

Indigenous Land Rights and Self-Determination in Botswana

Dr. Anne F. Boxberger Flaherty
Associate Professor, Merrimack College

Abstract:

This article argues that government resistance to the recognition of indigenous land tenure and rights in Botswana presents a serious challenge for the future of indigenous Basarwa peoples. While the government of Botswana was a signatory to the United Nations Declaration on the Rights of Indigenous Peoples, it has not been willing to offer policy support for self-determination.

1. Introduction: Self-Determination for the Basarwa in Botswana

Botswana is a southern African nation often celebrated for its stable democracy, secure and equal rights for its citizens, and a developing economy. Botswana has a strong legal and institutional commitment to equality and equal treatment for all citizens under the law. There is no formal recognition of groups, and no recognition of group rights (Boko 2002). As a result, Botswana has strongly resisted policies and changes that would specifically support indigenous rights and exclude other citizens. This has hindered the development of the indigenous Basarwa peoples, who are largely disadvantaged under the present economic, cultural, and political system, and has prevented them from exercising their rights to self-determination as a collective group.¹ The reluctance of the government to address and respect the particular needs of indigenous peoples in Botswana has ultimately perpetuated and resulted in very unequal outcomes. The barriers to self-determination are particularly evident when looking at issues surrounding land rights, access and use.

This article explores the situation of the indigenous Basarwa peoples in Botswana and the history of the nation's definitions of land rights. The government's refusal to recognize and support the indigenous peoples' traditional use of land goes against their rights to self-determination and counters Botswana's ostensible support for the United Nations' Declaration of the Rights of Indigenous Peoples. While recent legal developments related to the Central Kalahari Game Reserve, particularly in 2011, appear positive on the surface, without state based policies, enforcement, and support it seems unlikely that the Basarwa's rights to self-determination in land use will be respected.

Self-determination requires the capacity for a group to choose their own path and to follow traditions and cultures as they see fit. The Basarwa peoples' traditional lifestyle of hunting and gathering has been largely excluded from contemporary definitions of legal land use, and their access rights have been systematically diminished. Further, in the rare instance where some Basarwa were granted use of land within the Central Kalahari Game Reserve, they were forced to give up their access to other basic rights and resources. Botswana's emphasis on equal treatment has forced compliance with dominant cultural practice and property uses, and has largely prevented the Basarwa peoples from exercising their rights to self-determination and freely choosing their own path.

The article is organized to offer an overview of the situation of indigenous land rights and concerns in Botswana. Section two introduces the international framework for indigenous peoples' rights. Next, the article reviews Botswana's history and demographics and highlights the history of marginalization of

the indigenous peoples of the country. The fourth section of the article outlines the framework of modern land rights in Botswana and explains how indigenous peoples' access to land and land use has been severely restricted. The fifth section of the article discusses the conflict over access to territory in the Central Kalahari Game Reserve and how even the "victories" of the Basarwa are limited because of the lack of policy support. The final concluding section returns to the topic of self-determination and a recent United Nations decision that points to the ongoing struggle for self-determination for the Basarwa in Botswana.

2. Rights of Indigenous Peoples

The law in Botswana emphasizes equality among all citizens. The legal tradition is clear; all Botswanans should benefit from policies equally (Felton and Becker 2001, 74). The government of Botswana has therefore not been willing to enact policies or offer support in favor of group based rights for indigenous peoples within its borders. This refusal goes against the nation's ostensible (and clearly superficial) support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The UNDRIP came out of more than thirty years of activism by indigenous peoples seeking to gain some recognition of their sovereign rights to self-determination, as individuals and as peoples. Historically, following the World Wars, there was international recognition of the concept of national self-determination and the idea that peoples, as collective groups, had rights to choose their own fates and seek their own manner of development (Babbitt and Hannum 2006, 10-11). For indigenous peoples in particular, rights to self-determination refer to the rights of the community to make their own decisions and pursue their own interests in terms of their cultural, economic, and political beliefs and values.

The United Nations' vote in September 2007 was largely in support of the UNDRIP. This vote was the product of years of indigenous activism, repeated attempts at passage, and many revisions. Only eleven countries abstained and four countries voted against the Declaration (all were later to reverse their votes). Botswana was among the first group of 143 countries officially in support of the Declaration, which contains a total of 46 articles and strong statements in support of the specific needs and rights of indigenous peoples around the world, as well as clear sentiments condemning past treatment of indigenous peoples by governments (Hitchcock and Babchuk 2010, 171; Pulitano 2010).

Despite their support, many of the signatory nations have been reluctant to enact or enforce policy changes in support of the Declaration. For many nations, this has resulted in the selection of a few policy areas to work on, often those already supported by state policies and norms. This behavior has been appropriately termed "selective endorsement" by Lightfoot (2012). Botswana has not even reached the level of selective endorsement, however, and has not implemented policies that specifically target indigenous peoples. This reluctance is due in part to the state's argument that offering group specific rights violates national principles of equality and fairness. Around the world, selective or non-endorsement has kept indigenous peoples from having full access to security in their cultural, economic, and territorial rights and constrained their potential for self-determination.

According to the United Nations' Declaration on the Rights of Indigenous Peoples, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (United Nations 2008). Several other articles within the UNDRIP specifically address land as fundamental for self-

determination. Article 8, for example, expects the state to prevent or offer redress for the dispossession of indigenous peoples' land. Article 10 also offers specific statements in support of indigenous peoples' rights to land and security in their territories (for full text, see http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). In Botswana, in clear opposition to the language in the UNDRIP, the indigenous Basarwa peoples have been prevented from using their traditional lands and maintaining traditional patterns of land use, severely constraining their ability to practice self-determination.

3. Overview of Country History and Demographics

Botswana is a largely arid country in southern Africa with a long human history. Archeological estimates place the ancestors of the Basarwa in southern Africa around 15,000 years ago (Wily 1979, 1). The Basarwa peoples, also known as the San, were a group which encompassed several different lineages and language dialects. They were hunter-gathers who had large territories which they moved around seasonally. The population was widely scattered due to the scarcity of natural resources, and generally lived in bands of 50 people or less (Wily 1979, 1). The Basarwa were the sole inhabitants until the Tswana peoples, who were tied to the Bantu peoples of central Africa, migrated into the region of Southern Africa, perhaps around 2000 years ago (Suzman 2001, 2). The Tswana lifestyle and economies were based on cattle, and the Tswana peoples controlled a large part of the land of modern day Botswana by the 18th century. During the 18th century, other groups such as the Bakwena, Bangaketse and Bangato migrated into the area as well and were brought into the Tswana kingdoms (Bennett 2002; Suzman 2001, 2; Wily 1979).

The territory of Botswana was colonized by Britain as the Bechuanaland Protectorate during the 19th century. It was governed primarily as Tswana ruled kingdoms (or *merafe*) with multiple other ethnic groups living within the kingdoms. Generally, the Tswana were the ruling elite, with distinctions that treated the Basarwa and the Bakalagadi (another group of hunter-gatherers) as serfs rather than group members (Bennet 2002). The colonial administrators began to use the word "tribe" to refer to kingdoms or chiefdoms themselves in a political sense, although "tribe" was also used to denote ethnic group (Bennett 2002). Contact with the Tswana and with Europeans was limited for those Basarwa in the western part of the country until the 19th century (Wily 1979, 3).

The Difiquane, a series of wars and unrest in South Africa in the 19th century, caused a wave of displacement throughout southern African and brought further migrants into Bechuanaland, again increasing pressure on the Basarwa (Saugestad 2001, 96). The new groups were largely incorporated into the Tswana kingdoms, and took land and resources that displaced the Basarwa and Bakalagadi (Bennett 2002). British administration was minimal, and much of the decision-making was left to Tswana chiefs (Bennett 2002). The devolution of power to local authorities was particularly prominent after the end of the Boer wars, when the region lost its strategic value for the British. The recognition of the British further institutionalized cheifdoms and gave more power to the Tswana chief systems (Bennett 2002).

At its highest, the Basarwa population may have reached up to 300,000 people, although this number was rapidly reduced with the arrival and pressures of the Tswana and further with the arrival of Europeans, disease and conflict in the later centuries (Wily 1979). By the time of Botswana's independence in 1966, Wily estimates the Basarwa population at around 30,000, but also notes that about three-quarters of the Basarwa were no longer in their traditional lifestyles and worked in menial,

serf-style labor (Wily 1979, 19). The new nation of Botswana maintained many of the institutions it inherited from the British. Setswana was declared the national language with English as the official language. All other languages were banned from use in social domains, including education, the media, and the judiciary. For the Basarwa, who had high rates of illiteracy and low enrollment in schools and were generally disconnected from the institutions of the state, this linguistic disconnect has been a significant source of isolation and disengagement.

Different official and outside reports on the status of the Basarwa throughout the 1970s, 80s, and 1990s offered recommendations on ways to support the population, which was recognized as facing serious challenges. Early reports following independence offered urgent recommendations for training centers to help Basarwa peoples to learn about food production, among other supportive institutions. The recommendations appear to have gone ignored, although other tribal groups did receive assistance (Wily 1979, 24-29). A conference in 1993 recommended a series of specific plans to support the Basarwa, including representation in the House of Chiefs. The report argued for more systemic government support for the Basarwa, including serious educational reforms. There were no resulting policy changes (Mazonde 2002a, 63).

Education in particular has been a major challenge for Basarwa peoples. Indigenous languages are not recognized in education, and students are punished for speaking in their mother tongue. All students are first taught in Setswana and then in English, both of which may be new to Basarwa students. There are few schools in the remote areas, so students must travel to and board at schools far away. They report abuse and discrimination, and also unhappiness with being so far from home. There are low enrollment and high drop-out rates as a result. For those Basarwa students who are able to succeed at formal education, they are often concerned about their isolation from their home communities and their lack of cultural knowledge, as they have missed the traditional training they would have gotten at home (Hays 2002,77).

The Basarwa have been marginalized economically and have not been advantaged by the country's broader growth. Botswana as a country is relatively high on the UNDP development index, and is in fact one of the few countries that have moved out of the category of "Least Developed" nations. Despite this growth, it remains highly unequal as a society (Suzman 2001).² Typically, the Basarwa have very little wealth or income and are very financially and physically insecure. The Basarwa face many challenges, including high levels of unemployment, discrimination, alcoholism, and low levels of literacy and schooling, access to health care, and other issues. Basarwa communities are often geographically isolated and socially and politically alienated. The Basarwa individuals and communities who have fared best are those with relatively secure access to land and natural resources (Suzman 2001).

Policymakers in Botswana have emphasized equality and equal treatment, which has translated to a reluctance to offer any targeted support or attention to the needs of the Basarwa as a specific group. Indeed, such identities are not even formally measured. The national census in Botswana has not included questions on language, tribe or ethnicity since the 1953 census as part of an institutional drive to support national homogeneity and nationhood (Nyati-Ramahobo 2002, 17; Suzman 2001, 5). The Botswana Constitution forbids discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed. Since independence in 1966, the government position has officially been that all policies should benefit all members of society equally (Felton and Becker 2001, 74). While certainly admirable, this emphasis has meant that for those who are structurally disadvantaged and discriminated

against on the basis of their identity, there are few mechanisms for support or even recognition of their marginal status.

The limited government support that has reached the Basarwa has been tied to their location in remote rural areas. The Basarwa are concentrated in places known officially as “remote areas.” Basarwa peoples are commonly the largest population in communities called remote area settlements, although there are other residents as well (Cassidey et al 2001). Basarwa peoples tend to have the least resources and power even in these remote regions, and often serve as herders and laborers for those with wealth and resources (Mazonde 2002a, 58-60). There have been ongoing concerns raised among scholars that with their claims to land being denied, the Basarwa are being continually squeezed out of resources, cultivation and cattle keeping (Peters 1994).

It is estimated that the largest Basarwa population is in the rural Ghanzi district, where it makes up around half of the population. In other districts, the population is both numerically smaller and a much smaller percentage of the total population, between 8 and 10 percent in Chobe, Ngamiland, and Kgalagadi, but only around 1 or 2 percent in Kweneng, Southern, Central, or Kgatleng. This entire population of Basarwa is made up of a large number of different groups, with distinct identifications, histories, and sometimes dialects. Many of the Basarwa live in small settlements, and the population is also characterized by very high mobility and movement. Many Basarwa communities are remote and isolated, with very limited access to infrastructure such as schools or markets (Cassidy et al 2001, 6).

The experience and status of Basarwa peoples in Botswana clearly indicates a marginalized population with the need for more formal recognition and support. As indigenous peoples, they should have the right to practice their traditional culture and way of life, which includes access to and security in land in the same way that other citizens in Botswana have security in their rights to land. This particular area of rights is essential to allow the Basarwa to maintain their community, their sustainability, and to begin to exercise self-determination. As the next section will show, however, the political and legal construction of land rights and use in Botswana has also severely disadvantaged the Basarwa and their potential for self-determination.

4. Land in Botswana

Basarwa peoples’ traditional land use of hunting and gathering has been systematically ignored and its legitimacy rejected by outside peoples coming into their traditional territory. The early pattern began with the arrival of the pastoral Tswana people and has continued through colonialism and into modern day. Botswana’s current pattern of land rights and categories is based on the way that Great Britain defined land under colonial rule. The British categorized land in three ways. First, British law recognized the rights of Tswana leaders to distribute land, and sought to secure land claims granted to European settlers by tribal chiefs. These lands were investigated and validated by a Concessions Court established in 1893, and recognized claims were granted freehold status (Boko 2002, 99). Second, British law recognized the Tswana ethnic communities’ claim to land, and supported the chief’s powers over the administration of the lands known as Native Tribal Reserves (Boko 2002, 100). Tribal leaders had the right to approve land use and allocate it to users. Third, there were crown lands held directly by the state. Those residing there, such as the Basarwa, may have been able to stay and use the property, but had no recognized rights and could be removed at any time (Boko 2002, 100).

Colonial systems of land distribution and ownership generally disregarded or downplayed the rights of indigenous peoples and their use of land, which did not conform to the concepts of improvement and

agricultural or pastoral use (Klug 1995). In essence, Bechuanaland (to become Botswana) was seen as “terra nullius” or empty land, and indigenous peoples’ existing claims or rights to the territory used for hunting and gathering were explicitly denied (Klug 1995, 10-11). When rights to land were recognized by colonial powers, the formal recognition came through the authority of colonial and tribal administration, indicating that it was granted, rather than something that preceded colonial occupation.

The Basarwa were allowed to stay in certain areas as settlers came in, such as in the Ghazi region, and sometimes worked as serfs through the 20th century. As land was converted to freehold, however, they were often fenced out of the territories that they had used for food and resources (Saugestad 2001, 98). Legal and political definitions of land tenure and rights recognized the administrative powers of traditional authorities- the Tswana leaders- under colonialism and following independence (Klug 1995, 3). The preferred methods of land use were and remain pastoral and agricultural, and recognize the traditional style of land use and practices of dominant population groups. The dominant populations also often made use of land that appeared unused because it was not farm or grazing land, but was part of Basarwa territory for hunting and gathering (Cassidy et al 2001, 8; Suzman 2001, 2). Formal policies supported this practice of recognizing pastoral and agricultural land use.

The government of Botswana currently recognizes three main types of lands and property: state lands, freehold lands, and native reserves or tribal lands. Freehold land is the smallest amount, totaling less than 6% of the country’s area. 23% of the country’s land is state land, primarily made up of parks and reserves. The remainder, about 72% falls under what is known as “tribal land.” (Cassidy et al 2001, 8). Tribal land is communally managed, and can be transferred but not sold. Assets and improvements made on or to the land can be sold, however (Cassidy et al. 2001, 8). Land management policies in Botswana have supported the authority of regional and local officials to determine allocations and use.

The Tribal Lands Act of 1968 mandated the establishment of Land Boards to oversee the distribution of tribal lands, which were empowered to allocate land to tribesmen for residential agricultural or conservation purposes. The Basarwa peoples, with limited education and resources, have not generally been represented on the Land Boards as decision makers, and they were rarely awarded land requested through the Boards. The Tribal Grazing Lands Policy of 1975 allocated lands for cattle ranching, and again much of the land was where the Basarwa had previously lived and found sustenance. Hunting and gathering was not considered or codified as land use in the Tribal Lands Act (Wily 1979, 33-34). The policy did state that there should be compensation for people who were displaced, but it was argued that, as “nomads,” the Basarwa had no lands and therefore could *not* be displaced, nor have any need for compensation (Suzman 2001, 12). This has resulted in a situation where Basarwa are forced to seek land rights to land that was once their ancestors’. They must seek this permission for tenure from government officials who are inclined to deny their requests in order to support a different sort of land use (Cassidy et al 2001, 9).

Cassidy et al note that “in the eyes of the law all citizens are entitled to equal access to land and the resources on it” (2001, 8). In practice, however, the Basarwa and Bakalagadi peoples have had little security in land as they have not had seats or power in the leadership of each region where the decisions over land are made, and their preferred use of the land is generally not sanctioned. Until 1993, individuals had to apply for land within the tribal district that they were assigned to. Following the 1993 Tribal Land Act amendment, any citizen has the right to apply for land in any district in the country. Rather than advantaging small minorities or those who were landless and impoverished, however, this

change has seemed to provide more options for wealthier citizens to add to their land holdings (Cassidy et al 2001, 8)

In recognition of the poor situation that faced many of the rural and remote communities and inhabitants in Botswana, the Bushman Development Programme was introduced by the government in 1974 to aid in rural development (Boko 2002; Felton and Becker 2001, 73; Wily 1979). The official goals were aligned with encouraging development and assimilation. In 1977 it was renamed the Remote Area Development Programme and further emphasis was placed on development, rather than on any policies that might particularly target the Basarwa (Wily 1979, 69-73). The focus shifted to equal rights and access, rather than supporting a specific group's needs.

Another policy tied to the issue of the Basarwa's land use rights is the establishment of Wildlife Management Areas and Controlled Hunting Areas. The designation of these areas allows communities to develop wealth from wildlife. As with other areas of administration, the right to allocate hunting rights and use of resources is determined by the community, and the benefits appear to be enjoyed by the more influential members of the community (Mazonde 2002a, 61). The managed areas appear to often be established on lands occupied by the Basarwa, which may effectively evict the Basarwa and also prevent attempts at livestock grazing, as they are officially livestock free zones (Boko 2002, 100).

The Basarwa peoples' traditional use of land and their rights to land have continually been suppressed by those in positions of formal authority. Further, their minority status and lack of formal positions of authority means that they are rarely in positions to alter the decisions being made by communal boards. As a result, Basarwa peoples' access to land has been severely restricted. This lack of access to and security in land has been a major component of the Basarwa struggles. Without access to land and resources, Basarwa individuals and communities are not able to remain self-sufficient. Instead they have been systematically discriminated against, impoverished and disempowered, and face steep hurdles to have their rights to practice traditional lifestyles and land use recognized. The recent legal decisions related to the Central Kalahari Game Reserve are steps that begin to support the Basarwa's rights to land, but there must be a great deal of additional support and policy change for these legal decisions to have broader effects.

5. The Basarwa and the Central Kalahari Game Reserve

Botswana's Central Kalahari Game Reserve (CKGR) is the largest game reserve in the country, and the second largest on the African continent. Botswana as a nation has displayed a strong interest in parkland, and has set aside about 40% of its land as parks and reserves devoted to wildlife and tourism. The CKGR was initially established under the colonial administration in 1961 specifically as land where the Basarwa could continue to pursue hunting and gathering (Cassidy et al 2001, 9). It was unique in that it was the one area in Botswana where Basarwa land use was explicitly protected. There were initially about 4,000 Basarwa people living on the land now designated as park, but by the mid-1980s the population was reduced to about 1,300, and most of them were concentrated in a few settlements. This shift to permanent settlement was in part because of colonial era boreholes (deep water wells), such as one at Xade, which remained even after independence (Cassidy et al 2001).

In 1986 the government decided to identify sites outside of the CKGR to relocate residents to. It was widely speculated that this action had to do with issues of mineral rights and a diamond deposit discovered in CKGR in the mid-1980s by De Beers, an international diamond corporation (Cassidy et al 2001, Kiema 2010). In 1992 the Permanent Secretary of the Ministry of Local Government Lands

and Housing stated that the Remote Area Dwellers within the CKGR had agreed to be resettled- but not all of the residents were aware of this and many refused to comply (Hitchcock and Babchuk 2010, 163). Those who left the CKGR received money and in-kind compensation (livestock), but the payout was generally not felt to be sufficient (Hitchcock and Babchuk 2010,164). A resident of Xade, Kuela Kiema, recalls harassment and harsh treatment by wildlife officials throughout the 1990s for those who remained. Ultimately, the situation at Xade became simply intolerable for many, and even more Basarwa left the CKGR (Kiema 2010). The CKGR, which at one point had been the one place where self-determination for the indigenous peoples existed, was no longer formally open to human inhabitants.

In 1996 the remaining Basarwa residents were told to move (again) by government officials (Cassidy et al 2001, 27). By June 1997 the town of Xade had been “relocated” to New Xade, but the promised building materials and resources had not yet arrived (Cassidy et al 2001, 28). In 2002 the government shut down wells and stopped all food deliveries within the reserve. In 2005 there were armed clashes and confrontations with those holdouts living in the CKGR (Hitchcock and Babchuk 2010, 166-8).

During the ongoing confrontations in the 1990s and early 2000s, CKGR residents, with international and non-profit support, constructed a legal suit against the state in an attempt to resist their removal. After being first filed in 2002, the 2006 court decision in *Sesana and Others vs Attorney General of Botswana* found that the state was wrong in forcing the Basarwa out. The decision also clearly advocated the return of the former residents, and offered groundbreaking support for rights based on individual ascription as part of an identity-based group. The ruling further stated that the former residents should have the right to hunt and gather with licenses (Hitchcock and Babchuk 2010; Kiema 2010).

The decision was limited by the fact that only a specific set of individuals were granted access to entry, so other Basarwa peoples saw no extension of rights or recognition. Further, the ruling absolved the government of any responsibilities to provide services to those living in the CKGR (Hitchcock and Babchuk 2010, 172). Former Basarwa residents of the CKGR could return, but doing so effectively cut them off from any of their other basic rights and benefits as citizens of Botswana- they would have no access to public goods such as schools or health care unless they provided and maintained these resources on their own (Hitchcock and Babchuk 2010, 158). The government effectively enacted a policy that the former residents of the CKGR had to choose: they could be indigenous, or they could have the benefits of being citizens of Botswana, but not both. This arrangement was problematic on many levels. Ultimately, what brought the issue back to court was the action of government agents in actively seeking to prevent CKGR residents’ access to water in the borehole.

The appellants in the next case, led by Matsipane Mosetlhanyane, challenged the actions of the government to deny the returned residents of the CKGR access to water, the denial of permits to hunt game, and other concerns. The court decision in the case, issued in January 2011, sided with the appellants’ argument that the governments’ refusal to permit the use of borehole was inhuman and degrading treatment. The court decision noted the government’s concern for the animals in the reserve versus the human residents: “Animals in the Reserve are given the water they require at the same time as it refuses to allow the applicants to make their own arrangements to the same end...” (Dinokopila 2011).

The decision, which found that the government did not have the right to deny this access to water, was seen as “a victory for the rule of law, the protection of human rights in Botswana and, most importantly, the judicial enforcement of socio-economic rights within a legal framework...” (Dinokopila 2011). Many concerns among the Basarwa and their supporters remain, however. The decision builds on the earlier decision in *Sesana and Others v. Attorney General of Botswana* in 2006. Following the *Sesana* decision, the state clearly refused to support the population and, in fact, took measures to prevent the success of their reclamation. The 2011 decision reaffirms the rights of those with claims to the land to live there and affirms their human rights to water, but still has no enforcement authority. Further, it continues to place the burden of replacing, repairing, and maintaining the boreholes, as well as other resources, on the Basarwa. The decision also continues to tie to the rights of individuals with claims to the land, rather than the rights of an indigenous group as a community to have access to territory and resources.

Certainly, the 2011 decision represents a legal victory for the Basarwa. Legal victories do not necessarily translate to on the ground change, however. For the Basarwa to continue to survive as a distinct community, to improve their access to resources, and have real self-determination and agency, the laws and policies in Botswana need to change. Policy makers and enforcement agencies and agents in Botswana need to recognize the distinct status and needs of the Basarwa as an indigenous community. This is particularly true in term of the recognition of territorial rights and customary land use.

The legal and political environment in Botswana does not support the Basarwa peoples’ traditional land practices of hunting and gathering, which has meant that their claims to territory and land rights have often gone unrecognized. This prevents their exercise of land use, culture, and self-sufficiency, and effectively curtails the real practice of self-determination. The current allocation of land and resources disadvantages the indigenous peoples of Botswana and continues to suppress the Basarwa and their chance to independently seek their future. Lawmakers’ greater recognition of land rights and alternative styles of land use would be a significant step toward supporting self-determination.

At the core, these cases are about indigenous rights to self-determination and the Basarwa peoples’ recognized access and rights to land. Botswana’s constitution and laws recognize the rights of individuals and equality. Historically, this formal equality has characterized discussion of and decisions (administrative or legal) related to land; the law states that all citizens have equal rights to land and it is assumed to be so. This system expects that all land users will propose to make use of their land in sanctioned ways. These politically and socially approved uses of land are defined by the dominant groups in control of land distribution, generally Tswana, which has severely disadvantaged the Basarwa. The situation in the CKGR was unique because there was a longstanding arrangement in which Basarwa peoples alone had the right of residence there based on a colonial agreement- until the government evicted them. While the legal decisions on the rights of specific Basarwa to land in the CKGR appear supportive, they support only those particular individuals and there remains no larger national support for the rights of the Basarwa to traditional land or traditional land practices.

6. Land and Self-Determination:

Self-determination, as laid out in the United Nations Declaration, requires that indigenous peoples have control over their own development as well as the means to support this. This includes recognition and security in their rights to land and in their right to use the land in their own way. The state’s refusal to

fully recognize or support the Basarwa peoples' rights to land has created a serious impediment to any level of realistic self-determination and sovereignty.

A further challenge for the Basarwa is that there has been little international pressure on Botswana to recognize indigenous rights in policy and practice. A clear weakness of the UNDRIP is that it is non-binding and countries voluntarily alter policies as they wish. Further, it appears that other United Nations agencies have been willing to allow Botswana to give superficial attention to indigenous rights and yet ignore the UNDRIP in actual practice. In the summer of 2014, the United Nations Organization for Education, Science, and Culture (UNESCO) World Heritage Committee offered its approval to name the Okavango Delta as Botswana's second World Heritage Site.³ During the ceremony, the Botswana flag was held aloft by Gakemotho Satau, a member of the Khwe community (one group of the Basarwa). As part of the UNESCO decision, the committee stated that Botswana will need to give attention and recognition to the rights of indigenous peoples in the newly recognized territory- in part because of the concerns about indigenous peoples that came out of the determination process (Crawhall 2014). There is little evidence that there will be repercussions if this does not happen.

During the UN's determination process for the Delta, the historic and ongoing lack of communication, respect and a positive relationship between the government and the indigenous communities within Botswana's borders was noted. The United Nations was aware that in the very submission of the request to UNESCO, the government of Botswana had persisted in ignoring the rights or needs of the indigenous peoples in the Okavango Delta:

There was a moment of concern when it was noted that the State Party had officially indicated that there were no San living within the boundaries of the core zone of the designated property... The state submission claimed that there were only 530 local villages within the core zone, which was contradicted by the official map submitted to IUCN and UNESCO. According to the map, there appear to be thousands of villagers on the banks of the Okavango that are inside the core zone, both San and Bantu-speaking fishing and farming peoples. IUCN in dialogue with Botswana noted that this information appeared to be uncertain and requires further evidence gathering (Crawhall 2014).

The government of Botswana again ignored indigenous peoples' land rights, denying their very existence in the submission of the report. This was clearly contradicted in the reality on the ground as found by UNESCO itself. This concern did not delay or prevent the UN decision makers from recognizing the World Heritage site, indicating a tacit acceptance of the government's behavior and a refusal of the UN agency to strongly support the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

Perhaps the future will show that government of Botswana and United Nations officials have taken the UNESCO recommendation to heart, and the status and territory of the Basarwa in the Okavango Delta will be recognized and protected. Given recent history, however, it seems highly likely that there will be no formal policy enacted to protect the indigenous inhabitants, and that any protections that they gain will be hard fought in the courts. Many factors work against support for Basarwa self-determination: a general lack of attention to the Basarwa in Botswana public sentiments, widespread national support for

individual based rights and equality, and government policies that repeatedly ignore the needs of indigenous peoples (Pulitano 2012, 4).

To support self-determination for the Basarwa, policy makers and administrators in Botswana must be willing to support Basarwa peoples' access to resources without compromising their access to other supports. Indeed, no one else in Botswana has been forced to give up their rights to public services to make use of their recognized rights to territory. A major step forward would be formally recognizing the legitimacy of hunting and gathering as acceptable land use and offering stronger rights to access and use of land for the Basarwa. The international community should step forward to support indigenous rights to land and traditional land use as well. The Basarwa peoples' ability to live sustainable, self-determined lives as individuals and communities requires a fundamental change Botswana's definition of land use and rights and a willingness to recognize the distinct needs and rights of indigenous peoples.

End Notes:

1. This article uses the term "Basarwa" to describe the indigenous peoples also referred to by outsiders as either "San" or "Bushmen," unless a source is directly quoted. This term is commonly used in Botswana and in academic literature (see for example Boko 2002, Cassidy et al 2001). In the case of quotations, the original language is left unchanged. As is often true when indigenous peoples are referred to in encompassing terms, all of the potential labels have histories and frequently negative connotations that have been introduced by outsiders. Indigenous peoples themselves in Botswana often prefer to be noted by their individual tribe or band, such as Khwe or Kua, within the larger group that is here called Basarwa. The overarching term has been used because this work addresses questions of the state treatment and policies that affect the larger group in its entirety. See the discussion in Mazonde (2002b) for an overview of the variety of choices and the complexities of this issue.

The prefix "Ba" indicates a people. For example, the Tswana people may also be referred to as the Batswana, the Sarwa peoples as the Basarwa, and so on. The Bastswana are most commonly called the Tswana, which is the title that this article uses. Languages are denoted by the prefix "Se," so the language of the Tswana people is called Setswana. There are frequently multiple variations of English language spellings of the names of peoples in Botswana. For example, Bakhalaghari, Bakhalagadi, and Bakgalagadi are all variations of English spellings used to denote the same group of people, with the additional spelling of Bakalagadi used in this article. I have attempted to adopt one spelling for each population mentioned for the ease of the reader, but do not make any arguments as to whether or not I have chosen the "best" spelling.

The Basarwa are widely accepted as indigenous peoples. Hays (2002) identifies five key characteristics to identify indigenous peoples. First, they must have pre-inhabited the other occupants of the region or state, which it is clear that the Basarwa did. Second, the group must be culturally distinct. The Basarwa have a distinct culture and language that sets them apart from other, primarily Tswana speaking, peoples in Botswana. Third, the group must be non-dominant in society. The Basarwa as a large group have been repeatedly dispossessed and discriminated against on many levels, have little political or economic power, and lag the majority population on many major indicators, such as health or educational outcomes. Fourth, the indigenous group should have distinct patterns of land and resource use, which indeed the Basarwa do with their tradition of hunting and gathering. And finally, the group must self-identify as indigenous. The Basarwa recognize their own indigeneity and clearly see

themselves as distinct from the non-indigenous population, which they identify as “black” (Mazonde 2002a, 57).

2. The United Nations Conference on Trade and Development established its list of Least Developed Countries in 1971 based on thresholds tied to per capita gross domestic product, share of manufacturing, and literacy rates. The growth in Botswana’s economy, education, and standard of living brought it above the set standards in 1994 and it was declared as a “graduate” of the LDC list. <http://www.un.org/events/ldc3/prepcom/history.htm>

3. The first World Heritage site in Botswana is Tsodilo, a site in the Kalahari desert that is home to over 4,500 paintings that could be as much as 2,000 years old and approximately 100,000 years of archeological evidence of human activities and environmental changes. See more at: http://whc.unesco.org/pg.cfm?cid=31&id_site=1021

Works Cited:

- Babbitt, Eileen and Hurst Hannum (eds). 2006. *Negotiating Self-Determination*. New York: Lexington Books.
- “Botswana: Bushmen Face 10 Years of Abuse Despite Landmark Legal Victory.” 2014. *Survival International*, 4 July. <http://allafrica.com/stories/201407041277.html>
- Bennett, Bruce S. 2002. “Some Historical Background on Minorities in Botswana.” In Isaac N. Mazonde, (ed). *Minorities in the Millennium: Perspectives from Botswana*. Gabarone, Botswana: Lightbooks. Pp 5-15.
- Bennett, Olivia and Christopher McDowell. 2012 “Displaced: The Human Cost of Development and Resettlement.” New York, New York: Palgrave MacMillan.
- Boko, Duma Gideon. 2002. “Integrating the Basarwa under Botswana’s Remote Area Development Programme: Empowerment or Marginalization?” in Isaac N. Mazonde, (ed). *Minorities in the Millennium: Perspectives from Botswana*. Gabarone, Botswana: Lightbooks. 97-110.
- Cassidy, Lin, Ken Good, Isaac Mazonde, and Robert Rivers. 2001. “An Assessment of the Status of the San/ Basarwa in Botswana.” Report 3 of 5. Regional Assessment of the Status of the San in Southern Africa. Windhoek, Namibia. John Meinert Printing.
- Crawhall, Nigel. 2014. “Botswana: Govt Accepts San As Indigenous to the Okavango Delta.” *All Africa*, 25 June. <http://allafrica.com/stories/201406261474.html>
- Dinokopila, Bonolo Ramadi. 2011. “The right to Water in Botswana: A review of the Matsipane Mosehlhanyane case.” *African Human Rights Law Journal*, 11 (1): 282-295.
- Felton, Silke and Heike Becker. 2001. “A Gender Perspective on the Status of the San in Southern Africa.” Report 5 of 5. Regional Assessment of the Status of the San in Southern Africa. Windhoek, Namibia. John Meinert Printing.
- Hays, Jennifer. 2002. “Education and the San of Southern Africa: the Search for Alternatives.” in Isaac N. Mazonde, (ed). *Minorities in the Millennium: Perspectives from Botswana*. Gabarone, Botswana: Lightbooks. 73-87.
- Hitchcock, Robert K. and Wayne A Babchuk. 2010. “Local Justice and Legal Rights among the San and Bakgalagadi of the Central Kalahari, Botswana.” In Alexander Laban Hinton, ed.

- Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence. Piscataway, NJ: Rutgers Press. 157-176.
- Kiema, Kuela. 2010. Tears for My Land: A Social History of the Kua of the Central Kalahari Game Reserve Tc'amnquoo. Gabarone, Botswana: Mmegi Publishing House.
- Klug, Heinz. 1995. "Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law. Working paper 23. Johannesburg, South Africa: Centre for Applied Legal Studies, University of the Witwatersrand.
- "The Least Developed Countries: Historical Background." <http://www.un.org/events/ldc3/prepcom/history.htm>
- Lightfoot, Sheryl. 2012. "Selective Endorsement without intent to implement: Indigenous rights and the Anglosphere." *The International Journal of Human Rights* 16 (1): 100-122.
- Mazonde, Isaac N. 2002a. "The San in Botswana and the Issues of Subjectivities- National Disintegration or Cultural Diversity?" in Isaac N. Mazonde, (ed). Minorities in the Millennium: Perspectives from Botswana. Gabarone, Botswana: Lightbooks. Pp 57-71.
- Mazonde, Isaac N. (ed). 2002b. Minorities in the Millennium: Perspectives from Botswana. Gabarone, Botswana: Lightbooks.
- Morapedi, Wazha G. 2011. "Customary Law and Chieftanship in Twenty-First Century Botswana." In Jeanmarie Fenrich, Paolo Galizzi, and Tracy E. Higgins (eds). The Future of African Customary Law. New York, New York: Cambridge University Press. 247-265.
- Nyati-Ramahobo, Lydia. 2002. "Ethnic Identity and Nationhood in Botswana. In Isaac N. Mazonde, (ed). Minorities in the Millennium: Perspectives from Botswana. Gabarone, Botswana: Lightbooks. Pp 17-27.
- Peters, Pauline E. 1994. Dividing the Commons: Politics, Policy and Culture in Botswana. Charlottesville, VA: University Press of Virginia.
- Pulitano, Elvira. 2012. "Indigenous Rights and International Law: An Introduction." In Elvira Pulitano, ed. Indigenous Rights in the Age of the UN Declaration. New York: Cambridge University Press. 1-30.
- Republic of Botswana. 2013. "Okavango Delta: World Heritage Nomination Dossier." Gabarone, Botswana: Ministry of Environment, Wildlife and Tourism. <http://whc.unesco.org/uploads/nominations/1432.pdf>
- Saugestad, Sidsel. 2001. The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance, and the First People of the Kalahari. Uppsala, Sweden: The Nordic Africa Institute.
- Suzman, James. 2001. "An Introduction to the Regional Assessment of the Status of the San in Southern Africa." Report 1 of 5. Regional Assessment of the Status of the San in Southern Africa. Windhoek, Namibia. John Meinert Printing.
- United Nations. 2008. *Declaration on the Rights of Indigenous Peoples*. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- United Nations World Heritage Centre. "Tsodilo." http://whc.unesco.org/pg.cfm?cid=31&id_site=1021
- Wily, Liz. 1979. "Working Paper No. 23: Official Policy Towards San (Bushmen) Hunter-Gatherers in Modern Botswana: 1966-1978." Gabarone, Botswana: University College of Botswana.