Integrating the Basarwa under Botswana's Remote Area Development Programme: Empowerment or marginalisation?

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Introduction

The ethnic group referred to here as Basarwa has attracted much attention and interest.[1] Myriad conferences have been held and reports published around issues affecting them (Tsonope & Saugestad 1994). Basarwa rock art, life-style and social organization have fascinated anthropologists leading to a great deal of research.

Some of the interest has generated a lot of controversy (Hitchcock 1978). This controversy has been wide and varied. It covers whether the Basarwa have any concept of territoriality and, consequently, whether the land they have inhabited and roamed from time immemorial belongs to them. So serious was this aspect of the controversy that the government of Botswana sought a legal opinion on it. The opinion advised, in part,

> As far as I have been able to ascertain the Masarwa (sic) have always been true nomads, owing no allegiance to any chief or tribe, but have ranged far and wide for a long time over large areas of the Kalahari in which they have always had unlimited hunting rights. ... Tentatively, however, it appears to me that the true nomad Masarwa (sic) can have no rights of any kind except rights to hunting (*Re Common Leases* cited in Hitchcock 1978).

The controversy has also focused on the name of the group. The appellation 'Bushmen' has been widely used in some literature (Van Der Post Taylor 1985a). The term Bushmen, while recognised to have 'acquired too much of a pejorative connotation' (Saunders 1995: 187) is still preferred by Sanders who argues that the term 'need not carry a connotation of contemptuousness' (Saunders 1995). He

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1 The Basarwa are also known as the Bushmen, they reside in and around the Kalahari Desert region of southern Africa.

maintains that, '[u]nfortunately a derogatory connotation is the fate any appellation of a marginal group, even when in its original form the appellation was merely descriptive and meant no harm' (Saunders 1995: 187).

The other term used in relation to the Basarwa is the Khoikhoi appellation, San, which means gatherers. The Bantu derivative, Basarwa, is the name used in this paper. The name Basarwa has itself now become something of a derogatory reference. It is widely used by the Tswana speaking population of Botswana to mean servant. In spite of this special meaning now being ascribed to the term, it was, it would appear, no more than just a derivative from the Khoikhoi appellation, San. Basarwa is also the name widely used in Botswana. It is for these reasons that it is preferred in this paper.

The number of Basarwa presently living in Botswana is estimated to be between 40,000 and 49,000. The majority of these have moved away not only from their ancestral lands but also from their way of life. They now pursue a more sedentary pastoral existence either as small cattle owners or serfs on cattle posts owned by the more affluent Tswana speakers. Whatever conceptions exist about the Basarwa they are acknowledged to be the indigenous or aboriginal inhabitants of Botswana (Hitchcock 1987).

It is also important to acknowledge that the Basarwa have led burdensome lives. Some of them have survived next to nature, relying on whatever remains to be hunted and gathered or on food handouts from the government in government organised settlements (Kahn 1990) Some of them have, as stated earlier, been assimilated into the mainstream of Tswana society as cattle herders working under conditions of slavery or near slavery. Their situation can only be characterised as abject poverty and deprivation. Even the official position of the government acknowledges them to be 'the poorest of the desperately poor' (Kahn 1990). The Remote Area Development Programme Report notes,

> [O]nly a restricted proportion of the Basarwa are living today in mobile bands and relying upon hunting and gathering. A significant proportion in all districts are impoverished herders and farm labourers. Moreover, because of deteriorating hunting grounds, an increasing number of [Remote Area Dwellers] are settling as squatters in villages. They often live under extremely difficult conditions (1986: 6).

It was, perhaps, in response to this plight that the Botswana Government established a programme to deal with the plight of the Basarwa. The government established, in 1974, what was known as the Bushman Development Programme. In 1975 its name was changed to Basarwa Development Programme. In 1976 the programme became

known as the Extra-Rural Development Programme. The name was to change yet again in 1977 to Remote Area Development Programme, the name which has survived to date. I shall not venture into the long drawn debate surrounding the change in nomenclature. The official explanation was that a socio-economic rather than an ethnic based definition of the programme's target group was necessary in view of the fact that not all Botswana's poor rural dwellers were Basarwa or of Sarwa origin (Gulbrandsen 1986). The examples given are the Balala and the Bakgalagadi in the Southern District, Zhu/Twasi, Mbanderu and Batawana in Western Ngamiland (above). The concern of this paper lies in the objectives and approach evinced in the programme.

The Remote Area Development Programme (RADP) has as its main objective the integration of marginalised communities into the mainstream of Botswana society. The major focus of this paper is to examine the implications of this integration for the Basarwa especially in relation to access to land and other resources. It will also inquire whether the RADP was guided by the norms of international law regarding the treatment of indigenous peoples or ethnic minorities. This evaluation of the RADP will necessarily have to be situated within the constitutional history and genealogy of Botswana's democracy. The Constitution of Botswana will also be a part of the discussion with the aim of establishing what special protection, if any, it affords the Basarwa.

It will be argued that Botswana's Constitution does not provide marginalised communities generally, and the Basarwa in particular, any entrenched recognition and rights as a discreet and identifiable minority. It does not protect their cultural identity and heritage. The Basarwa do not, as a result, enjoy any special rights to be affirmed and empowered under the Constitution of Botswana. The paper will urge a more heightened protection of the rights of the Basarwa.

An overview of the legal displacement and marginalisation of the Basarwa

Botswana's constitution was produced after a series of consultative discussions held in 1961.[2] The country's ethnic minorities were not part of these discussions. The Constitution that was produced contains a Bill of Rights, which protects rights and freedoms of the individual (*Bill of Right* ss 3-18). It does not recognise and protect the collective rights of the minorities. This is in spite of the fact that even at the time the

2 See for example, Bechuanaland Protectorate Constitutional Discussions, 1963.

Constitution was designed the ethnic minorities needed special mention and protection.

Regarding the specific issue of land the marginalisation of the Basarwa began around the middle of the 19th century when the Tswana speaking inhabitants of then Bechuanaland took to cattle farming. Land in the vicinity of Tswana settlements was appropriated without regard for the rights of the Basarwa as original dwellers of the land. The use to which the Basarwa had put the land was neither recognised nor respected by these settler Tswana communities. The tenurial systems that emerged were in accordance with the lifestyle of these dominant Tswana speaking communities. Land use now took the form of residence, which had to be permanent, grazing and cultivation (Moeletsi 1993). The pre-existent land tenure system of the Basarwa that entailed roaming the land, hunting and gathering on it and deriving sustenance from it was ignored. Non-recognition of this tenurial system as vesting any land rights on the Basarwa amounts to a declaration that Basarwa land was uninhabited and, therefore, *terrae nullius*. To the extent no rights were seen to exist, none could be seen to have been violated. The land was later carved for commercial purposes, apportioned for cattle farming and wildlife conservation without consultation with its original inhabitants. This marked the start of a long process by which the Basarwa would be ignored and disempowered.

The declaration of protectorate status over what then became known as *Bechuanaland Protectorate* (Bechuanaland Protectorate General Administration Order in Council 9 May 1891) neither changed nor halted the displacement of the Basarwa from their ancestral lands. What the protecting authority, Great Britain, did was to define categories of land holding that cemented the exclusion of the Basarwa.[3] Three categories of land tenure emerged. The first involved the securing of claims to land by the European settler communities. All the land concessions that had been 'granted' by tribal chiefs were investigated and validated by a Concessions Court established in 1893 (Ng'ong'ola 1997). Those whose claims were recognised acquired 'freehold' title to the land. The second type of land holding came in the form of Native Tribal Reserves (Frimpong 1986). The demarcation of this land assumed that it was only the Tswana ethnic communities that had any claim to land. The resultant reserves were themselves a further recognition of the dominance of the Tswana and

3 See Tribal Territories Proclamation No. 9, 29 March 1899. This proclamation established and determined the boundaries of five Native Reserves, namely, Bamangwato, Batawana, Bakgatla, Bakwena and Bangwaketse. The subsequent addition of three more Native Reserves increased their number to eight; see also Bechuanaland Protectorate (Lands) Order in Council, 1904 and the Bechuanaland Protectorate (Lands) Order in Council, 1910.

their tenurial systems. Under the Tswana model of land tenure, the chief had substantial powers over the control and administration of land. Schapera provides some sense of the centrality of the chief in the Tswana polity thus,

> The Chief, as head of the tribe, occupies a position of unique privilege and authority. He is a symbol of tribal unity, the central figure round whom the tribal life revolves. He is at once the ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people (Schapera 1984: 62)

While most of these powers no longer repose with the chief, the office of Chief still commands some important administrative function.

The remaining land formed the third category of land tenure known as Crown Land. All those communities that did not get swallowed up and incorporated into the Tswana ethnic groups faced the invidious situation of living on land that belonged to the Crown. Speaking of the precariousness of the circumstances of these people, Ng'ong'ola observes:

> Although again, the Crown did not demand rent for the use and occupation of the land, and tribal modes of occupation generally continued without significant perceptible changes, traditional land rights were not as protected as was the case in the reserves (cited in Schapera 1984: 11).

The inhabitants could be removed or displaced without consultation. They would not be entitled to any compensation. The enactment of flora and fauna conservation laws underscored the precariousness of occupation of Crown Lands. Consultation in respect of hunting regulations was carried out with the chiefs in the tribal reserves. No such dispensation was extended to the communities in Crown Lands. In other words, the consultative process ignored the very people for whom hunting and gathering constituted the source of livelihood (Spinage 1991). The creation of game reserves, national parks and other Wildlife Management Areas (WMAs) on land already inhabited by Basarwa further exacerbated their loss of land rights. The effect was the creation of livestock-free zones. The Basarwa who remained in occupation of some pockets of Crown Land were unable to own and keep livestock. If any of them were desirous of adopting some sedentary form of life and rearing livestock they stood to lose even this occupation of Crown Lands. The choice was, therefore, for most of them, between improvement of their economic status by rearing livestock and losing occupation of the Crown Lands, and avoidance of this type of economic activity if only to keep, for the moment, occupation of Crown Land. To the extent that such occupation was uncertain, both choices pointed to landlessness.

Independence and the Constitution did not bring about any significant changes. The three categories of land holding continued. One change was that Crown Land became known as State land. Freehold land is now estimated to be about 5 per cent, State land 25 per cent and Tribal land 70 per cent (National Development Plan 7 cited in Ministry of Finance and Development Planning 1991: 293). Another change was the enactment, in 1968, of the *Tribal Land Act* (Cap 32:02). This Act vested all control and administration of tribal land in Land Boards established thereunder. The Act provided,

> All the rights and title to land in each tribal area ...shall vest in the land board set [up] in relation to it ... in trust and for the benefit and advantage of the *tribesmen* of that area and for the purpose of promoting the economic and social development of all the peoples of Botswana [s 10(2), emphasis added].

The Act was amended in 1993 and the word tribesmen replaced with citizen. The problem with the word tribesman included the imprecision of the word itself. The definition section of the Act explained the word to mean a citizen of Botswana who is a member of the tribe occupying the tribal area. Since tribal land was based on an understanding that regarded the eight Tswana ethnic groups as the ones entitled to land the Tribal Act did not change anything. The situation was also compounded by the Constitution which established a House of Chiefs based on the hegemonic position of the Tswana speaking ethnic communities. The Constitution provides that:

> The House of Chiefs shall consist of
> (a) eight ex officio members;
> (b) four elected members;
> (c) three Specially Elected members' (s77(2)).

As if to eliminate any doubt about the dominant position of the eight Tswana ethnic groups, the Constitution goes on to state:

> The ex officio members of the House of Chiefs shall be such persons as are for the time being performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes respectively (s 78).

There could be no clearer indication of the administrative and political marginality of the Basarwa. This is further evidenced by the fact that, '[E]ven in districts where they comprise a significant fraction of the population they are virtually without representation in political bodies, including land boards' (Gulbrandsen 1986).

Exclusion of the Basarwa from the recognised administrative and political structures under the Constitution aids their exclusion in practice. Access to land for them was closed off.

The option available to the Basarwa under the Remote Area Development Programme seems to be assimilation into Tswana society. One of the effects of the assimilation is the abandonment by the Basarwa of their ethnicity. It is important to note that this type of assimilation would violate Botswana's international obligations. The December 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, formulates the obligation of states to protect the existence and identity of minorities (GA Res 47/135). Among the rights enunciated in the declaration is the right to participate effectively in cultural, religious, social and economic life as well as in the decision-making process concerning the minority to which they belong. Against the background laid out in the preceding discussion this can hardly be said to apply in Botswana.

The Remote Area Development Programme: Objectives and accomplishments

The RADP was seen as 'part of the government's effort to enhance the well being of citizens who resided in remote parts of the country' (Kahn 1990: 3). It was decentralised in 1977 and Remote Area Development Officers (RADOs) appointed for seven of the country's ten districts. The objectives of the programme were stated in a 1978 workshop to include:

(a) provision of social services, including education and health;
(b) provision of physical infrastructure including water;
(c) expansion of economic opportunities including access to land, subsistence and jobs; and
(d) ensuring of awareness and protection of people's political, legal and cultural rights.

The framework within which the goals of the RADP were to be achieved was, basically, what the government saw as rural development. This was stated in a Government White Paper as far back as 1972. It was soon realized that additional assistance would be necessary for certain segments of the rural population. These were people living in the extremely remote areas. Thus, the target group of the programme was the dwellers of the extremely remote areas.

The main physical features of the RADP are schools, hostels, boreholes for the provision of water and the establishment of small-scale agricultural schemes. It is in relation to these developments that the success of the RADP has largely been measured (Wily). The RADP has undergone several reviews.[4] It is also annually

4 It was reviewed in 1986 for NORAD, a Norwegian donor agency, leading to the production of the report cited as Gulbrandsen 1986). It was also reviewed by Ulla Kahn whose report has also been mentioned as Kahn 1990.

evaluated in RADP workshops, the first of which took place in 1978. The major observation from these reviews and evaluations is that the RADP has made little progress in attaining its economic and political/legal goals (Egner 1981). This was, among other things, because income levels among the Remote Area Dwellers (RADs) had changed very little (Egner 1981). It was also noted that the reduction of dependency, fostering of self-reliance and the raising of awareness among the RADs about their rights were still to be realised. These observations, made in 1981, were to be reiterated in the 1990 review by Ulla Kahn. They remain valid today. The reasons for this, it is submitted, lie embedded in the very nature and approach of the RADP itself. This nature and approach can be neatly summarised as, '[E]stablishing settlements, gazetting of official headmen in RAD communities, and promoting the integration of RADs in Botswana society' (Kahn 1990: 4).

The establishment of RAD settlements as a broad approach is laudable. But to content ourselves only in the physical existence of such settlements without adverting our minds to the internal dynamics thereof could also be deceptive. There are problems that must be appreciated and addressed. The category collectively referred to as RADs is made up of peoples or ethnic groups with their own distinct cultural identities and practices. The way they organise their communities would differ. Grouping them together under the general rubric of Remote Area Dwellers and appointing a chief or 'headman' for the settlement into which they have been put betrays a false understanding of the differences the RADs may have as different ethnic groups. Such an approach would not even consider how many ethnic groups have been brought together in the particular settlement and, consequently, how their administrative and political structures would be configured. A more carefully designed and sensitive settlement programme would factor in these important considerations. The RADP has simply, it would appear, treated these many ethnic groups of RADs as one homogenous community, defined only by their poverty and the remoteness of the areas they occupy. Their main need has been seen only in terms of land; any land, provided it had water, schools and other rudimentary infrastructure. Yet the annual workshops of the RADP persistently indicated the problems that had to be addressed. Ulla Kahn acknowledges these as follows,

> The report of the 1982 Remote Area Development Workshop contained recommendations concerning compensation for eviction from land held by RADs, support for minimum wage legislation in the agricultural sector and resettlement (bonno). The political rights of self-determination, fair representation and consultation were also emphasised in discussions in RADP workshops and meetings (Kahn 1990: 4).

The above recommendations were more than critical. A lot of RADs, to use the blanket reference, had been dispossessed of their land as well as access to their

traditional hunting and gathering areas (Silberbauer 1965; Childers 1976; Guenther 1976). This had occurred during the establishment of, among others, the Ghanzi Freehold Farms. For those who took up employment in the agricultural sector there was no protection from exploitation. The absence of minimum wage legislation remains a major problem. Regarding their actual organisation, the settlements could not be established into distinct districts. Thus, they were placed within the already existing districts and, sometimes, villages as little RAD or Basarwa enclaves. The districts and/or villages into which they were resettled already had their own tribal and administrative patterns and institutions. The result, for the Basarwa who came to settle, was to find themselves engulfed by the more dominant ethnic groups. They found themselves in situations of encystment.[5] The scheme of relations created can only be of master and servant. At the attitudinal level the result for the Basarwa can be aptly described on the basis of the 'rank-concession syndrome' explained as, '[A]ccepting social inferiority and relative powerlessness, adopting practices of the dominant society... and losing solidarity in the process' (Gardner 1991: 546).

The Basarwa do not enter and settle in this districts and villages as equals. They cannot be for they do not have any district to call their own. They are only seen as something of 'aliens' or squatters. The socio-political matrix in these villages continues to exclude them.

Where they have been settled by themselves, the expectation in the RADP seems to be that their social organisation must conform to the more 'familiar', typically Tswana structures. For instance, they are expected to have chiefs or 'headmen'. These structures would then be 'gazetted', in other words, formally recognised and validated. This of course would appear to facilitate cooperation between them and the Tswana who would then be more comfortable dealing with these "familiar" institutions. Whichever way one looks at it there is no denying that it speaks to the convenience of the Tswana ethnic groups. In this and other ways, the very programmes that should seek their empowerment marginalise the Basarwa.

The Basarwa and the international legal position

International law recognises the indigenous people as a particularly vulnerable group. Commenting on this vulnerability, Professor Anaya states,

> In the contemporary world, indigenous peoples characteristically exist under conditions of severe disadvantage relative to others within the state constructed around them. Historical

5 For an illuminating discussion of encysted communities see Orans (1965).

> phenomena grounded on racially discriminatory attitudes are not just blemishes of the past but rather translate into current iniquities. Indigenous peoples have been deprived of vast landholdings and access to life-sustaining resources, and they have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined (Anaya 1996 : 3).[6]

This paper has highlighted the demonstrable resonance of the above observations for the Basarwa of Botswana.

Indigenous peoples have been clearly defined by the United Nations.[7] That the Basarwa are an indigenous people of Botswana is settled (Saunders 1995). They must, therefore, benefit from the array of international legal norms intended to protect and secure indigenous peoples. The first of these norms is non-discrimination. It is laid down in many international as well as regional instruments.[8] These instruments enjoin states to actively combat invidious discrimination against indigenous peoples. The norm of non-discrimination is, however, not incompatible with schemes and programmes that discriminate positively in favor of indigenous peoples. The spirit and aim of such schemes would be to redress imbalances that resulted from age-old invidious discrimination (*Convention on the Elimination of All Forms of Discrimination Against Women*). Affirmative action programmes intended to accelerate the empowerment of indigenous peoples would be in accordance with the non-discrimination precepts of international law. Furthermore, institutions and practices within a state, whose effect is to discriminate against and perpetuate the inferior status of indigenous peoples would fall foul of international law.

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6 Also see Burger (1987).

7 See the definition contained in the U.N. Subcommision on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*,U.N. Doc. E/CN 4/ Sub. 2/1986/7 Add.4, para. 379 (1986).

8 See, inter alia, U.N. Charter art. 1(3); *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion and Belief*, G.A. Res. 36/55, Nov. 25, 1981, GAOR, 36th Session, Supp No. 51, at 171, U.N. Doc. A/36/684 (1981); *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, G.A. Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force January 4, 1969); see also Convention (No. 169) *Concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, art 3(1), International Labour Conference (entered into force September 5, 1990) Official Bulletin, vol. LXXII, 1989, Series A, No. 2 pp 59-70.

The next precept is that of respect for the cultural identity of an indigenous people. This involves not only ensuring the same formal civil and political rights for indigenous peoples as other ethnic groups in society. It also involves facilitating the development, by the indigenous peoples, of their own cultures, institutions and values (*International Covenant on Civil and Political Rights*, Art 27). The advisory opinion of the Permanent Court of International Justice on Minority Schools in Albania (1935 Permanent Court of International Justice (P.C.I.J) Ser A/B No 64) is quite instructive. It bases its analysis of the minority provisions of the European treaties, on equality considerations (Anaya 1996: 98). A 1966 UNESCO declaration underscores the intrinsic value of each culture and urges respect for the rich cultural diversity of the world (*Declaration of the principles of International Cultural Cooperation* Art 1). This cultural integrity precept requires respect for each culture in the sense of allowing and enabling the indigenous people to practice and enjoy their culture without hindrance. Hindrance should, it is submitted, not only be construed in the narrow sense of the presence of formal impediments. It should cover all forces and practices that defeat or undermine the full enjoyment of the culture of the indigenous people. The preservation of any sites held sacred by an indigenous people becomes an important corollary of the right to cultural integrity. Language also forms a critical component of a people's culture. The need to respect and uphold an indigenous people's cultural integrity must also entail an obligation to facilitate the use and development of such a people's language. Express recognition of language rights for indigenous peoples is required (Anaya 1996).

Land and natural resources are also of extreme importance to indigenous peoples. In the case of the Basarwa, their lives have been shaped around deriving sustenance from the land in terms of their hunting and gathering mode of life. It must be ensured that they do not lose access to land and natural resources. This has been widely canvassed under international law (International Labour Organisation Convention No 169 Art 13(1) & 14(1)). There is also a requirement that these land rights be safeguarded (Art 15).

The relationship between international law and the Botswana legal system

It is important to make some brief remarks on the relationship between the Botswana legal system and international law. The relationship between international law and municipal law can be situated somewhere between the twin-poles of monism and dualism. The monist approach involves automatic incorporation of international legal instruments into municipal law (Brownlie 1991; Strake 1936; Dugard 1971). Dualism, also known as the transformation theory, is the approach followed by Botswana. The Judge President of the Court of Appeal of Botswana described this

approach thus: 'Treaties and conventions do not confer enforceable rights on individuals within the State until parliament has legislated their provisions into law'.

In effect, international treaties and conventions do not assume automatic operation in Botswana. They must first be incorporated into domestic legislation by parliament. Presently, Botswana has ratified very few international conventions and incorporated even fewer into domestic law.[9] Questions obviously arise regarding the status of those treaties and conventions that have not been incorporated into national legislation. The Court of Appeal of Botswana dealt with these questions in the *Attorney General v Dow* (Gulbrandsen 1986). The Court noted that Botswana was a member of the comity of civilized states (Gulbrandsen 1986), and cannot, therefore, operate on laws and practices that violate the imperatives of the international community (Gulbrandsen 1986). Resolving the dispute regarding the use of international treaties and conventions under Botswana law, Justice Ammissah states,

> Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated its (sic) provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution (Cited in Gulbrandsen 1986: 153).

The learned judge went on to say,

> I am in agreement that Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken (Cited in Gulbrandsen 1986: 153).

It remains unclear what is meant by 'obligations Botswana has undertaken'. It is

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9 The ones that have been incorporated are the *1951 Convention relating to the Status of Refugees* as well as its *1967 Additional Protocol*, the four *1949 Geneva Conventions on International Humanitarian Law* and the *1969 Vienna Conventions on Diplomatic and Consular Relations*. The first of the above was incorporated into domestic law by the *Refugees (Recognition and Control) Act* of 1967. The ones on Humanitarian Law were incorporated by the *Geneva Conventions Act*, CAP 39:03, while the *1969 Vienna Conventions* were incorporated by the *Diplomatic Immunities and Privileges Act* No. 5 of 1968, CAP 39:01 of the Laws of Botswana.

submitted that the best approach would be to base the assumption of international obligations on the mere fact of Botswana's membership of the international community of civilized nations. In this way, international ratification and, in other instances, incorporation into domestic law, would further strengthen the force of such obligations. Further support for this submission is found in the *General Provisions and Interpretation Act*. This Act stipulates that, '[A]s an aid to the construction of an enactment, a court may have regard to ... any relevant international treaty, agreement or convention' (s 27(1)).

It also bears pointing out that the celebrated judgment of the Court of Appeal in *Attorney General v Dow* has interpreted Section 15 of the Constitution of Botswana to outlaw invidious discrimination. The observations in that case apply to all manner and type and type of conduct and practices that invidiously discriminate against people on the basis of the immutable characteristics enumerated. These clearly include indigenous ethnic groups. The Constitution states:

> [D]iscriminatory means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description (s 15(3)).

This constitutional provision deals with issues of formal equality. It is not clear whether it can be relied upon to ground arguments for substantive equality. As presently worded, the provision would seem to be incompatible with affirmative action or any attempt to redress the effects of past injustices through positive discrimination. It is submitted, however, that it would be possible to make a tenable case under the constitution of Botswana for a more proactive approach to safeguarding the Basarwa. A more positive obligation to facilitate the enjoyment of the fundamental rights of the Basarwa as an indigenous people, and in conformity with the norms of international law, can be defended.

The Remote Area Development Programme and empowerment

As shown in the preceding discussion, the RADP focused on the Basarwa at its inception. The change to a socio-economic as opposed to an ethnically defined target group undermined the programme's initial focus on the upliftment of the Basarwa. The intended beneficiaries of the programme were now lumped together in a manner that ignored the peculiar problems they faced as an ethnic group. One of the main approaches aggressively followed by the RADP is the concept of villagisation.

Thus integration of the marginalised ethnic communities has involved enforced villagisation. This villagisation is structured around a strictly sedentary way of life away from the ancestral areas of the Basarwa. It also involves permanent occupation of some clearly demarcated individual land parcels. To the Tswana speaking ethnic groups this is the only acceptable way of life. To the Basarwa it is largely an unfamiliar lifestyle.

The Basarwa lifestyle has not been characterised by occupation of individual land holdings. It has involved inhabiting of course an identifiable land area from which the group would communally derive sustenance by way of hunting and gathering. Within this land area they would roam freely in search of food and water (Schapera 1930; Ng'ong'ola 1997). Their environment dictated this way of life. The Kalahari, where the Basarwa have existed, is semi arid. It does not have enough surface water readily available. The temporary settlements in the vicinity of any water point would depend on the availability and utilisation of the available water. The group would then move to another water point within the vast territory it inhabits. Their tenurial system entailed roaming these territories and eking out a livelihood. The individuated rather than the group or communitarian approach to land tenure occluded entirely the Basarwa land rights. The starting point for any programme intended to uplift the Basarwa should have been an articulation of their tenurial system and recognition of its resultant land rights for the Basarwa. The approach of the colonial government as endorsed and continued by the government of Botswana was wrong. Under this approach no land rights were recognised for the Basarwa.

The Remote Area Development Programme should, at the very least, have begun by documenting and openly acknowledging this marginalisation of the Basarwa. It would then have clearly have determined the various forces, economic, cultural and political that resulted in this marginalisation and displacement of the Basarwa from their land.[10] This, it is submitted, would have enabled the programme to formulate a more empowerment-oriented approach to address the situation of the Basarwa. One of the ways that could have been explored, at least in relation to those areas in which Game Reserves and Wildlife Management Areas have been established, is to ensure the active involvement of the people displaced in the actual administration of these areas. This would ensure employment opportunities for them. In addition, they, as a people, would be entitled to some share of the profits generated in these areas. Such revenue would be channeled into projects designed with the active participation of the Basarwa themselves and aimed at their upliftment. It is submitted that this approach would recognise the Basarwa as social beings with a

10 See Wilmsen (1989) for an elaborate and incisive discussion of this marginalisation and denigration.

history deserving of respect rather than just a 'natural history specimen' (Wilmsen 1989: 25) calling for integration into Tswana life patterns. This starting point would also have forced a conscious recognition of the human rights of the Basarwa and the need to infuse these into any development strategy for their empowerment. Their obscurity under the RADP's socio-economic approach as presently being implemented would have been avoided.

Conclusion

The year 2000 marks the twenty sixth year of the operation of the Remote Area Development Programme. The realisation of a framework of respect for the land and other rights of the Basarwa remains elusive. There still has not been a change of approach to actively strive for the assurance of any form of ethnic visibility and respect for the Basarwa. The RADP is still preoccupied with providing basic facilities such as schools and boreholes to the 'remote area dwellers'. In a lot of instances these remote area dwellers are being removed from their ancestral lands to settlements organised under an imposed and unfriendly administrative structure. This results in further marginalisation. The most current removals relate to the Central Kalahari Game Reserve (CKGR) to settlements, which Basarwa find inhospitable.

What seems to emerge quite clearly is that over the last twenty-six years of its implementation the RADP has not translated into a vehicle of empowerment for the Basarwa. It has exacerbated their marginalisation. It has not enabled the correction of the wrongs of the colonial and post-colonial past. The programme has simply employed the internal logic by which Basarwa displacement was carried out. The new guise for the further displacement of the Basarwa is the notion of their integration into a lifestyle that denigrates them and undermines their ethnic solidarity. The result is a settlement arrangement in which the Basarwa are engulfed by other ethnic groups with whom they relate as social inferiors.

The programme has also not been able to lend itself to adoption as an advocacy tool in the fight for a more meaningful recognition and protection of the rights of the Basarwa. It has not highlighted the Botswana Constitution's lack of special protective provisions for ethnic minorities. It has also not challenged Botswana's legal system to at least deploy the potent and evocative equal protection language relied upon to outlaw sex based discrimination in Botswana's constitutional jurisprudence. In short it has ignored the simple reality that the treatment meted out to the Basarwa in Botswana amounts to a denial of their equal protection under the law as laid down in the Constitution.

It amounts to invidious discrimination which the Courts of Botswana should be willing to strike down as they did in the celebrated case of *Attorney General v Dow.*

The Remote Area Development Programme has not brought the real concerns of the Basarwa to the fore, much less has it provided a workable mechanism to address them. ●

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