagadi Game Reserve Fact Finding Mission (1985) Gaborone: Government Printer; Hitchcock (n 208 above) 35.

<sup>225</sup> S Saugestad "Improving their lives." State policies and San resistance in Botswana' *Before Farming* 2005/4 art 1, 4.

<sup>226</sup> As above 3.

- (d) Whether they were unlawfully or wrongly deprived of the land without their consent;
- (e) Whether refusal by the Government to issue Special Game Licenses (SGL) was unlawful and unconstitutional; and
- (f) Whether the refusal of the Government to allow residents to enter the Game Reserve without a permit was unlawful and unconstitutional. The Court ruled that the residents had lawfully occupied the land and were unlawfully deprived of it without their consent.

One of the issues was whether or not the applicants had been unlawfully relocated from the reserve. The answer to this question depended, according to the High Court, on whether or not the Basarwa were in lawful possession of the CKGR when they were removed in 2002.<sup>227</sup> The very framing of this question suggests what the Court in fact did expressly state, namely that the CKGR belonged to the state and therefore the rights that Basarwa may have would, at best, be the right of possession and not ownership.<sup>228</sup> On the other hand, the applicants claimed that they had native title to the CKGR.<sup>229</sup>

The Court held that for a colonial power to acquire ownership of land there has to be a specific act of acquisition which is distinct from the act of colonisation as land within the colony could be owned by people either as individuals or a community.<sup>230</sup> The Court held that, at the time of proclamation of independence, the Basarwa had native title to the CKGR and that native rights could only be distinguished by a specific act such as alienation to a third party. The Court also held that this native title was held by all other native groups in Botswana with respect to lands they occupied at the time of proclamation.<sup>231</sup> The Court further held that native title was not extinguished by declaration of land rights, except where the use to which the land is put would be inconsistent with the existence of native rights like alienation to third parties, development of residential areas, and so on.<sup>232</sup> The Court held that the native title of the Basarwa to the CKGR was not affected by the 1910 Order-in-Council because the British

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<sup>227</sup> *Sesana* case 324 (per Phumaphi J).

<sup>228</sup> As above 350.

<sup>229</sup> As above 329.

<sup>230</sup> As above 332.

<sup>231</sup> As above 339.

<sup>232</sup> As above 336.

colonial government allowed them to reside and hunt in the CKGR without interference.<sup>233</sup> Similarly, the Creation of the CKGR was itself not held to have extinguished native title because section 3 of the Fauna Conservation Act provided for the hunting rights of those who primarily depended on hunting.<sup>234</sup> As a result the Basarwa were in lawful possession of the CKGR in 2002. The Court then reached the conclusion that the Basarwa were unlawfully deprived of this possession for a number of reasons including the destruction of the Basarwa's huts, the termination of provision of services such as water and hunting licences and the separation of families. All these factors were evidence that the Basarwa did not give proper consent to their relocation.

This was a landmark decision which highlighted a number of important issues. One issue relates to consent. In this case, the government had entered into negotiations for a period of over fifteen years before finally deciding to relocate the applicants. On the face of it, it appeared as if the applicants had been consulted and therefore had freely consented to their relocation. However, the Court found that there was no free and informed consent because the government failed to take into account the specific socio-economic circumstances of the applicants. These circumstances included the fact that the applicants were generally a very poor, marginalised community with very little education and who spoke and understood Setswana in varying degrees. Furthermore, the applicants were of a culture that was markedly different from the Tswana culture and, therefore, whilst consultation through *Kgotla* meetings might have been sufficient for Tswana communities, this might not necessarily be so for non-Tswana groups.<sup>235</sup> This was an important finding which required compliance with standards of the UN Declaration and ILO 169 on free and informed consent. Furthermore, the Court found that, although some applicants may have received compensation, there was no evidence that they understood the consequences of such compensation.<sup>236</sup> Further, the compensation which was in the form of a small plot of land and some livestock was insufficient because no assessment

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<sup>233</sup> As above 339.

<sup>234</sup> As above 350.

<sup>235</sup> *CKGR* case 232 (per Dow J).

<sup>236</sup> *Kamanakao* case 375 (per Phumaphi J).

was ever conducted of the value of the proprietary rights that the applicants were deprived of as a result of the compensation.<sup>237</sup>

However, there are also a few problems highlighted by the case. The first is that native title is an inferior form of title which may be extinguished by an act of state without compensation. Thus, for example, it appears from the case that had the British colonial government and the current government passed legislation that expressly extinguished native title this would have been possible without any compensation. For this reason the provisions of the UN Declaration on the requirements of recognition of indigenous title and land tenure and mechanisms for redress are important. Another issue is that, although the Court held that the Basarwa had native title it did not state what the nature and content of that title was. For example, did that include hunting and mineral rights? Although the Court referred to the right of Basarwa to hunt it is clear from the case that the right is premised not on native title but on the legislation that specifically gave the Basarwa the right to hunt. Another problem is that native title is clearly only useful where it has survived express or implied extinction as in the case of the CKGR.

The right of an individual to protection from deprivation of property is guaranteed in section 8 of the Botswana Constitution. However, the section permits the acquisition of property by government and the Acquisition of Property Act gives effect to the government's right to expropriate property.<sup>238</sup> In *President of the Republic of Botswana and others v Bruwer and Another*,<sup>239</sup> the Court of Appeal held that the Act only applied to the acquisition of immovable property such as land. Therefore, whilst the Constitution protects the right to property, the state has the right to expropriate such land for public purposes and upon payment of adequate compensation. The problem with this provision is that it is doubtful whether it would provide adequate protection to communities who may not have the right of ownership to land but simply the right to possess as in the case of the residents of the CKGR.

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<sup>237</sup> *Kamanakao* case 240 (per Dow J).

<sup>238</sup> Ch 32:01 Laws of Botswana.

<sup>239</sup> 1998 Botswana Law Reports 86.

### 8.3 Tribal Land

In relation to tribal land, it is important to note that during the pre-colonial and colonial eras, the chiefs had administrative, judicial and executive powers. With regards to land and natural resources within a tribal territory, the chiefs had almost absolute power even during the colonial era. Land and natural resources within a tribal territory belonged to the tribe and were administered by the chief on behalf of the tribe.<sup>240</sup> Thus, for example, the chief was responsible for granting mining and hunting licenses. At independence, chiefs were stripped of most of their administrative powers, including those with respect to land and natural resources.<sup>241</sup> In 1968, two years after independence, the Tribal Land Act was passed. This Act created Land Boards which replaced chiefs as trustees of tribal land on behalf of tribes.<sup>242</sup> In terms of the Tribal Land Act, the Land Boards were mandated to allocate lands to ‘tribesmen’ for residential, arable, grazing or business purposes.<sup>243</sup> The objective behind the creation of Land Boards was in principle sound because chiefs were known to exercise their powers arbitrarily.<sup>244</sup> Land Boards, on the other hand are, notionally, independent bodies. However, endemic discrimination against indigenous peoples also permeates the Land Boards. Consequently, there are numerous reports that their applications are not accepted or considered, or that the application processes take much longer than those of the Tswana tribe of the territory.<sup>245</sup>

There were, however, some problems with the Tribal Land Act. First, land could only be granted for residential, arable, grazing or business purposes. The other traditionally-recognised land uses such as hunting and the collection of wild foods became the responsibility of the central government. This essentially means that the traditional land use systems of the indigenous peoples were not recognised. Second, land could only be granted to an individual who qualified as a tribesman. This meant that an individual could

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<sup>240</sup> N’gon’gola and Moeletsi (n 9 above) 8.

<sup>241</sup> Masire (n 186 above) 61-82.

<sup>242</sup> Sec 10(1) Tribal Land Act .

<sup>243</sup> Eg sec 23 Tribal Land Act.

<sup>244</sup> Masire (n 186 above) 184.

<sup>245</sup> The Botswana Centre for Human Rights ‘Land Rights’[http://www.ditshwanelo.org.be/land\\_rights](http://www.ditshwanelo.org.be/land_rights).

only be allocated land in tribal territory to which he belonged. The problem with this requirement was that tribal membership was something that could always be contested. Thus, some Basarwa were excluded from making applications for land on the basis that they were not tribesmen.<sup>246</sup> In 1993 the Tribal Land Act was amended to provide for the allocation of land to be based on the basis of citizenship and not tribal affinity.<sup>247</sup> On the face of it, this was a welcome amendment because citizenship is relatively easy to prove in Botswana. The law requires every citizen over the age of 16 to carry a national identity card. However, in the broader context of the Tribal Land Act with its emphasis on individual land ownership this means that group rights to land are not recognised.

This is ostensibly based on the government's policy of non-racialism and non-tribalism. The policy of the government is that every citizen is entitled to land and that no particular tribe owns any territory.<sup>248</sup> The government's policy is flawed and difficult to justify for at least two reasons. First, it is based on a denial of group rights which are recognised by the African Charter, the UN Declaration, ILO 169 and a growing body of international law. Second, although the government's stance is that no tribe owns any territory, evidence points to the recognition of tribal ownership of, or at least association with, land. For example, Land Boards are named after the tribes of the territories for which they are responsible. For example, there are the Tawana Land Board (for Batawana Territory), the Kgatleng Land Board (for Kgatleng Tribal Territory), and so on. All these bear the names of the principal Tswana Tribes. Thus, although every citizen is entitled to an individual piece of land, the government recognises group ownership of (or at least association with) land of the Tswana ethnic groups.

Indigenous peoples therefore have no recognised territory outside of the Tswana tribes that they are assumed to be part of.<sup>249</sup> However, the government sees no problem with this because the government's philosophy of *Tswanadom* sees non-Tswana groups as

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<sup>246</sup> EA Wily EA *Official policy towards San (Bushmen) hunter-gatherers in modern Botswana: 1966-1978* (1979) 33.

<sup>247</sup> Sec 10(1) Tribal Land (Amendment) Act of 1993.

<sup>248</sup> Masire (n 186) 185.

<sup>249</sup> Mazonde (n 15 above) 138,

mere components of Tswana tribes. Thus, the government sees nothing wrong with the designation 'Tswana Land Board', precisely because in terms of *Tswana* philosophy Tswana includes non-Tswana groups like the Basarwa, the Wayei and the Subiya living within what is believed to be Tswana territory. However, this very philosophy violates article 19 of the African Charter which provides for the equality of 'peoples' and proscribes the domination of one people by another. It may well be that there is equal treatment of individuals in the allocation of land but this does not justify the unequal treatment of peoples.

However, it is important to emphasise that the situation in Botswana is a bit more complicated than may appear. For example, although the Tribal Territories bear the names of the eight Tswana tribes, these tribes have no legal rights as a collective to either the land itself or mineral rights underneath it. Mineral rights, as shall be shown shortly, belong to the state. However, it has been argued that 'land is part and parcel of African Socio-political systems, and is often perceived as a territorial dimension of African societies'.<sup>250</sup> As a result, although tribes may currently not have group rights to land in Botswana, the very association of certain territories with Tswana tribes and the exclusion of other tribes from this group rights association violate the African Charter.

#### **8.4 Natural resources: Minerals and wildlife resources**

Accesses to natural resources such as wildlife and minerals which naturally attach to land was also affected by the proclamation of a protectorate and the subsequent change of the land tenure system. Section 5(1) of the Game Proclamation of 1948 provided for the establishment of national parks and game reserves, whilst section 5(2) of the Game Proclamation outlawed hunting in game reserves. In this way all traditional rights to hunting were extinguished. Nevertheless, the colonial government recognised that many indigenous communities depended on hunting and gathering. As a result, section 14(2) of the Game Proclamation gave the Resident Commissioner the discretion to grant special

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<sup>250</sup> Hitchcock (n 208 above) 28.

permission to hunt for specific purposes. Furthermore, for communities that depended on hunting and gathering, like the Basarwa, the colonial government ignored the fact that they hunted in contravention of the law. In 1967 the Fauna Conservation Act was passed which outlawed hunting. However, section 3 of that Act provided for hunting rights for those who depended on hunting and gathering.

The Wildlife Conservation and National Parks Act 28 of 1992 was passed in 1992 to replace the Fauna Conservation Act. This Act provides for the regulation of wildlife and the management of national parks under the supervision of a Director of Wildlife and National Parks (the Director), and gives effect to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and other international conventions to which Botswana may from time to time be a party. Part II designates specific areas as National Parks, and confers on the President the power to declare any state or bequeathed land as a national park, game reserve and sanctuary, or private game reserve. The Act charts list of activities that are prohibited in parks which include the entry of persons without permission, the cutting down of trees, the removal of animals, and so on. Part III provides for the establishment of wildlife management areas and controlled hunting areas by the President, and this enables the President to draw up regulations regarding such areas.

Part IV specifies a list of protected animals in Botswana, and imposes a fine of P10 000 (about US\$ 2,000) and imprisonment of seven years for persons who hunt or capture such animals without authorisation, with higher fines in the case of rhinoceros. Many Basarwa have been convicted as a result of a violation of these provisions. Part V deals with hunting generally, and provides that licenses are required for the hunting of all animals, except in the case of personal consumption of non-protected animals outside of a national park or game reserve, or in the case of hunting non-protected animals by someone holding 'landholder's privileges' on the land subject to that privilege. Even in the latter cases, however, hunting is subject to certain restrictions. Although section 12(3) of the Wildlife Conservation and National Parks Act outlaws hunting, section 39(1)(b) gives the Director the discretion to grant permits for the purposes of

killing or capturing animals in the interests of conservation, management, controlling or utilisation of wildlife. Section 45(1) of the Regulations promulgated pursuant to the Wildlife Conservation and National Parks Act provides that persons resident within a game reserve at its establishment or who can rightly claim to have the right to hunt, may be given a special licence to hunt in the game reserve. Regulation 3(1) of the Regulations outlaws hunting whilst regulation 9(3) provides that special licences may be issued to people who principally depend on hunting and gathering.

The net effect of the above regulations is to vest in the state the management of wildlife resources to the exclusion of the peoples, whilst article 21 of the African Charter provides for the right of peoples to freely dispose of their wealth and natural resources. The wildlife legislation may not of its own violate international law as the state itself has the obligation to ensure the preservation of wildlife as the Wildlife Conservation and National Parks Act purports to do. Although the state might be responsible for the management of wildlife within its jurisdiction, international law does require that the peoples themselves be involved in the management of their resources. This is a difficult issue which requires a careful balancing of competing interests. The Act gives the Director the discretion to determine who should be entitled to special licenses to hunt wildlife and this discretion may be exercised improperly.

In the *CKGR case* the applicants claimed, among other things, that the government's refusal to issue them with special licences was unlawful since it was calculated to force them to relocate from the CKGR. The Court held that it was clear that the Director's refusal to grant special hunting licences was merely in pursuance of the government's policy of relocating the Basarwa from the CKGR. In the event the Director had failed to exercise his discretion and therefore the refusal of licences was unlawful.<sup>251</sup> The Court further held that the discretion was intended to benefit those who primarily depended on hunting for subsistence and therefore the refusal to grant licences was tantamount to

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<sup>251</sup> *Sesana* case 379 (per Phumaphi J).

condemning the applicants to death by starvation in violation of the right to life.<sup>252</sup> Although the Court held that the residents of the CKGR and all those who could prove that they depended principally on hunting for subsistence had the right to hunt, it is clear that the Court held that this right derived from legislation and therefore could be revoked or denied by the Director upon a proper exercise of discretion.

It is not only surface resources that are vested in the state. The Mines and Minerals Act<sup>253</sup> provides in section 3 that all rights to minerals vest in the state. In terms of the Act, a mineral is any substance, whether in solid, liquid or gaseous form occurring naturally in or on the earth formed by or subject to a geological process. The government justifies the vesting of natural resources on the state on the basis that it ensures that all the citizens have a common stake and enjoy common benefits from mineral revenues. It further argues that revenues derived from minerals have been used to build schools, roads, clinics, hospitals and to provide potable water electricity and telecommunications for the benefit of people throughout the country.<sup>254</sup> On the face of it and particularly given Botswana's history of tribal dominance the vesting of mineral rights on the state was a desirable step. Prior to independence, mineral rights vested in the tribes. Given Botswana's tribal organisation which only recognises Tswana tribes, this meant that non-Tswana had no direct claim to mineral rights.

It appears that the government's policy has received general acceptance by all ethnic groups as no ethnic group has laid claim to ownership of mineral rights in any of the territories they regard as their ancestral right. Thus, even the Basarwa of the CKGR have not laid claim to minerals within the CKGR despite claims that they were relocated from the CKGR to make way for diamond exploration. As noted above, the Court never laid down the nature and content of their rights over the CKGR other than that they as residents were in lawful possession at the time they were relocated. However, article 21 of the African Charter does give peoples the right to freely dispose of their natural

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<sup>252</sup> As above, 380.

<sup>253</sup> Act 17 of July 1999.

<sup>254</sup> Republic of Botswana 'Relocation of Basarwa from the Central Kalahari Game Reserve' ([www.gov.bw/](http://www.gov.bw/) (accessed 10 March 2008)).

resources.<sup>255</sup> In this way the African Charter makes it clear that the government has an obligation to ensure that exploration does not result in harmful degradation of the environment and also that the peoples within whose territories mineral resources are located benefit from such exploration. The government of Botswana has established a National Conservation Strategy Co-ordinating Agency that promotes the use of environmental planning in all exploration and mining projects, including the use of environmental impact assessments. The Mines and Minerals Act contains elaborate requirements for environmental protection.

## 9 Socio-economic rights

Botswana's economy has been amongst the world's fastest growing economies for many decades, with a real GDP growth averaging 8 per cent per annum.<sup>256</sup> As a result of this growth Botswana has grown from being one of the poorest countries in the world at the time it attained its independence to being a middle-income earner. However, this economic growth and prosperity have not been matched by social indicators. For example, nearly a quarter of the population live below US\$ 1 a day whilst the distribution of income is seriously skewed and the gap between the rich and the poor is very wide.<sup>257</sup> Indigenous peoples are generally acknowledged to be the poorest in Botswana.<sup>258</sup> Since independence the government has sought to bring the standard of living of the Basarwa up to the level obtaining in the rest of the country.<sup>259</sup>

The government of Botswana has initiated development programmes geared towards the elimination of poverty, specifically singling out the San as the target group. In the early 1970s the government initiated a San development programme which was named the

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<sup>255</sup> The African Commission has held in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* that a state may be held responsible for breach of this article if exploration of mineral resources results in the destruction of resources to the detriment of the peoples. (2001) AHRLR 60 (ACHPR 2001).

<sup>256</sup> International Monetary Fund 2005 'IMF Country Report: Botswana' (2005) 7.

<sup>257</sup> (UNDP 2005).

<sup>258</sup> Mr Tshipinare 'Speech by Minister of local government marking the official opening of an international conference on research for Khoe and San development at the University of Botswana' 09 September 2003, University of Botswana, Gaborone.

<sup>259</sup> Saugestad (n 204 above) 4.

Bushmen Programme and which was specifically aimed at providing permanent settlement for the San.<sup>260</sup> The idea was to lure the San away from their nomadic lifestyle which is viewed as antithetical to their ‘development’.<sup>261</sup> The Bushmen Programme was replaced in 1974 by the Remote Area Dwellers Programme (RADP). This is an integrated programme co-ordinated by the Ministry of Local Government which aimed at assisting all those who live in what are called remote areas or areas which are far removed from settled villages or urban centres. These people are called Remote Area Dwellers (RADs) and the majority of them are acknowledged to be the Basarwa. The government’s basic premise is that RADs constitute a socio-economically marginalised group requiring special attention in order to benefit from the country’s economic growth.<sup>262</sup> The broad goal of RADP is to promote the social, cultural and economic development of RADs through the establishment of organised settlements, the provision of basic education and the allocation of land.<sup>263</sup> In particular, RADP is aimed at intensifying the development of remote settlements, the promotion of income-generating activities, the enhancement of the remote area dwellers’ access to land, the encouragement of community leadership and active participation, the provision of training and education and social, cultural and economic advancement as well as the preservation of their unique culture and tradition.<sup>264</sup> These are noble aims which could indeed ensure the socio-economic improvement of a people.

The government has always maintained that the situation of RADs is a purely economic problem which has nothing to do with their ethnicity and which can easily be addressed by improving their economic condition through bringing development to them. It is for this reason that Botswana is not a signatory to the ILO Convention 169 on Indigenous and Tribal Peoples although it has maintained that it supports ‘the general principles and

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<sup>260</sup> KN Bojosi *The University and Participatory Development in Botswana* a paper presented at the International Forum on Universities and Participatory Development on 20-22 November 2006, University of British Columbia, Vancouver, Canada.

<sup>261</sup> L Wily ‘Settlement as a strategy for securing land for nomads: An examination of Botswana government’s current programme of settling the Kalahari San’, Pastoral Network Paper, 7c.

<sup>262</sup> Republic of Botswana, Initial Report of State Party submitted to the Committee on the Rights of the Child CRC/C/51/Add.927 February 2004, ( Botswana CRC 2004 Report) para 377.

<sup>263</sup> L Tshireletso ‘Participatory Research: A Development World Research Paradigm for Change’ in S Saugestad *S Indigenous Peoples in Modern Nation-States* Occasional Papers Series 141-147.

<sup>264</sup> Botswana CRC 2004 Report para 377.

objectives of the said International Labour Organisation Convention 169 in so far as they relate to the economically disadvantaged sections of the population'.<sup>265</sup> In so far as the government is concerned, the target groups of ILO 169, just like RADs, 'include groups of similar socio-economic status'.

The result of the government policy of seeing RADs as simply a socio-economically-defined group has been to gauge the success of the RADP by the existence of infrastructural developments like schools, clinics, hostels, boreholes for the provision of water and the establishment of small-scale agricultural schemes.<sup>266</sup> Such a view emanates from an approach to development that is not people-centred. One of the guiding principles of the RADP is to 'intensify development of remote settlements in order to bring them at par with other villages in the country'. In the event government efforts at improving the socio-economic situation of RADs and indigenous peoples are effectively to convert them into prototype villages with all the basic amenities such as schools and clinics. This is exemplified by the amount of money expended on the programme and the criteria set by the government for gauging its success. Currently, the RADP covers 64 settlements in seven districts and has a budget of US\$14 million for the government's National Development Plan 9 running from 2003-2008. All of the 64 settlements have portable water, 63 of the 64 settlements have primary schools and 58 have health posts. Furthermore, the government has established an Economic Promotion Fund to the amount of US\$1.1million for small scale income-generating activities. The Fund is intended to support labour-based relief projects and to generate income for these communities. Whilst these efforts would ordinarily be commendable, they also reveal the inherent problems with the government's policy. For example, at the settlement of New Xade alone, the government has so far spent US\$ 626 000.00 in income-generating and labour-based relief projects that include candle making, brick laying, knitting, sowing and

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<sup>265</sup> Tshipinare (n 236 above).

<sup>266</sup> DG Boko 'Integrating the Basarwa under Botswana's Remote Area Development Programme: Empowerment or Marginalisation?' (2002) 19 *Australian Journal of Human Rights* <http://www.austlii.edu.au/au/journals/AJHR/2002/19.html#Heading71> (accessed 10 March 2008).

poultry.<sup>267</sup> None of these projects reflect indigenous peoples' own socio-economic activities. The programme does not only represent a typical top-down approach to economic development, but it also involves the imposition of alien economic activities on indigenous peoples.

It is hardly surprising, therefore, that periodic reviews of the RADP since its inception have found that more than two decades following its inception, about 90 per cent of all the RADs were still very poor and depended on government food relief.<sup>268</sup> Furthermore, as seen above, despite the provision of schools in these settlements, illiteracy among indigenous peoples is still at a very high level. Similarly, despite the provision of health posts in these settlements, serious health issues such as HIV/AIDS are a major problem among indigenous peoples. This has been attributed to the disruption and breakdown of indigenous peoples' societies as a result of their displacement.<sup>269</sup>

Another fundamental setback with the RADP is the government policy of cultural neutrality which deprived the target groups of their cultural specificity. The problem with this approach is that even the government acknowledges that the majority of RADs are Basarwa. RADs are composed of peoples with distinct cultural identities, practices and socio-economic and political institutions. The government's approach does not consider how many ethnic groups have been brought together in the particular settlement and how this would in turn determine their administrative and political structures.<sup>270</sup> As a result the expectation is for these RADs to adopt the accepted social and political organisation of Botswana. For example, they are expected to have chiefs or headman presiding over a *kgotla* which is a traditional Tswana forum (but foreign to non-Tswana groups like the Basarwa) which doubles both as a judicial and a political/administrative forum where

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<sup>267</sup> For detailed statistics see Government of Botswana 'Rural Development and Poverty Alleviation' <http://www.gov.bw/index>.

<sup>268</sup> The reasons for the failure of the RAD included the fact that the settlements had no income generating capacity, that the land allocated bore no relationship to the number of residents in a settlement and the fact that the residents of the settlement had no control over access to the land; Tshireletso (n 241 above) 141;

Brody, H Botswana, 'The Bushmen/San, and HIV/Aids' *Open Democracy Quarterly* August 2003 [www.opendemocracy.net/faith-africa\\_democracy/article](http://www.opendemocracy.net/faith-africa_democracy/article).

<sup>270</sup> Boko (n 244 above).

community issues are discussed and decisions made. Similarly, these RAD settlements are located within existing administrative districts and sometimes villages occupied by the more dominant Tswana groups.<sup>271</sup> As a result, the RADs continue to be in a position of socio-economic marginalisation, even in settlements created for them. In this way their socio-economic marginalisation is simply reproduced in these RADs.

However, there are other far-reaching implications of this government policy. First, it has the effect of denying indigenous groups their ethnic and cultural identity in violation of international law. Secondly, because of this denial of their cultural and ethnic identity the government denies these people the right to their economic, social and cultural development with due regard to their freedom and identity in terms of article 22 of the African Charter. This also violates the right of peoples to freely determine their political status and pursue their economic and social development according to the policy they have freely chosen as provided by article 22 of the African Charter.

As a result the noble aims of the RADP have largely failed because, by failing to acknowledge the cultural specificity of the groups within the RADs, the government assumes that a single model of economic development will work for all groups. For example, according to the government, one of the characteristics of RADs is that they lack cattle and livestock. In this way their non-pastoralist lifestyle is seen not as a cultural way of life but rather as an economic deficit to be remedied by the provision of cattle and livestock. Since the people are not traditionally pastoralist, RADP programmes aimed at turning them into pastoralists tend to fail. In the event non-Tswana ethnic communities, particularly the Basarwa, remain the poorest communities in Botswana. Similarly, despite the numerous schools built through RADP, literacy levels are extremely low among the Basarwa and other marginalised communities, precisely because the education policy does not take into account their ethnic diversity and the socio-cultural differences of the different groups that make up Botswana.

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<sup>271</sup> As above.

## 10 Gender equality

Section 15 (1) of the Constitution of Botswana protects individuals from discrimination.<sup>272</sup> The Court of Appeal of Botswana has held in the *Dow* case that discrimination on the basis of sex is prohibited. The Court also held that section 3 of the Constitution which guarantees every individual the enjoyment of fundamental rights and freedoms irrespective of, among other things, sex, in fact guaranteed every individual equal protection by the law. It follows therefore that the Constitution of Botswana protects women, including indigenous women, from discrimination. However, section 15(4) excludes the application of section 15(1) to any law which makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. In essence laws that discriminate against women but falling within the above categories would not be held to be in violation of the prohibition against discrimination.

Section 15(4) is contrary to both article 2 of the African Charter and article 2 of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by failing to protect women against discriminatory laws dealing with areas in which most discrimination against women is to be found. It has been suggested that the Constitution intends to protect customary laws and other cultural practices which operate side-by-side with common law.<sup>273</sup> However, the exclusion of marital laws, divorce laws, adoption laws and other matters of personal law from the prohibition of discrimination against women leaves women in a vulnerable position. Under customary law women occupied an inferior position relative to men within the society and family. For example, women did not have the same rights to speak in *kgotla* meetings, they did not have the same rights to land, livestock or other property that men had.<sup>274</sup> Furthermore, women had limited rights with respect to inheritance. However, because of the evolving nature of customary law, women are increasingly being accorded similar treatment as men.<sup>275</sup> The

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<sup>272</sup> The definition of discrimination under sec 15(2) of the Constitution does not specifically refer to sex as a ground upon which discrimination is excluded.

<sup>273</sup> Botswana CERD 2006 Report 2006, para 195.

<sup>274</sup> Schapera (n 147) 28-29, 202-207, 218-221.

<sup>275</sup> Botswana CERD Report para 198.

common law was almost similar to customary law in that married women were generally regarded as minors and under the guardianship of their husbands.<sup>276</sup> Indigenous peoples – including women and girls - are subject to customary law, which is assumed to apply to indigenous peoples. Similarly, they are subject to the common law which is clearly an alien system of law

In Botswana a gender-based approach to indigenous rights is relatively new and this has been attributed to the fact that thinking in gender-specific terms was considered unnecessary in a society characterised by a high degree of gender equality.<sup>277</sup> The result of this relative gender equality in Botswana is that many of the Basarwa women's human rights violations are generally consequences of general human rights issues discussed in this report that affect the Basarwa generally. These include issues of poverty, low literacy levels, exclusion from decision-making processes, discrimination and a lack of respect for their culture and traditions.<sup>278</sup> For example, whereas the resettlement of the Basarwa had a negative impact on both men and women, it tended to affect women differently. For instance, amongst Basarwa families women tend to own small livestock purchased from revenues generated by their trade in handicrafts. However, when the government paid compensation to families for their relocation from the CKGR they tended to give livestock to men because in line with Tswana culture livestock belonged to men. Similarly, when allocating plots of land after the Basarwa relocation, Land Boards were reluctant to give certificates to women because in Tswana culture men had the right to land.<sup>279</sup> This was done in disregard of traditional Basarwa culture in which men and women were theoretically equal.<sup>280</sup>

It was pointed out above that literacy levels among Basarwa are low, mainly due to a high number of drop-outs at primary school-level. Studies indicate that the drop-out rates for Basarwa girls are even higher. This is because Basarwa girls are more prone to certain

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<sup>276</sup> EK Quansah *The Law of Marriage and Divorce in Botswana* (1998) 37.

<sup>277</sup> As above, 167.

<sup>278</sup> As above, 167.

<sup>279</sup> As above, 175.

<sup>280</sup> As above.

types of abuse than their male counterparts. Long absences from home during school terms and the hostel situation described above make Basarwa girls vulnerable to assaults and teenage pregnancies that result in higher drop-out rates for Basarwa girls.<sup>281</sup> As a result, despite laws and policies that guarantee equality between men and women, Basarwa women continue to face gender-specific human rights issues that nevertheless emanate from the general government policy towards non-Batswana marginalised groups, precisely because the law fails to adopt a culture-sensitive approach to gender equality.

## **11 Indigenous children**

In Botswana there is no single body that is responsible for the co-ordination of policies relating to children or the implementation of the Convention on the Rights of the Child (CRC) and other international instruments on the rights of children. However, there are administrative and institutional structures to facilitate the achievement of child welfare policies.<sup>282</sup> These are located within the Department of Social Welfare in the Ministry of Local Government. For example, the National Programme of Action for the Children of Botswana (NPA) was initially launched as a ten-year programme to run from 1993 to 2003, and has now been extended to run until 2013. Its main aim was to ensure that children's rights were at the centre of the development agenda. The NPA has set out, among other things, to identify children belonging to certain vulnerable groups in order to address their specific needs. The NPA has identified socially and culturally disadvantaged children as among the most vulnerable categories.<sup>283</sup> The Division of Social Welfare also established the National Child Welfare Committee which is a multidisciplinary committee made up of representatives of various government departments, NGOs, UNICEF and the University of Botswana. The Committee is in the main responsible for overseeing the activities for children and also publicising the text of the CRC and monitoring its implementation.<sup>284</sup>

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<sup>281</sup> Bolaane and Saugstad (n 193 above) 46.

<sup>282</sup> Botswana CRC Report 2004 12.

<sup>283</sup> Botswana 2004 CRC Report, para 45.

<sup>284</sup> Botswana 2004 CRC Report, para 53.

The government of Botswana is therefore generally sensitive towards the specific needs and rights of the Child and has submitted periodic reports to the Committee on the Rights of the Child (CRC Committee). Furthermore, there are numerous pieces of legislation that protect the rights of the child.<sup>285</sup> However, its overall policy on indigenous children is the same as for indigenous peoples generally discussed above. As a result, although the NPA has identified socially and culturally disadvantaged children as a vulnerable group, the general government policy is to see the problem of indigenous peoples in simply economic terms that can be addressed by improving their economic situation. As a result there is no specific legislation that protects and promotes the rights of indigenous or marginalised ethnic children.

Indigenous children are doubly vulnerable to discrimination and a violation of their rights by virtue of their ethnicity and their status as children. For this reason article 30 provides that in those states with 'ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language'.

As noted under the section dealing with education, the Constitution of Botswana and the Education Act do not specifically provide for education as a right. Similarly, education is neither free nor compulsory. In January 2006 the government introduced school fees.<sup>286</sup> Given that indigenous peoples are at the bottom of the economic strata, there is a real likelihood that the already-high illiteracy levels among the Basarwa will rise further. Furthermore, as noted above, the mediums of instruction in schools are English and Setswana. The Botswana education curricula which, as shown above, is geared towards the assimilation of non-Tswana children, is not in consonance with CRC, ILO 169, ILO 182 and the African Children's Charter which provide for the right to education geared towards respect for ethnic identity and values.

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<sup>285</sup> These include the Children's Act (Ch 28:04), Adoption Act (Ch 28: 01), Affiliation Proceedings Amendment Act of 1999, Disserted Wives and Children's Protection Act 28:03), Marriage Act (Ch 29:01), Penal Code, Evidence in Civil Proceedings Act (Ch 10: 02) and Education Act (Ch 58:01).

<sup>286</sup> Botswana CRC 2004 Report para 275.

Article 9(1) of CRC provides that a child shall not be separated from his or her parents against her will except when competent authorities subject to judicial review determine that is necessary in the best interests of the child. It has been shown above that the children of Remote Areas Dwellers as young as seven years old are often separated from their parents for long periods of time during school terms.<sup>287</sup> This practice is in clear violation of the CRC given the fact that most of these children live in hostels which the government itself admits are not in the best condition. Furthermore, as shown above there is evidence of abuse and assaults in these hostels.<sup>288</sup> The poor condition of hostels in remote areas is a violation of article 3(3) of the CRC which obligates states to ensure that institutions for the care of children conform to standards established by competent authorities. The condition of hostels is also in violation of article 27 which provides that the child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

Another aspect of the education policy which the Basarwa find contrary to their culture is in relation to the administration of corporal punishment.<sup>289</sup> The Education Act (Corporal Punishment) Regulations of 1968 provide for the administration of corporal punishment under very strict conditions. For example, corporal punishment must given only for very serious and repeated offences, it must be administered by the school head or teacher in the presence of the school head and that a light cane must be used to administer more than five strokes. However, it is reported that in practice these Regulations are violated and corporal punishment is regularly resorted to in circumstances that are tantamount to assault.<sup>290</sup> Corporal punishment is not part of the Basarwa culture and is resented by children and parents.

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<sup>287</sup> Botswana CRC 2004 Report para 281.

<sup>288</sup> Bolaane and Saugestad (n 193 above) 48-50.

<sup>289</sup> Hitchcock (note 193 above) 139.

<sup>290</sup> Ditshwanelo (Botswana Centre for Human Rights) 'Children's Rights' [http://www.ditshwanelo.org/bw/child\\_rights.html](http://www.ditshwanelo.org/bw/child_rights.html).

Indigenous children are particularly vulnerable to economic exploitation and child labour. Article 31 of the CRC and article 15 of the African Children's Charter impose obligations on states to take legislative and other measures to protect children from economic exploitation and from performing any work likely to be hazardous or to interfere with their education. The Employment Act<sup>291</sup> protects children against exploitation and hazardous employment and provides in detail for conditions under which children of different ages may work whilst the Trade Union and Employers Organisation Act<sup>292</sup> precludes the registration of an individual under the age of 15 from membership of a registered trade union. The Employment Act distinguishes between a child (person under the age of 15) and a young person (aged between 15 and 18). Although the Employment Act provides that a child may not be employed, it allows for the employment of a child who has attained the age of 14 and not attending school in work that is not harmful to his health and development by a member of his family subject to the approval of the Commissioner of Labour. The Employment Act also provides that no child may work for more than 6 hours a day or 30 hours a week. The main problem with the labour laws in Botswana is that they set the age limit for legal employment below that accepted by international standards. As a result it allows for the employment of children as young as 14 years. Articles 4 and 7 of ILO 169 and ILO 182 respectively call on states to take special measures to protect the labour of indigenous persons and vulnerable children at risk. The labour law in Botswana fails to adopt measures to protect indigenous children despite evidence that these children are particularly vulnerable to child labour.<sup>293</sup> Official figures show that at least 9 per cent of children (between the ages of 7 and 17) were employed in Botswana, of which 60 per cent were male. In line with government policy, official records do not make reference to ethnicity. However, the figures show that a total of 64.9 per cent of children in employment were in rural areas and that about 66 per cent were employed in the agricultural sector.<sup>294</sup> Given that a majority of indigenous peoples

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<sup>291</sup> Ch 47:01 Laws of Botswana.

<sup>292</sup> Ch 48:01 Laws of Botswana.

<sup>293</sup> Ditshwanelo (note 270 above).

<sup>294</sup> Central Statistics Office '2005/2006 Labour Force Report', Department of Printing and Publishing Services, Gaborone,, February 2008, pages 14-16 <http://www.cso.gov.bw>.

live in rural areas and that many of them are employed as farm workers, the statistics seem to lend credence to reports of indigenous child labour on farms.<sup>295</sup>

The government acknowledges that child labour is a serious problem and has formulated and approved the Draft Action Programme on the Elimination of Child Labour (APEC) with the assistance of the International Labour Organisation's (ILO) programme Towards the Elimination of the worst forms of Child Labour (TECL). In the main, TECL is a technical support structure on child labour and related issues run in Botswana, Lesotho, Namibia, South Africa and Swaziland.<sup>296</sup> In general, APEC identifies specific child labour issues that include orphaned and vulnerable children as well as the commercial sexual exploitation of children and then charts a strategy for addressing the issues. The strategy includes education and consultation with children, parents and employers and also reviewing legislation. Although APEC identifies 'vulnerable children' as a specific issue, it does not specifically recognise indigenous children as falling within this category. APEC is still at a draft stage and therefore it is still a work in progress.

Article 2(1) of the CRC obligates state parties to respect and ensure the rights set out in the Convention without discrimination, irrespective of the child's or parent's or legal guardian's race, national, ethnic or social origin, among other attributes. Article 2(2) puts an obligation on state parties to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of the child's parents, legal guardians or family members. Several laws in Botswana subject children to discrimination on the basis of the marital status of the parents. Generally customary law, common law and statutory law treat children born out of wedlock differently. For example, under the common law, children born within marriage are entitled to inherit from their parents who die intestate whilst children of unmarried parents can only inherit if the father made a specific bequest to the child or the father's family voluntarily

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<sup>295</sup> Ditshwanelo 'Children's Rights' [http://www.ditshwanelo.or.bw/child\\_child](http://www.ditshwanelo.or.bw/child_child).

<sup>296</sup> Draft National Action Programme towards the Elimination of Child Labour in Botswana (APEC), Department of Labour & Social Security, Ministry of Labour and Home Affairs, February 2008.

recognises the child. The position is the same under customary law.<sup>297</sup> In terms of section 6 of the Children's Act only the maternal relatives of a protected child (under the age of 7) born out of wedlock are permitted to take care of the child without registration. This amounts to unjustified unequal treatment.

The government has recently sponsored a Children's Bill, which if passed will replace the Children's Act. The responsible Minister has stated that the broad aim of the Bill is to ensure compliance with international instruments.<sup>298</sup> The specific aim of the Bill is the promotion and protection of the child's physical, emotional, intellectual and social development, as well as the general well-being of children. It charts out a Bill of Child Rights. It provides for freedom of expression, religion and privacy. However, the Bill also provides for the duties of the Child and the rights of parents with respect to their children. Thus, in the exercise of their rights, children are subject to parental guidance and control. The Bill provides for the creation of a Children's Consultative Forum to facilitate consultation with children on matters which affect them. The Bill also creates Children's Courts with exclusive jurisdiction on matters that directly affect children, such as applications for protection orders in circumstances where the safety and security of children are compromised and endangered. The Bill determines that a child may be placed in alternative care in cases where circumstances in their homes make it either difficult or impossible for them to receive care or protection from harm. Institutions in which children may be temporarily placed to ensure their safety, security and general well-being must be licensed and the Bill provides for the requirements licensing.<sup>299</sup> In line with government policy, the Bill makes no reference to indigenous peoples. Nevertheless, it potentially may go a long way in protecting the rights of indigenous children from abuse and exploitation.

### **Part III: Conclusions and recommendations**

#### **1 Conclusions**

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<sup>297</sup> Botswana CRC 2004 Report para 120.

<sup>298</sup> 'Nasha Explains Children Bill' Mmegi Newspaper, vol 25, 21 October 2008.

<sup>299</sup> See Children's Bill, Government Gazette, 9 January 2009.

Botswana is generally regarded as a beacon of democracy and respect for human rights in Africa. However, in the last few years indigenous peoples have claimed substantive equality and respect for their distinct identities, histories and cultures. A thread that runs through the discontent of indigenous peoples is the government policy of underplaying ethnic and cultural diversity under the guise of nation-building. However, underlying this policy is the long-enduring philosophy of Tswana supremacy which resulted from the pre-colonial tribal organisation in which non-Tswana groups were either conquered or attached themselves to militarily and politically-stronger Tswana groups. This philosophy assumes that non-Tswana ethnic groups are merely components of Tswana groups, that the Tswana language is the language of all ethnic groups and that the cultures, traditions and histories of the Tswana are the cultures, traditions and histories of all ethnic groups in the country.

The offshoot of this historical background is that the practical implementation of this government policy results in a denial of the culture, history, tradition and identity of non-Tswana ethnic groups. Thus, government records, such as the national census do not reflect different ethnic groups and languages that exist in the country. Similarly, indigenous languages are not accorded official recognition and therefore are not used in the government media and schools. Similarly, indigenous peoples' groups are not accorded the same treatment in representative bodies such as the House of Chiefs. This negatively impacts on their ability to participate in decision-making processes that affect them. Similarly, developmental policies do not factor in the country's ethnic diversity and ignore cultural distinctiveness which would ordinarily inform government's policies. Whereas the government has taken measures to ensure gender equality and the protection of the human rights of children, virtually nothing has been done to address the ethnic dimension of gender discrimination and the abuse of children's rights.

However, there is an increasing awareness of ethnic and cultural diversity and the need to ensure substantive equality. The Constitution of Botswana guarantees equal protection of the law and the courts in Botswana are increasingly interpreting the Constitution in accordance with international human rights law. However, the courts are inhibited by the

fact that, in most instances, ethnic discrimination is enshrined in the Constitution itself. The government itself is showing signs, albeit guarded, of recognising cultural and ethnic diversity. Thus, the education policy and Vision 2016 - the government development blueprints - recognise the need to promote cultural diversity in education and development policies. Similarly, the CBNRM has been introduced to afford communities a measure of self-management of natural resources within their territories. However, government policies remain unmatched by any significant legislative changes.

## **2 Recommendations**

(1) The government should adopt legislative measures to recognise the existence of the different ethnic groups in Botswana. Similarly, the government should incorporate ethnicity and language data into the impending population and housing census scheduled for 2011. These measures should assist the government in identifying the specific needs of the different ethnic groups in Botswana. This, in turn, would assist in adopting measures to ensure substantive equality among the different ethnic groups in the country.

(2) The government should undertake a comprehensive review of laws and policies to remove those laws and policies that discriminate on the basis of ethnic origin. In particular, the government should amend section 15 which provides for derogations from the right to non-discrimination in relation to laws passed before the coming into effect of the Constitution and in relation to laws that permit discrimination on the basis of ethnicity in matters of personal law and customary law.

(3) The government's efforts to devolve a measure of self-management to indigenous communities through CBNRM are commendable. However, the government should adopt measures to protect communities in their dealings with foreign safari companies to ensure that these communities benefit from the exploitation of resources within their designated areas.

(4) The government should introduce affirmative action legislative measures to ensure equal and effective participation in the political life of the country by indigenous groups. In particular, the government should amend the Constitution to provide for ethnicity as a criterion for nominating specially-elected members to the National Assembly to allow for representation of indigenous peoples. Similarly, the government

should amend the Constitution for equal membership to the House of Chiefs through chiefs of the different ethnic groups appointed according to the laws, customs and traditions of each ethnic group. In this regard, the government should respect and recognise the San National Council, once constituted, for purposes of representing indigenous peoples in representative bodies such as the House of Chiefs.

(5) The government should adopt legislative measures to recognise, protect and promote the histories, languages and cultures of indigenous peoples in the country. These measures could include the establishment of an institution with the mandate of developing, promoting and protecting the histories, languages and cultures of ethnic groups in the country. Furthermore, other languages should be accorded the same status as the Setswana language through equal use in government-sponsored national media and schools.

(6) The education curriculum should be tailored to suit the needs of indigenous peoples. In particular the government should initiate measures to facilitate mother-tongue education from primary to secondary levels. Furthermore, the curriculum should reflect the histories and cultures of indigenous peoples.

(7) Whilst the law vests natural resources in the state, the government should introduce legislative measures to ensure that the communities within whose territories natural resources such as minerals and fauna are located directly benefit from their exploitation – but not to the exclusion of those who do not live in the vicinity of these resources. Similarly, the government should introduce legislative measures to recognise indigenous peoples’ traditional land use.

(8) Whilst the formulation of development policies and programmes are the responsibility of the government, the government should ensure that the policies take cognizance of the country’s ethnic diversity and the specific needs, cultures and traditions of indigenous peoples. To accomplish this, the government should consult the people through their recognised traditional forms of consultation to ensure that development policies reflect the country’s ethnic diversity and the specific needs of the different groups.

(9) Whilst the government is committed to ensuring gender equality, the government should adopt an ethnicity-related dimension to gender equality to ensure that indigenous

women are protected from the double-pronged disadvantages they suffer as a result of their gender and ethnicity. The government should adopt similar measures to infuse an ethnicity-based dimension to the promotion and protection of the rights of the child.

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