

INDIGENOUS RIGHTS IN BOTSWANA: DEVELOPMENT, DEMOCRACY AND DISPOSSESSION

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I. INTRODUCTION

The Central Kalahari Game Reserve, one of the largest conserved areas in Africa, encompasses tens of thousands of square kilometers of arid lands in Botswana that for millenia have been inhabited by San groups indigenous to southern Africa. Despite the ancient and close relationship between the San and the Kalahari region, the government of Botswana has provoked international outcry by progressively expelling San communities from the Reserve, placing them in dilapidated settlement camps, and issuing licenses for diamond prospecting to a multinational mining concern backed by the World Bank Group's International Finance Corporation.¹ San groups, human rights NGOs, and others have mobilized in response to the crisis and have brought the government to the negotiating table and the Botswana High Court.² The outcome of this confrontation remains to be seen, but a resolution is unlikely to be lasting or effective unless the government, civil society and the international community come to grips with the deeper, structural aspects of San subordination in Botswana.

Botswana's experience underscores how the pursuit of national development and democratization, even if successful along other dimensions, is likely to fail indigenous groups when not accompanied by recognition of indigenous rights and acknowledgement of the effects of legally-supported inequality. The San have largely been denied the fruits of Botswana's rapid economic growth and social development, suffering from chronic unemployment and poverty, holding little land and few assets, and frequently depending on government beneficence for survival.³ At the same time, dynamics such as the conversion of land for grazing and

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1. See discussion *infra* pp. 804–07.

2. See discussion *infra* notes 280–81 and accompanying text. See also *San People to Challenge Eviction in Botswana Court*, AFROL NEWS, June 1, 2004, <http://www.afrol.com/articles/13008>.

3. See discussion *infra* at p. 802 and accompanying notes.

extractive uses have created grave threats to the San's traditional activities.⁴ These contemporary problems, however, cannot be fully understood without tracing their roots in the customary, and subsequently formal, legal and political organization of pre-colonial Tswana chiefdoms and then the Bechuanaland Protectorate.

Under Tswana rule, the San were subjugated as serfs and excluded from the political community.⁵ Although the British-controlled Bechuanaland Protectorate formally abolished serfdom, in other respects it exacerbated the inequities between San and Tswana groups by establishing a two-tier land and governance framework that gave the dominant Tswana tribes substantial autonomy to enforce their own customary law while denying the San similar recognition. The Protectorate provided protection for San land rights only through a London-conceived conservation framework that provided insecure tenure.⁶ The post-independence nation building enterprise of the Republic of Botswana has not rectified these problems, in part because of the shortcomings of land reform, the enactment of increasingly burdensome hunting regulations, and a focus on assimilating the San into the Tswana-dominated mainstream, rather than on giving them control over the projects and policies that affect them.⁷ Finally, the article discusses applicable international human rights norms, including those in the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination, and sets forth an argument for the viability of an aboriginal title claim to San lands in Botswana.

II. THE EXCLUSION OF THE SAN FROM THE BENEFITS OF BOTSWANA'S TRANSFORMATION

Botswana's democratization and diamond-driven growth have brought it acclaim as a salutary exception to the "resource curse" that locks resource-rich developing countries into a cycle of poverty, governmental corruption, and economic stagnation. Botswana's economy, a large proportion of which is constituted by the mining sector,⁸ expanded at a torrid pace from independence to the late 1990s. Between 1966 and 1991,

4. See discussion *infra* notes 21–24 and accompanying text.

5. See *infra* pp. 815–17.

6. See *infra* pp. 818–57.

7. See discussion *infra* pp. 837–50 and accompanying notes.

8. In recent years, mining has accounted for anywhere from 30–50% of Botswana's GDP. See Maria Sarraf & Moortaza Jiwaji (World Bank), *Beating the Resource Curse: The Case of Botswana* 10 (2001), available at <http://www.worldbank.org>.

its economy grew at a remarkable annualized rate of thirteen percent (13%), and by 1991 its real per capita income stood at five times the average for sub-Saharan African countries.⁹ The World Bank estimates that Botswana's 1966–1996 per capita Gross Domestic Product (GDP) growth rate was the highest in the world, exceeding even the rates of the East Asian economies.¹⁰ Botswana is also lauded for having one of the most transparent, democratic, and well-managed governments in the developing world, and has one of the longest-running constitutional democracies in Africa.¹¹ In a continent possessing many states with a history of corruption, autocracy, and economic mismanagement, Botswana has benefited from “a relatively coherent leadership, with traditional legitimacy, education, business acumen,” and “a strong civil service, governed through recognized institutions rather than personal deals,” which together have sustained electoral democracy, enabled debate in government, and responsibly handled dealings with foreign corporations and management of state enterprises.¹² Although gains have been substantially curtailed because of the HIV/AIDS pandemic, Botswana through the late 1990s achieved major improvements in human development.¹³

9. *Botswana Human Development Report 2000: Towards an AIDS Free Generation*, U.N. Development Programme, at 16 (2000), at <http://www.bw.undp.org> (last visited Apr. 14, 2004) [hereinafter *Botswana Human Development Report 2000*].

10. J. Clark Leith (World Bank), *Botswana: A Case Study of Economic Policy Prudence and Growth* 1 (1999), at http://www.wds.worldbank.org/servlet/WDS_TBANKServlet?pcnt=details&eid=000094946_00011405343417 (last visited Apr. 14, 2004). Economic growth slowed during the 1990s but still reached an annual rate of approximately 5%.

11. TIYANJANA MALUWA, *INTERNATIONAL LAW IN POST-COLONIAL AFRICA* 121 (1999)

12. FREDERICK COOPER, *AFRICA SINCE 1940: THE PAST OF THE PRESENT* 183 (2002). Botswana also has one of the highest proportions of wildlife conservation land in the world, with about forty percent under some kind of protection. Kenneth Good, *At the Ends of the Ladder: Radical Inequalities in Botswana*, 31 J. MOD. AFR. STUD. 203, 223 (1993), available at <http://www.jstor.org> (last visited Apr. 14, 2000).

13. By 1996, Botswana ranked third among sub-Saharan countries in terms of the UN Human Development Index. See *Botswana Human Development Report 2000*, *supra* note 9, at 111 (1996). Education enrollment rates increased by over five percent per year, and, before the onset of the HIV/AIDS pandemic, major progress was made in measures of health as well. Although Botswana's high level of inequality improved only marginally, it dropped somewhat in rural areas from the mid 1970s to the mid 1990s. Leith, *supra* note 10, at 6. The incidence rate of poverty significantly declined through 1999, infant mortality fell from 108/1000 in 1966 to 38/1000 in 1999, and primary school enrollment increased from 50% to 97% in the same period. *Country Programme Outlines for Botswana* (2003–2007), United Nations Development Programme, U.N. Doc. DP/CPO/BOT/1 (2002), at 2, available at www.unbotswana.org/bw/ordp/docs/Botswana.CPO.pdf (last visited Apr. 14, 2004). Major gains also occurred in life expectancy, literacy, secondary school enrollment, child nutrition, and access to health care and clean water. See African Development Bank Data for Botswana, at http://www.afdb.org/knowledge/statistics/statistics_indicators_selected/country_tables/pdf/botswana.pdf (last visited Apr. 14, 2004); *Botswana Human Development Report 2000*, *supra* note 9. The

Notwithstanding Botswana's extensive success in promoting development and democracy, the San have been denied many of the benefits. Many San in Botswana continue to be poor, with high unemployment rates, high infant mortality, high incarceration rates, low literacy levels, and few assets.¹⁴ Although serfdom was formally eliminated by the middle of the twentieth century, San continue to be paid low wages for the farm labor in which many of them engage,¹⁵ and "many . . . are at least partially and sometimes totally dependent on livestock owners for their subsistence and income."¹⁶ The average wage for farm and cattle post workers is "considerably below" what would sustain their families, leading many of them to supplement their incomes through foraging, food production, the sale of crafts and other goods, and government transfers.¹⁷ High inequality, among other factors, has impeded poverty reduction in rural areas, particularly those with large San populations.¹⁸ Poverty is "especially severe in the Ghanzi, Kgalagadi, and Ngamiland districts," which traditionally contain large San populations.¹⁹ The rural poverty rate of fifty-five percent (55%) is nearly twice the urban rate, an disparity that also exists with regard to social development indicators.²⁰

It is also clear that Botswana's transformation over the last several decades, regardless of its benefits, has had some highly negative effects on San groups. A 1992 letter from the San NGO First People of the Kalahari to the government declared that "twenty-six years of independence have brought Botswana forward and us, The First People of the Kalahari,

HIV/AIDS pandemic has had a catastrophic effect, however, and is undoing much of the progress achieved in the last several decades. In 2000 an estimated thirty-six percent of Botswana citizens between fifteen and forty-nine years of age were infected with HIV/AIDS. *Id.* at 1.

14. See ROBERT K. HITCHCOCK, KALAHARI COMMUNITIES: BUSHMEN AND THE POLITICS OF THE ENVIRONMENT IN SOUTHERN AFRICA 18 (1996); Robert K. Hitchcock, *The Politics and Economics of Bureaucratic and Ethnic Identity Among Remote Area Populations in Botswana*, in PROCEEDINGS OF THE KHOISAN IDENTITIES AND CULTURAL HERITAGE CONFERENCE 303, 309 (Andrew Bank ed., 1998) [hereinafter KHOISAN IDENTITIES].

15. See Good, *supra* note 12, at 218.

16. See Hitchcock, in KHOISAN IDENTITIES, *supra* note 14.

17. *Id.* The Remote Area Development Programme has brought benefits such as access to water, schools, credit, health posts and other services, but it has not raised the social or economic status of the San, according to the San and those who work with them. Yet, the government may be scaling the Programme back. *Id.* at 310–11.

18. *Id.*

19. See Botswana Human Development Report 2000, *supra* note 9, at 16.

20. *Id.* at 17. UNDP estimates that the Human Poverty Index (which incorporates data on illiteracy, lack of access to water and health services, child mortality, and child underweight) was 21.9 and 14.5 for the eastern urban centers Gaborone and Francistown, whereas it was 45.0 for Ghanzi and 44.8 for Kgalagadi South. *Id.* at 67, tbl. A4.3.

backwards.”²¹ Large tracts of land once used for hunting and gathering have been allocated for grazing, pushing those who wish to continue traditional lifestyles farther into shrinking veld areas.²² Declining animal populations caused by habitat degradation and globalized markets for game have induced the government to constrain further San hunting practices in the last ten years.²³ Botswana’s efforts to use social policy in order to improve conditions for the San have been plagued by problems and mistakes and have increased dependence on bureaucratic structures rather than on self-sufficiency or autonomy.

Perhaps the most prominent among problems in the government’s relations with the San have been those concerning the Central Kalahari Game Reserve (CKGR). The CKGR was created in 1961, shortly before Botswana’s independence, with the aim of protecting dwindling wildlife populations in the Kalahari. Though the matter is disputed, it was possibly also created to protect lands for the San. The CKGR’s over 52,000 square kilometers of land in the Ghanzi district include areas traditionally inhabited by the G//we and G//ana. Although residents of the CKGR were relatively undisturbed for the first decades of its existence, the government imposed major changes in the 1980s and 1990s that deeply affected the San. The government announced in 1986 that henceforth the Remote Area Dweller settlements should be made outside the CKGR.²⁴ The commission

21. Letter from First People of the Kalahari to the Botswana Ministry of Local Government, Lands and Housing (May 17, 1992), *quoted in* SIDSEL SAUGESTAD, *THE INCONVENIENT INDIGENOUS: REMOTE AREA DEVELOPMENT IN BOTSWANA, DONOR ASSISTANCE AND THE FIRST PEOPLE OF THE KALAHARI* 178 (2001).

22. Good, for example, notes that in the Ghanzi district in the late 1980s approximately 2400 square kilometers, or 1.7% of the district, had been allocated for Remote Area Dwellers who constituted forty-two percent of the district’s population, whereas almost 19,000 square kilometers had been acquired by commercial ranchers through the Tribal Grazing Land Policy. *See* Good, *supra* note 12, at 215.

23. In 1992, the government passed the Wildlife Conservation and National Parks Act, which gave the President new powers to abolish or create game reserves, sanctuaries and wildlife management areas. It also imbued the minister of parks and wildlife with the power to create or abolish controlled hunting areas. Wildlife Conservation and National Parks Act (Act No. 28 of 1992), *available at* www.jgc.apc.org/envLaw/africa/index.html (last visited Apr. 14, 2004). The Act empowered the parks and wildlife minister to issue regulations on the provision of Special Game Licenses (SGLs) “to citizens of Botswana who are principally dependent on hunting and gathering veld products for their food.” *Id.* § 30(1). The SGLs specify the type and number of animals that can be killed. *Id.* Licensing officers, however, grew increasingly reluctant to issue SGLs to those in the Remote Area Development Programme. The Ngamiland and Kgaligadi districts stopped issuing SGLs by the late 1990s, and by 1998, “only people in the Ghanzi District were slated to receive [SGLs].” Robert K. Hitchcock, *Hunting is Our Heritage: The Struggle for Hunting and Gathering Rights Among the San of Southern Africa*, at <http://www.kalaharipeoples.org/documents/Hunt-iwg.htm> (observing that as of 2000 none of the remaining communities in the CKGR had been able to obtain hunting licenses) [hereinafter Hitchcock, *Hunting is Our Heritage*].

24. *See* Robert K. Hitchcock, *Seeking Sustainable Strategies: The Politics of Resource Rights*

did not include any residents of the CKGR, and several commission members objected to the failure to consult local groups, who in turn vigorously protested the policy once it was announced.²⁵ A report from the American Anthropological Association observed that “local people reacted strongly to this request, arguing that they should be allowed to stay where they are,” and that the CKGR was originally established to protect the land and resource rights of central Kalahari inhabitants.²⁶ The government justified its new policy on the grounds that it was too expensive to provide social services in the remote CKGR, that wildlife conservation would otherwise suffer, and that development assistance could be more effectively provided in locations with more transportation infrastructure. In the 1990s the government used increasingly coercive methods to induce residents to move, including resettlement.²⁷ The NGOs Ditshwanelo and the Botswana Center for Human Rights note that most residents of the CKGR did not want to move from the reserve.²⁸ Although the government promised compensation and increased benefits for those moving out of the reserve, residents allege that the government has failed to carry out its promises.²⁹

Among the Central Kalahari San, at <http://kalaharipeoples.org/documents/Fpk-ckg.htm> (last visited Apr. 14, 2004) [hereinafter Hitchcock, *Seeking Sustainable Strategies*]. “On July 15, 1986 a Botswana Government white paper on remote area dweller (RAD) settlements in the CKGR stated that the government of Botswana policy was that existing settlements should be relocated in areas outside of the reserve. The Honorable Moutlaggola Nwako, Minister of Commerce and Industry, announced the Government’s decision to have the communities move out of [CKGR] on October 12, 1986.” *Id.*

25. *Id.*

26. See American Anthropological Association, *Human Rights, Development, and the Peoples of the Central Kalahari Game Reserve, Botswana*, at <http://www.aaanet.org/committees/cfhr/rptbotswana.htm> (1997) (last visited Apr. 14, 2004).

27. In May and June 1997, the government resettled 600 CKGR residents of the !Xade community within the CKGR, about half of the remaining CKGR population, into the resettlement village of New !Xade outside the reserve. See Christian Erni, *Resettlement of Khwe Communities Continues*, 3/4 INDIGENOUS AFFAIRS 28–29 (1997). The resettlements of 1997 and 1998 decreased the population further. See Hitchcock, *supra* note 24, at 19.

28. See American Anthropological Association, *supra* note 26.

29. See Hitchcock, *Seeking Sustainable Strategies*, *supra* note 24; Erni, *supra* note 27, at 9. Visitors to settlements outside the CKGR observe that they are in poor condition. In 1997 Erni noted that “New !Xade is a desolate place with hardly any trees to provide shade and without potable water,” and, while a pipeline with brackish water was built, “the people were not provided with any building material.” Erni, *supra* note 27, at 9. The International Working Group on Indigenous Affairs observed of the New !Xade and Kaudwane settlements that their “populations . . . are so large, and the resources in the vicinity of the settlements so few, that the residents have been unable to sustain themselves through foraging, small-scale agro-pastoralism and rural industries,” thus forcing them “to depend heavily on the government of Botswana’s relief programs.” INTERNATIONAL WORKING GROUP ON INDIGENOUS AFFAIRS, *THE INDIGENOUS WORLD: 2000–2001*, at 281 (Diane Vinding ed., 2002) [hereinafter IWGIA Report].

In the last several years, problems in the CKGR have worsened. In early 2002, the government announced that it was ceasing provision of all basic services, including water, food rations, health services, and transportation for children to schools.³⁰ Despite criticism from the US ambassador and diplomatic representatives of other countries,³¹ the government continued its efforts to empty the CKGR, confiscating vehicles and setting up roadblocks to prevent the G//ana and the G/wi from returning to the reserve, notwithstanding the claim of a local government minister in New !Xade that the San were “free” to return.³² Allegations surfaced that diamond mining lay behind the resettlement and that the government had made concessions in the CKGR.³³ In response, the government has emphatically denied that the San are being removed to facilitate mining, and that regardless the issue is an internal matter.³⁴

Speculation has been borne out in some measure by the revelation that the World Bank Group’s International Finance Corporation is providing

30. Press Release, The Botswana Centre for Human Rights, Ditshwanelo (Jan. 31, 2002), at <http://www.ditshwanelo.org.bw> (last visited Apr. 14, 2004).

31. Ambassador John E. Lange questioned Botswana’s treatment of the San after visiting the CKGR and resettlement camps. He “emphasized that the San people must be allowed to choose where want to they live,” and that the settlement conditions were “unsustainable.” He also offered US assistance to ensure the San’s return to their lands. Richard Howitt, a member of the European Parliament’s Development Committee, also visited the CKGR and met with San representatives. *US Condemns Botswana’s Eviction of “Bushmen”*, AFROL NEWS, Aug. 28, 2002, at http://www.afrol.com/News2002/bot005_san_us_amb.htm (last visited Feb. 7, 2004). In addition, MP Angus Robertson on May 11, 2004 tabled an Early Day Motion in the UK Parliament recognizing the CKGR as the ancestral land of the Gana and Gwi, expressing concern over the government’s eviction of the San, and urging the Government to encourage the government of Botswana to strengthen the rights of the San under international law and their right to return to and inhabit the CGHR. The EDM garnered 38 votes. See Early Day Motion 1168, available at <http://edm.ais.co.uk/weblink/html/motion.html/ref=1168> The UN’s Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, stated in his 2001/2002 report to the Human Rights Commission that “the Bushmen, numbering around 80,000, have been the victims of discriminatory practices and their survival as a distinct people is endangered by official assimilationist policies. Of particular concern is the fact that many groups have been dispossessed of their traditional lands to make way for game reserves and national parks.” *Economics and Social Council, Indigenous Issues*, Commission on Human Rights, 58th Sess., Item 15. U.N. Doc. E/CN.4/2002/97/Add.1 (2002) (last visited Mar. 1, 2004). Such displacement has frequently occurred in sub-Saharan Africa. See, e.g., RODERICK P. NEUMANN, IMPOSING WILDERNESS: STRUGGLES OVER LIVELIHOOD AND NATURE PRESERVATION IN AFRICA (1998).

32. *Botswana Remains Harsh on “Bushmen”*, AFROL NEWS, Sept. 13, 2002, at http://www.afrol.com/News2002/bot006_san_evicted.htm (last visited Apr. 14, 2004).

33. The diamond issue has been taken up particularly by the London-based NGO Survival International, which has sought to mobilize international opinion and to confront the Botswana government as well as the De Beers diamond concern by organizing protests and sit-ins and making appeals to boycott tourism, among other strategies. See <http://www.survival-international.org> (last visited June 18, 2004).

34. See, e.g., *Central Kalahari Game Reserve Carved up for Diamonds*, at http://www.survival-international.org/bushman_030220.htm (last visited Apr. 14, 2004).

funds for diamond prospecting in the Central Kalahari by Kalahari Diamonds Ltd. (KDL), a British subsidiary of BHP Billiton, the world's largest "diversified resource group," whose 2002 revenues were more than double Botswana's total GDP.³⁵ Although the government has provided ninety prospecting licenses to KDL covering about 78,000 square kilometers, roughly one-third of the licenses lie within the boundaries of the Central Kalahari and Khutse Game Reserves.³⁶ The IFC stresses that "Botswana's rapid growth . . . has been based on the exploitation of mineral deposits, the reinvestment of the returns . . . in the sustainable development of the economy, sensible economic policies and expenditure allocations, and a democratic system of Government."³⁷ Even if this claim is, narrowly speaking, true, it reflects a perspective that fails to recognize the experience, conditions, and marginalized status of the San, who, despite the project's inclusion of their traditional territory, are not slated to receive anything beyond a vague assurance about IFC-backed "local economic development" if their lands are mined.³⁸

The crisis over the Central Kalahari Game Reserve and other aspects of the San's experience in Botswana illustrate how development efforts

35. See *World Bank Support for Controversial Botswana Diamond Project*, Feb. 17, 2003, at http://www.afrol.com/prueba/html/News2003/bot002diamond_project.htm (last visited Apr. 14, 2004); *Bushmen Lose to Diamond Mining, Activists Say*, Feb. 18, 2003, at <http://www.sadocc.at/news/2003-050.shtml> (last visited Apr. 14, 2004); *Diamond Miners Exploit Land of the Bushmen*, THE GUARDIAN, Feb. 20, 2003. See also International Finance Corporation, *Environmental Review Summary*, Project 20426, (2003), at <http://www.ifc.org> [hereinafter IFC]. The IFC contribution is small in itself but will assure the equity investors whom KDL is seeking to attract by raising \$12–20 million by private placement. BHP Billiton has been the object of criticism for its corporate predecessor BHP's original controlling interest in the Ok Tedi mine in western Papua New Guinea (BHP and Billiton merged in 2001, after which the interest was divested). In 1982 Ok Tedi was constructed in the rainforest. It annually generated millions of tons of waste rock and tailings which, instead of being contained or stored, was dumped into the Ok Tedi river. See Global Mining Campaign, *Digging Deep: Is Modern Mining Sustainable?* 10–11, at http://www.jatam.org/wti/doc_lain/digging%20deepEng-edited.pdf (last visited Apr. 14, 2004). Local communities mobilized, and brought their claims to the International Water Tribunal in the Hague, which found that BHP had violated the rights of downstream residents. *Id.* at 11. A lawsuit was also brought in Melbourne, Australia, where BHP was incorporated. It was settled in 1996 for an estimated \$500 million and commitments to tailings containment. *Id.* Nonetheless, residents brought another lawsuit in 2000 charging BHP with violating the terms of the settlement. *Id.* The IFC documents do not mention the Ok Tedi mine, instead referring only to BHP Billiton's Ekati mine in Canada and the Mozal smelter in Mozambique. IFC, *supra* note 35.

36. *Id.* The IFC's Environmental Review Summary ("ERS") states that the government "has a successful record of using revenues from mining over [the] last two decades to upgrade infrastructure and to improve educational and health standards and this provides a sound foundation for its economic diversification program." IFC, *supra* note 35. The IFC's ERS, while it acknowledges the possible impacts on the CKGR's environment and the San, asserts that they "can be minimized and mitigated with careful management." *Id.* See also *Bushmen Lose to Diamond Exploration*, *supra* note 35.

37. IFC, *supra* note 35.

38. *Id.*

cannot be assumed to benefit indigenous groups but rather can coexist with, and under certain circumstances, contribute to their continuing dispossession and subordination. No single factor is exclusively responsible for this dynamic in Botswana, but a key imperative has been the refusal to recognize historically-entrenched inequities that track ethnic divisions and that are grounded in legal and political institutions. Botswana's history suggests that continued failure to acknowledge such inequities will only frustrate the advancement of indigenous rights and a more equitable dispersion of the fruits of development.

III. THE SAN AND THE POLITICS OF ETHNIC IDENTITY

Before tracing the creation of San subordination under the legal and political frameworks of pre-colonial Tswana and, later, the Bechuanaland Protectorate, it is necessary to convey a better sense of how ethnicity, and in particular notions of ethnic identity, have figured in relations between the San and the Tswana-dominated government. Ethnicity is a category that is often conspicuously absent from discussions about human rights and development, but claims about and struggles over ethnicity frequently affect the allocation of rights and resources in normatively significant ways.³⁹ The troubled relations between the San and the government can be best understood in view of struggles over ethnic identity, as different actors have used notions of San identity to advance public claims about resources and rights. This pattern has recurred from the days of Tswana control over the San, when the San were not recognized as having the appropriate social structure for community membership, to the present day, when the government ardently seeks to assimilate the San into broader society.

Although the groups constituting the San have recently engaged in deliberations about how they collectively wish to be addressed, notably few of the popular names have been coined by the San themselves.⁴⁰

39. Development strategies that overlook ethnic animosities may produce disastrous results. *See, e.g.,* AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED & GLOBAL INSTABILITY* (2002) (discussing a pervasive phenomenon by which economic liberalization has exacerbated economic dominance by ethnic minorities, eventually leading to nationalist backlash by ethnic majorities).

40. As Komtsha Komtsha of the Kuru Development Trust remarked at a 1992 workshop, "By which name should the Basarwa be known? Nobody has asked us what our name is and how we should be called. All other tribes know who they are, and have a name by which they are known." *See* SAUGESTAD, *supra* note 21, at 175. Historically, however, the San have been described as "Khwe," "Basarwa," and "Bushmen," among other names, as well as by the names of the distinct ethnic groups that constitute them, including, for example, the Ju/'hoansi [!Kung], G/wi, G//ana, Kxoe, Nharo

Traditionally, the San groups in Botswana have been labeled “Basarwa,” a Setswana term used by the dominant Tswana tribes.⁴¹ Basarwa is derived from a word meaning “people of the south,”⁴² reflecting the perspective of northern-originating Tswana tribes. The term “Basarwa,” though viewed by some as pejorative, improved on the former term, “Masarwa,” which, rather than the “Ba-” prefix used to denote people, contains the “Ma-” prefix used to denote objects and animals.⁴³

Tswana references to the San as “Basarwa,” however, must be distinguished from government classifications. The government of Botswana occasionally uses “Basarwa” in limited circumstances, but in general avoids the explicit use of ethnic classifications, partly on grounds that the terms resonate with the legacy of apartheid. To the disapproval of the United Nations Committee on the Elimination of Racial Discrimination, the government has even declined to keep official data on San populations.⁴⁴ When the government refers to the San it usually does so obliquely in ethnicity-neutral language, often by the expression “Remote Area Dweller,” a reference to the government’s Remote Area Development Programme (RADP) and the poor, marginalized, rural residents who are supported by it. This term not only elides ethnic distinctions among the groups participating in the RADP,⁴⁵ it also defines them from the contingent perspective of Tswana groups residing in the

[Naro], and =Kx’au/’ein. The term “San” was perhaps used earliest by the Khoekhoen or Khoikhoi, a traditionally pastoral people inhabiting South Africa’s western Cape, to describe hunters, and means “people different from ourselves.” See Alan Barnard, *Problems in the Construction of Khoisan Ethnicities*, in KHOISAN IDENTITIES, *supra* note 14, at 51, 56. For rough linguistic distribution see SAUGESTAD, *supra* note 21, at 14. “San” may carry a pejorative connotation in Khoikhoi, and means “thief” in Afrikaans, but it gained popularity among researchers, and subsequently has been viewed as an acceptable term by San groups. “Khoisan” has been used in reference to hunter-gatherer groups in southern Africa who speak click languages. See generally ALAN BARNARD, HUNTERS AND HERDERS OF SOUTHERN AFRICA: A COMPARATIVE ETHNOGRAPHY OF THE KHOISAN PEOPLES (1992). The term “Bushmen” was an anglicized variant of an Afrikaans expression, *boschjeman*, and was used in Namibia until 1996 (when “San” was substituted officially) and in South Africa (where “San” has also been used officially). Zambia, Zimbabwe, and Angola do not have official terms for San, but in Zimbabwe the names Amasili and Batwa are sometimes used, while in Angola, Kwankhala, Bushmen, and Bosquimanos (Portuguese) are used. See generally Robert K. Hitchcock & Megan Biesele, *San, Khwe, Basarwa, or Bushmen? Terminology, Identity, and Empowerment in Southern Africa*, at <http://www.kalaharipeoples.org/documents/San-term.htm> (last visited Apr. 14, 2004).

41. See Hitchcock, in KHOISAN IDENTITIES, *supra* note 14, at 303.

42. *Id.*

43. *Id.* This did not prevent the World Bank from uncritically using “Masarwa” in a 1985 report. See Dov Chernichovsky, Robert E.B. Lucas, & Eva Mueller (World Bank), *The Household Economy of Rural Botswana: An African Case 3* (1985), available at <http://www.worldbank.org> (last visited Apr. 14, 2004).

44. See discussion *infra* note 204 and accompanying text.

45. Saugestad estimates that about 70–80% of Remote Area Dwellers are San. SAUGESTAD, *supra* note 21, at 127.

urbanized and more densely populated southeastern region of Botswana. Above all, the term “Remote Area Dweller” is, as Saugestad observes, “deeply resented by those who are so called.”⁴⁶

With increasing mobilization around concerns common to the numerous groups composing the San, the latter have asserted their collective identity in various ways that are gaining momentum. Representatives of San groups met in 1996 in Namibia and agreed to allow the use of the “San” designation, a decision that was reaffirmed at a meeting on “Khoisan Identities and Cultural Heritage” in Cape Town in July 1997.⁴⁷ Other expressions such as “First People” have received support among San groups, signifying their status as the first inhabitants of the Kalahari desert.⁴⁸ Finally, the term “Khwe,” meaning “people” in Central Bush languages,⁴⁹ is gaining popularity among the San in Botswana, and a variant of it is also used by First People of the Kalahari.⁵⁰ Choice of terminology is fraught with risk where groups like the San are undergoing a public process of self-definition after years of enduring externally imposed classifications. Controversy will likely continue until the groups constituting the San reach a consensus on a collective public identity. This Article will primarily use the term “San” because it has been accepted by groups such as the Working Group of Indigenous Minorities in Southern Africa (WIMSA), the Kuru Development Trust, and others.⁵¹

The San are the second largest former forager group in Africa, and an estimated 95,000 San inhabit Angola, Botswana, Namibia, South Africa, Zambia, and Zimbabwe.⁵² The San, contrary to mistaken anthropological

46. *Id.*

47. *See generally* KHOISAN IDENTITIES, *supra* note 14. Importantly, the San also emphasized that specific group names should continue to be employed for the various social units. *Id.*

48. For example, the organization Kgeikani Kweni (First People of the Kalahari) was formed in 1992 and has taken a leading role in San advocacy efforts.

49. Hitchcock, *in* KHOISAN IDENTITIES, *supra* note 14, at 303. *See generally* Hitchcock, *San, Khwe, Basarwa, or Bushmen?*, *supra* note 40.

50. Hitchcock, *San, Khwe, Basawaran Bushmen?*, *supra* note 40. As Roy Sesana, a G//ana member and FPK leader from the Central Kalahari, stated in 1992, “we want to be called by our own name. The name of ‘Motswana’ [“citizen of Botswana”] makes it impossible for us to receive whatever assistance is available, because it comes to a Motswana even if it may be meant for Basarwa. We want to be called by our name ‘N/oakwe’ [“Red People”].” *See* SAUGESTAD, *supra* note 21, at 176.

51. *See, e.g.*, Working Group for Indigenous Minorities of Southern Africa, <http://www.san.org.za> (last visited Apr. 14, 2004). San communities do not reside exclusively in Botswana, and it should be noted that, while some issues for San groups in Botswana are common to San populations in Namibia, South Africa, and elsewhere, references to the San in this Article should generally be interpreted as references to the San in Botswana.

52. Robert K. Hitchcock & John D. Holm, *Bureaucratic Domination of Hunter-Gatherer Societies: A Study of the San in Botswana*, 24 DEV. & CHANGE 305, 307 (1993). I use the term “former” because the San used to be a foraging group but with Botswana’s development have in many

claims made in the past, are emphatically not a “dying race.”⁵³ Botswana has the largest concentration of San groups with an estimated population of 45–60,000, constituting about four percent of the national population.⁵⁴ The San have inhabited what is now Botswana and contiguous areas for millennia, perhaps as long as 30,000–40,000 years. San paintings in southern Africa have been dated between 19,000 and 27,000 years old.⁵⁵ To many, the San are best known as a hunter-gatherer and forager group, and this is often how they have been characterized by anthropologists, the media, and government officials.⁵⁶

One’s intuition might be that the hunting, gathering, and foraging practices of San groups is important to recognizing their “real” or “traditional” identity rather than one imposed or articulated by the government. It turns out, however, that the notion that the San are hunter-gatherer “nomads” has been used by Botswana’s government as a reason not to allocate land to the San, to build schools and clinics, or to provide other social services.⁵⁷ As WIMSA declared at a 1997 conference, “the stereotypes of nomadism have been used to justify the exclusion of the San from their rights to land, natural resources, and development.”⁵⁸ A notorious example is a 1978 legal opinion from the government that contended that the “nomadic” status of the San entails that, with the exception of hunting rights, they have “no rights of any kind” deriving from customary practices, and in particular no land rights.⁵⁹

Contrary to the “nomadic” stereotype, there is evidence indicating well-developed practices among San groups for recognizing and respecting defined territorial boundaries that mark one group’s usage

capacities taken on a non-foraging lifestyle. The reality of the situation, however, is likely more complex than terms such as “foraging” or “hunting-gathering” can convey, and I do not intend to make any definitive anthropological claims in this regard.

53. See discussion and debunking of this misconception in Phillip Tobias, *Myths and Misunderstanding About Khoisan Identities and Status*, in *KHOISAN IDENTITIES*, *supra* note 14, at 19.

54. See Good, *supra* note 12, at 206; Hitchcock & Holm, *supra* note 44; HITCHCOCK, *supra* note 14, at 13; IWGIA Report, *supra* note 29, at 277. The relatively wide range likely derives in part from the government’s refusal to keep official statistics on San populations in Botswana.

55. J.D. LEWIS-WILLIAMS, *DISCOVERING SOUTHERN AFRICAN ROCK ART* 17–18 (Cape Town 1990). See Good, *supra* note 12, at 206.

56. See, e.g., John Simpson, *Botswana Bushman Fights for Survival*, BBC NEWS WORLD EDITION (Aug. 15, 2002), available at <http://news.bbc.co.uk/1/hi/world/africa/219564.stm> (last visited Apr. 14, 2004).

57. Ngakaeaja, Mathambo et al., *A San Position: Research, the San and San Organizations*, in *KHOISAN IDENTITIES*, *supra* note 14, at 30.

58. *Id.*

59. In this regard, there is some evidence to support the claim that the “ideological foundation” of San subordination rests “in the myth, or more precisely the manufactured tradition, of San aboriginality and hence of their propertylessness.” Good, *supra* note 12, at 210.

rights over land, game, water, and other resources.⁶⁰ In addition, evidence exists to support the claim that, contrary to past assumptions, the San at various points engaged in agropastoralist activities beyond hunting and gathering.⁶¹ Anthropological debate about the past practices of the San will continue, but regardless of its outcome, it is clear that the San currently do not engage exclusively in a “nomadic” hunter-gatherer lifestyle.⁶² At the same time, some San continue to hunt, gather, and forage.⁶³ Perhaps the best view is that the San engage in “clusters of adaptive strategies that combine hunting and gathering with products from agriculture and pastoralism on a seasonal or occasional basis, or mixed strategies where agriculture and pastoralism provide the majority if not all of subsistence.”⁶⁴ For our purposes, it may be said that it is simplistic, and

60. See, e.g., BARNARD, *supra* note 40, at 147; Richard Lee, *!Kung Spatial Organization: An Ecological and Historical Perspective*, 1 HUMAN ECOLOGY 125 (1972), reprinted in KALAHARI HUNTER-GATHERERS: STUDIES OF THE !KUNG SAN AND THEIR NEIGHBORS 122–26 (R. Lee & I. de Vore, eds., 1976); SAUGESTAD, *supra* note 21, at 88–90; GEORGE SILBERBAUER, HUNTER AND HABITAT IN THE CENTRAL KALAHARI DESERT 192–94 (1981). See also Kristyna Bishop, *Squatters on Their Own Land: San Territoriality in Western Botswana*, 31 COMP. & INT’L L.J. S. AFR. 92 (1997). An early anthropological study noted that “each group of [San] has a very specific territory which that group alone may use, and they respect the boundaries rigidly. Each group also knows the territory very well . . . and [has] usually named every place in it where a certain kind of veld food may grow.” ELIZABETH MARSHALL THOMAS, THE HARMLESS PEOPLE 10 (1959).

61. Some contend that the San were the first pastoralists in Botswana and that they owned significant cattle and sheep herds. Tobias finds it likely that “the San of today have not always been hunters, and that there have been phases of herding over the last 2,000 years, whilst, under conditions of adversity, some groups lost their cattle and reverted to hunting.” Tobias, in KHOISAN IDENTITIES, *supra* note 53, at 26. Wilmsen further posits that San groups were significantly involved in regional trading networks for ceramics and ivory. EDWIN WILMSEN, LAND FILLED WITH FLIES: A POLITICAL ECONOMY OF THE KALAHARI 11 (1989).

62. See Hitchcock & Holm, *supra* note 52, at 310. Hitchcock notes that “[w]hatever the relative proportions of foraging and domestic production in the past,” in the last several decades the San have moved significantly “away from foraging to domestic food production and wage earning.” *Id.* In addition, a large proportion of San in the late twentieth century became dependent on government transfers and work programs. *Id.* at 310–11. Taylor asserts that, as of 1997, only about 5% of San in Botswana had sufficient resource access for hunting and gathering to be a viable subsistence practice, and that 80–90% depend primarily on government assistance. Michael Taylor, *These Are Our Hills*, in KHOISAN IDENTITIES, *supra* note 14, at 352. This phenomenon has taken hold in the Central Kalahari Game Reserve, among other places—“whereas the people of the [CKGR] region were mobile foragers in the 1960s, in the 1990s, the vast majority of the people living in the reserve depended on domestic foods obtained through drought relief, national feeding programs, or by purchasing it.” Hitchcock, *supra* note 25.

63. For example, a 1989 study of five San communities found a plurality of lifestyles, ranging from hunting and gathering in one, to labor and squatting on cattle ranches in another, to agriculture and craftwork in others. Megan Biesele et al., *Hunters, Clients and Squatters: The Contemporary Socioeconomic Status of Botswana Basarwa*, 9 AFRICAN STUDY MONOGRAPHS 109 (1989), available at http://jambo.africa.kyoto-u.ac.jp/kiroku/asm_normal/root.htm (last visited Apr. 14, 2004).

64. See SAUGESTAD, *supra* note 21, at 94; Helga I.D. Vierich, *Adaptive Flexibility in a Multi-Ethnic Setting: The Basarwa of the Southern Kalahari*, in POLITICS AND HISTORY IN BAND SOCIETIES 213–22 (E. Leacock & R. Lee eds., 1982).

probably misleading, to generalize about San groups as exclusively being hunter-gatherers or sedentary agriculturalists, as differences exist within and among the various San groups in Botswana, and different activities have, in many instances, likely been pursued across time by the same group. Having examined some of the key questions of ethnic identity and their impact on the rights and resources enjoyed by the San in Botswana, we may now turn to an historical analysis of how legal and political institutions, both customary and formal, strengthened inequities along ethnic divisions, leading to dispossession and subordination that have never been rectified.

IV. THE SAN ENCOUNTER WITH THE TSWANA: SERFDOM AND POLITICAL EXCLUSION IN THE PRE-COLONIAL ERA

Sometimes the problems of indigenous peoples are viewed in terms that emphasize the influence or legacy of historical, colonial domination by external powers based in the West or North, whether through direct oppression or indirectly via the entrenchment of a domestic elite that oppressed the indigenous group. It is well-known that many indigenous groups were historically subjected to enslavement, dispossession, and extinguishment in numerous regions of the world. San and Khoikhoi groups in South Africa suffered such treatment at the hands of early European settlers.⁶⁵ It would be a serious error, however, to view the current problems in Botswana without reference to Botswana's pre-colonial politics. A central claim of this Article is that the problems confronted by the San in Botswana today in many respects derive from, and resonate with, their relationship with the dominant Tswana tribes and the latter's customary legal and political structures. During the era of pre-colonial Tswana dominance the San were subjected to serfdom and political exclusion, creating a legacy of subordination and setting the groundwork for contemporary injustices in the areas of economic relations and land, hunting, and cultural rights.

Regular contact has existed between the San and the Bantu-speaking, agro-pastoral Tswana peoples for an estimated 2000 years.⁶⁶ Perhaps as

65. See, e.g., DAVID ABERNETHY, *THE DYNAMICS OF GLOBAL DOMINANCE: EUROPEAN OVERSEAS EMPIRES, 1415–1980* 56–57 (2001).

66. WILMSEN, *supra* note 61. It should be noted, however, that there is significant controversy among anthropologists over the extent and history of contacts between the San and non-hunter gatherer peoples like the Tswana. Wilmsen, for example, charges some anthropologists with encouraging an inaccurate and ahistorical depiction of the San that overly focuses on ecological determinants of their lifestyle instead of social and cultural contacts with other groups, presenting a

early as 700–800 years ago, Tswana tribes began migrating into present day Botswana from the north and east, crossing the Zambezi River from Zambia or Zimbabwe,⁶⁷ although their presence until about 200 years ago was largely limited to a relatively small area near the present day borders of the three countries.⁶⁸ Those who crossed the Zambezi broke up into a number of different tribes, each with its own territory and capital,⁶⁹ and several Tswana kingdoms emerged between the seventeenth and nineteenth centuries.⁷⁰ Conflicts with white settlers and other factors brought larger numbers of Tswana and other Bantu-speaking groups into Botswana during the nineteenth century.⁷¹ By the early twentieth century, the eight most powerful Tswana tribes controlled most of Botswana, with the exception of the Chobe, Ghanzi, and Kgalagadi districts in the west, which consisted of Crown lands with significant San populations.⁷²

Although it appears that initially Tswana and San groups engaged in more or less equitable trade and hunting arrangements, matters changed with the nineteenth-century growth of the cattle economy, during which Tswana cattle herders transformed some San lands into cattle posts and subjugated the San to exploit their labor.⁷³ Many of the San and members of other minority groups became serfs (*malata*), occupying the bottom of a tiered structure including, in descending status, the Tswana chief (*kgosi*)⁷⁴ and his relatives (*dikgosana*), commoners (*batlhanka*), and foreigners (*bafaladi*).⁷⁵ San living among the Ngwato and Tawana tribes had duties including hunting, cattle herding, and plowing, and had to pay tribute from

romanticized, Neolithic picture of “ancient” humanity. *Id.*

67. See SAUGESTAD, *supra* note 21, at 57–61.

68. *Id.* at 96.

69. Bishop, *supra* note 60, at 93. The tribes included the Tawana, Ngwato, Kwena, Ngwaketse, Lete, Kgatla, Rolong, Tlakwa and Tlhaping.

70. Hitchcock & Holm, *supra* note 52, at 308.

71. SAUGESTAD, *supra* note 21, at 96.

72. *Id.*

73. See WILMSEN, *supra* note 61, at 282–89.

74. See discussion *infra* note 85.

75. K. Datta & A. Murray, *The Rights of Minorities and Subject Peoples in Botswana: A Historical Evaluation* 58, 58–59, in *DEMOCRACY IN BOTSWANA* (John Holm & Patrick Molutsi eds., 1989); ISAAC SCHAPER, *NATIVE LAND TENURE IN THE BECHUANALAND PROTECTORATE* 26–27 (1943). Whether a group of foreigners became commoners or descended to serfdom depended on factors such as whether they had been absorbed by conquest. Additional factors include whether they had a strong corporate identity, a tradition of centralized leadership, and a culture that melded easily with Tswana culture. The San, having been conquered by Tswana and having decentralized leadership, a highly distinct culture from that of the Tswana, and a relatively weak corporate identity, were relegated to serfdom. Datta & Murray, *supra* at 67. A similar fate befell the Bakalagadi, traditional Kalahari inhabitants who have been removed from the Central Kalahari Game Reserve.

the gains of their hunting forays.⁷⁶ Serfs could not transfer their allegiance to other persons, and serfdom was passed down through the generations.⁷⁷

The San were not considered members of the relevant Tswana political community for definition of rights, namely, the *morafe* (nation or kingdom). Membership in the *morafe* was defined by membership in a ward, the basic administrative unit in Tswana and the primary vehicle, other than inheritance, for transfer of residential and arable land.⁷⁸ Through the ward system, the *kgosi* first distributed land to the ward heads, the official representatives, and spokesmen of ward members,⁷⁹ who then would distribute land to individual households based on their perceived needs.⁸⁰ The receiver of the land then held exclusive usage rights over the land while the community remained the owner; the individual interest was nonetheless secure as the tribe held a reversionary interest if the land became vacant.⁸¹ Non-membership in the ward system denied the San access to the primary means of land distribution for residential and arable lands under Tswana custom. Grazing land rights were not distributed through the ward system, and instead were treated as communal rather than individual. Nonetheless, the right to use grazing areas depended upon being a member of the tribal community.⁸² As Frimpong explains,

[A] tribesman's right to occupy and use land in the tribal area was based on his tribal affinity; it was a right conferred by virtue of his membership of the tribe. While he remained a member of the tribe he was entitled to a piece of land for residential purposes, [and] a piece for arable purposes, and enjoyed a right to graze his cattle on the communal grazing land.⁸³

The San were denied these rights, however, as they lacked the requisite tribal recognition by the Tswana.

76. See SAUGESTAD, *supra* note 21, at 99–100.

77. *Id.* at 100.

78. In this part I use the past tense insofar as this structure probably had the greatest importance before the emergence of Botswana, but much of this tribal structure continues today.

79. SCHAPER, *supra* note 75, at 29.

80. Kwame Frimpong, *Post-Independence Land Legislation and the Process of Land Tenure Reform in Botswana*, 26 COMP. & INT'L J. S. AFR. 385, 387 (1993). See also SCHAPER, *supra* note 67, at 44–45.

81. Frimpong, *supra* note 80, at 387. “Those who were not ward members, for example most if not all [San], were treated as serfs, as persons without rights.” Datta & Murray, *supra* note 75, at 60.

82. Frimpong, *supra* note 80, at 387.

83. *Id.*

The marginalization of the San within the Tswana chiefdoms was not limited to land distribution or economic issues. The San were “more than just an economic and social underclass” but “were excluded from participation in Tswana political life.”⁸⁴ As serfs, the San were excluded from participation in the ward *kgotla*, the traditional Tswana deliberative forum for the promulgation of laws, the adjudication of civil and criminal disputes, and discussion of matters of general tribal concern.⁸⁵ Each *kgotla* was headed by the *kgosi*, selected by primogeniture, who had the final decision in all matters, and the power to allocate land.⁸⁶ Moreover, although the *kgosi* could receive information and opinions from whomever he wished, his inner council was typically constituted by relatives. Exclusion from *dikgotla* meant that the San depended on Tswana masters and were unable to build up significant herds or gain access to land and water.⁸⁷ Some subject groups could take advantage of economic mobility provided by participation in the *mafisa*, a form of cattle-lending on which an individual, in return for herding a patron’s cattle, could receive one or more offspring per year, but the San were denied this privilege.⁸⁸ The period of precolonial Tswana rule brought not only serfdom and political exclusion, but also the commencement of a trend toward external control and regulation of the San hunting practices.⁸⁹ Although serfdom eventually

84. Hitchcock & Holm, *supra* note 52, at 310.

85. Datta & Murray, *supra* note 75, at 64 (“Those of the lowest status, the Basarwa, were excluded from the *kgotla* system altogether”). For further discussion of the *kgotla*, see P.T. Mgadla & A.C. Campbell, *Dikgotla, Dikgosi and the Protectorate Administration*, in *DEMOCRACY IN BOTSWANA*, *supra* note 75, at 48–57; and L.D. Ngcongco, *Tswana Political Tradition: How Democratic?*, in *DEMOCRACY IN BOTSWANA*, *supra* note 75, at 42, 45. On exclusion of serfs, see Datta & Murray, *supra* note 75, at 66.

86. Mgadla & Campbell, *supra* note 85, at 49. Discussion here will use the past tense since the focus is on the pre-colonial era, but it should be noted that the *kgotla* continues today, although some of its powers have been superseded by formal institutions.

87. Datta & Murray, *supra* note 75, at 63.

88. *Id.* at 60–61.

89. During the nineteenth century, Tswana chiefs imposed numerous regulations and restrictions on hunting. They classified a variety of animals such as elephants, giraffes, eland, and ostrich to be “royal game” and therefore off limits to San hunters. See CLIVE SPINAGE, *HISTORY AND EVOLUTION OF THE FAUNA CONSERVATION LAWS OF BOTSWANA* 8–11 (1990). Wild animals in Tswana tribal lands were held in trust for the tribe controlling the area by its chief, and therefore a hunter usually could not freely dispose of game killed in such areas but had to provide all or some of it to the chief. The San and other subject groups had to provide chiefs and other high-status individuals with tribute in the form of meat and skins. They also served as guides for the chiefs’ hunting trip. *Id.* Although the practice of tribute was largely ended by the end of the 1930s, resulting in a brief increase of hunting freedom for the San and other groups, new tribal restrictions were soon imposed on the hunting of large game at the request of the British. These restrictions were partly in response to the devastating effects on wildlife from the European-driven game trade. *Id.* at 9.

ended, its legacies lived on in the form of low wage labor, exclusion from the *kgotla*, and lack of recognition of San land and resource rights.

V. THE SAN IN THE BECHUANALAND PROTECTORATE, 1885–1966

Although some elements of San subordination during the pre-colonial era, such as serfdom, were alleviated or terminated with Britain's arrival, many were not. Moreover, in some respects British rule ratified previously customary inequitable relations. Britain's acquisition of control over the Bechuanaland Protectorate involved the use of legal methods that purported to empower Britain to make sweeping claims of sovereignty, jurisdiction, and, eventually, title over lands previously controlled by the San. An administrative framework was established that accorded the most powerful Tswana tribes substantial autonomy with respect to their lands, but that denied San groups any formal recognition, instead forcing them to live within areas controlled by the Tswana tribes or in Protectorate-administered Crown lands. British creation of Tswana tribal reserves, whatever its benefits for the Tswana, enabled the continued exclusion of the San from the institutions of the ward, *morafe*, and *kgotla*. Britain also imposed a European model of wildlife and land conservation, subjecting San groups to a series of increasingly burdensome regulations that rarely respected the subsistence and cultural functions of San hunting. The CKGR, which carved out of the Crown lands in 1961, provided some measure of security for San inhabitants. Its protections were modest and far weaker than they might have been, however, easing the future expulsion of the San in the late 1990s.

A. *The Establishment of the Bechuanaland Protectorate*

Although Britain eventually took control of Botswana, it was not the first European power to colonize southern Africa. What is now the nation of South Africa was settled much earlier by the Dutch, as well as French Huguenot immigrants, whose descendants, the Boers, spread east and north during the eighteenth century seeking land for farming and grazing. Boer settlers exterminated or enslaved many Khoikhoi and San in southern Africa, but as they moved farther toward the interior, they encountered southern-migrating Bantu groups, including Tswana tribes, who possessed the size and resistance to European diseases to contest further encroachments.⁹⁰ Competition for land between Tswana and Boer settlers

90. See ABERNETHY, *supra* note 65, at 56–57.

eventually produced violent conflict between the two groups. In the late nineteenth century Tswana tribes, seeking to end the violence, appealed to Britain for protection,⁹¹ eventually overcoming early British reluctance.⁹²

Although diamonds, gold, and farmland attracted settlers to the coast of the Cape Colony in South Africa,⁹³ Britain evidently did not have a strong interest in Botswana's resources at that time. Britain did wish, however, to prevent German expansion from the latter's colony of Southwest Africa (now Namibia).⁹⁴ The so-called "scramble for Africa"⁹⁵ commenced in the late nineteenth century and ran through 1913, a period that saw relatively little armed conflict between the European powers and a huge expansion of their colonial holdings.⁹⁶ That a territory was viewed as unsuitable for large-scale European settlement posed no barrier to its incorporation into an overseas empire, even if only to thereby exclude competitors. For this purpose, the legal form of the Protectorate proved invaluable.

Britain's presence in Botswana formally commenced with the conclusion of treaties between Britain and the chiefs of two Tswana tribes, the Baralong and the Batlaping, in May 1884.⁹⁷ On January 27, 1885 Britain founded the Bechuanaland Protectorate.⁹⁸ The January Order in Council delimited an area that covered only perhaps half of what is now Botswana and included northern parts of what is now South Africa.⁹⁹ The Order set forth the contents of the treaties with the 1884 treaties, and pronounced jurisdiction over all British subjects, all those enjoying Britain's protection within the territory described by the Order, and all persons within the limits of the Baralong and Batlaping lands specified in

91. See Bishop, *supra* note 60, at 93, 104.

92. *Id.* at 103–04.

93. ABERNETHY, *supra* note 65, at 93.

94. Britain declared a protectorate to prevent a junction between Southwest Africa and the South African Republic (Transvaal), with whom Britain was on hostile terms, culminating in the Boer War of 1899–1902. See JOHN ILIFFE, *AFRICANS: THE HISTORY OF A CONTINENT* 191 (1995).

95. See *id.* at 187–211. The partitioning of Africa among the European powers accelerated after the Berlin conference of 1884–85, where it was decided that Britain's informal exercise of influence through naval and commercial power would not be recognized as a valid claim to territory. *Id.* at 189.

96. During this time Europe held claim to some 8.6 million square miles of land, totaling approximately one-sixth of the world's land surface. See ABERNETHY, *supra* note 65, at 81, 88–93.

97. M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 36–37 (1925).

98. See Bechuanaland Protectorate Order in Council of 27 January 1885; LINDLEY, *supra* note 97, at 37.

99. The Protectorate's northern boundary cut across the Kalahari Desert at 22 degrees south (i.e. south of Botswana's current northern border, and cutting through what is now the Ghanzi district) with a western boundary of 20 degrees east, and had a southern boundary abutting the Cape of Good Hope Colony, and an eastern boundary abutting the South African Republic.

the treaties.¹⁰⁰ Notably, therefore, the Order implied that in tribal areas other than those of the Baralong and Batlaping, Britain did not have jurisdiction over non-British subjects or those not under British protection.

A subsequent 1885 Proclamation subdivided the area delimited in the January Order (described as previously “not within the jurisdiction of any civilised power”) into two parcels largely along the Molopo River, which serves as part of the Republic of Botswana’s current southern boundary.¹⁰¹ The area south and east of the Molopo and bounded by the Cape of Good Hope Colony and the South African Republic became the territory of British Bechuanaland (later allocated to the Cape Colony and subsequently to South Africa), a British colony over which “Her Majesty’s Sovereignty” was proclaimed.¹⁰² The area north and west of the Molopo remained Bechuanaland Protectorate,¹⁰³ whose internal sovereignty, with the exception of cessions by the two Tswana tribes mentioned above, remained intact.¹⁰⁴ The Protectorate’s borders were greatly expanded by an 1891 Order in Council,¹⁰⁵ which moved its boundaries to the Zambezi and Chobe Rivers in the north and east (covering thousands of square kilometers). This set of boundaries largely remained stable, with some modifications,¹⁰⁶ through transfer of sovereignty to the Republic of Botswana in 1966.¹⁰⁷ The expansion of boundaries covered the Ngamiland district and the northern half of the Ghanzi district, both areas with major San populations.

Little effort was made to explain how Britain acquired external sovereignty and jurisdiction. The 1891 order contained only the general prefatory clauses “whereas the territories . . . are under the protection of Her Majesty” and “whereas by treaty, grant, usage, sufferance, and other lawful means Her Majesty has power and jurisdiction in the said territories.”¹⁰⁸ Given that only two treaties encompassing a relatively small

100. LINDLEY, *supra* note 97, at 37.

101. BECHUANALAND PROTECTORATE NO. 1 (Sept. 30, 1885).

102. *See* LINDLEY, *supra* note 97, at 187.

103. *See* BECHUANALAND PROTECTORATE NO. 1, *supra* note 101.

104. Its external sovereignty was ceded to Britain by the initial 27 January 1885 Order.

105. Order in Council (May 1, 1891), *in* BECHUANALAND PROTECTORATE ORDERS IN COUNCIL AND HIGH COMMISSIONER’S PROCLAMATIONS 1891–1914 1–4 (M. Williams ed., 1915) [hereinafter BECHAUNLAND PROTECTORATE 1891–1914].

106. *See, e.g.*, Proc No. 8 of 28 March 1899, *in* BECHAUNLAND PROTECTORATE 1891–1914, *supra* note 105, at 114 (modifying eastern boundary slightly).

107. *See* Bishop, *supra* note 60, at 105.

108. *See* BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105. The language of “treaty, grant, usage, sufferance, and other lawful means” essentially derives from the Foreign Jurisdiction Act, originally passed in 1843 and subsequently modified. *See* Foreign Jurisdiction Act, 1843, 6&7 Vict c. 94 (Eng.). The Act empowered the Crown to gain extraterritorial jurisdiction over a foreign territory

area were concluded, it seems highly improbable that such vague references would have justified the acquisition of sovereignty over lands encompassing tens of thousands of square kilometers inhabited by a number of different groups.¹⁰⁹ Whether or not a justification existed, such methods of extending empire were generally treated by colonial powers as acceptable, particularly after the agreements made at the Berlin conference of 1885.¹¹⁰ European powers regularly buttressed weak territorial claims by reference to claims of discovery, papal bulls, conclusion of treaties with chiefs or rival states, settlements, and conquest.¹¹¹ Although the legal adequacy of these methods, as McNeil observes, “is a matter of debate,” this was of no consequence, as “[i]n practical terms, might made right, so that a sovereign who succeeded in exercising a sufficient degree of exclusive control was generally regarded as having acquired sovereignty.”¹¹²

Even by the terms of its legislation, however, Britain had not yet gained internal sovereignty or jurisdiction over *all* individuals in the Protectorate. The reason relates to the distinction in international law between colonies and protectorates. Jurisdiction in British colonies was unlimited, whereas jurisdiction in protectorates was limited to territory acquired through “treaty, capitulation, grant, usage, sufferance and other lawful means”¹¹³ (in essence, the same language used in the legislation of the Bechuanaland Protectorate¹¹⁴). Declaring a protectorate, as Pain explains, “did not involve the assumption of any jurisdiction over the

by such methods, which notably included others besides concluding treaties. In this way “[t]he Acts empowered English courts to recognise the less formal acquisition of an *imperium* in uncivilised territory than in civilised countries.” See P.G. McHugh, *The Aboriginal Rights of the New Zealand Maori at Common Law* 51 (unpublished D.Phil. dissertation, Cambridge University) (on file with author) (McHugh translates *imperium* as “right of government”). McHugh helpfully discusses the development of the concept of civilization in international law and its wide use in the late nineteenth century. *Id.* at 50.

109. In terms of domestic law, however, the apparent weakness of justification was irrelevant. Under English law, the determination of the adequacy by which the Crown acquired territory lay with the Crown, as part of royal prerogative, and no municipal court could challenge a declaration of sovereignty. KENT MCNEIL, *COMMON LAW ABORIGINAL TITLE* 111 (1989). See also *Post Office v. Estuary Radio*, 2 Q.B. 740, 753 (1968); *R. v. Kent Justices*, 1 All E.R. 560 (1967).

110. See McNeil, *supra* note 109, at 98.

111. *Id.*

112. *Id.*

113. *Nyali v. Attorney-General*, 2 W.L.R. 649 (1955). See also T. OLAWALE ELIAS, *BRITISH COLONIAL LAW* 38 (1962) (quoting *Nyali v. Attorney-General*); MCHUGH, *supra* note 108, at 52 (“so far as the acquisition of an extraterritorial jurisdiction in African territory was concerned, the Crown’s advisors proceeded on the basis that jurisdiction over British subjects and the native inhabitants could be derived from treaty, grant, usage or sufferance of the native rules”).

114. See, e.g., *supra* note 105.

indigenous inhabitants or responsibility for the internal administration of the territory by the local rulers,”¹¹⁵ because the protected state, in the classical view, sacrificed external sovereignty only.¹¹⁶ The classical view also held that the protecting state lacked complete sovereignty over the protected state unless the latter ceded such sovereignty.¹¹⁷

Britain had little early interest in administering Bechuanaland, and initially did not seek internal sovereignty over it. The first Assistant Commissioner was directed “not to interfere with the Native Administration; the Chiefs are understood not to be desirous of parting with their rights of sovereignty, nor are Her Majesty’s Government by any means anxious to assume the responsibilities of it.”¹¹⁸ Thus, Tshosa concludes, “Britain assumed full and complete control over external affairs of Bechuanaland Protectorate while internal matters were left to the government of the territory.”¹¹⁹ This state of affairs held for a time, but changes arrived with the twentieth century and the *Rex v. Crewe, ex parte Sekgome* decision, which in effect rejected the distinction between colonies and protectorates based on internal sovereignty.

The May 1891 Order that greatly expanded the boundaries of the Protectorate opened the first cracks in the foregoing doctrinal division between colonies and protectorates by providing for, or at least assuming,

115. J.H. Pain, *The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland*, 11 COMP. & INT’L L.J. S. AFR. 137, 143 (1978).

116. As Westlake explained, with protectorates “it is arranged that the [protected state] shall enter into no treaty or have any diplomatic intercourse with outside states without the consent of the [protector] . . . and any contrary attempt at such treaty or intercourse is regarded by the protecting state as a hostile act against it on the part of the outside state concerned as well as on the part of the protected state.” JOHN WESTLAKE, INTERNATIONAL LAW, PART I: PEACE 22 (1904).

117. In Vattel’s terms,

Consequently a weak state, which, in order to provide for its safety, places itself under the protection of a more powerful one, and engages, in return, to perform several offices equivalent to that protection, without however divesting itself of the right of government and sovereignty,—that state, I say, does not, on this account, cease to rank among the sovereigns who acknowledge no other law than that of nations.

EMMERICH DE VATTEL, LAW OF NATIONS 2 (Joseph Chilty trans., 1866) (1758). Compare also the view of Lord Justice Kennedy in *R v. Earl of Crewe Ex parte Sekgome*:

What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include is that absolute ownership which was signified by the word ‘dominium’ in Roman Law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting state a foreign country; and, this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State.

R v. Earl of Crewe (ex parte Sekgome), 2 K.B. 577, 620 (1910).

118. See SPINAGE, *supra* note 89, at 11.

119. ONKEMETSE TSHOSA, NATIONAL AND INTERNATIONAL HUMAN RIGHTS LAW: CASES OF BOTSWANA, NAMIBIA, AND ZIMBABWE 39 (2001).

some measure of internal British sovereignty over the territory. The order gave the High Commissioner of South Africa a broad series of powers over the Bechuanaland Protectorate, including the appointment of officers and legislation by proclamation for justice administration, revenue-creation, “and generally for the peace, order and good government of all persons within the limits of this Order”¹²⁰ The Order also specified that the High Commissioner, except insofar as incompatible with “due exercise” of British power and jurisdiction, “shall respect any native laws or customs by which the civil relations of any native chiefs, tribes, or populations under [British] protection are now regulated.”¹²¹ This provision began a long pattern in British governance of according Tswana tribes, but not San groups, substantial autonomy in their internal affairs, a pattern that largely continued until the transfer of sovereignty to the Republic of Botswana.

In contrast to earlier legislation, which was predicated exclusively on Britain’s possession of external sovereignty, the May 1891 Order and a Proclamation of June 10, 1891¹²² gave the South African High Commissioner limited jurisdiction and Britain some measure of internal sovereignty over the affairs of Bechuanaland Protectorate.¹²³ Importantly, the 1891 Proclamation also declared that the laws of the Cape Colony, *mutatis mutandis*, would be those of the Protectorate (though this was modified in some respect by 1909 legislation, which limited it to common law).¹²⁴ This declaration could bear significantly on San claims to

120. See BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 2.

121. *Id.*

122. Proc (June 10, 1891), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 31–32. The June proclamation further provided for means of government of the Protectorate enabling the South African High Commissioner to appoint a Resident Commissioner for Bechuanaland Protectorate. This Commissioner was empowered to establish courts, the latter whose jurisdiction did not extend in matters “in which natives only are concerned.” *Id.* The June proclamation also allowed the Resident Commissioner to allow Chiefs to adjudicate disputes not involving “any person of European birth or descent” as a party, and with regard to land, provided that concessions or grants made by Chiefs would not be recognized as binding without sanction of the Secretary of State, and that no claims to land by persons of European descent would be recognized without the High Commissioner’s approval. *Id.* at 32.

123. See also TSHOSA, *supra* note 119, at 39–40, observing that “the absence of a government with effective control over Bechuanaland Protectorate at the material time and desire to incorporate the territory into the Union of South Africa prevailed over the United Kingdom Government to assume complete control of both external and internal affairs of Bechuanaland Protectorate,” a policy followed in the other protected territories. The 1891 legislation was part of this effort.

124. See Proc No. 36 (Dec. 22, 1909), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 226. Stating that

the laws in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891 shall *mutatis mutandis* and so far as not inapplicable be the laws in force and to be observed in the said Protectorate, but no Statute of the Colony of the Cape of Good Hope, promulgated after

aboriginal title because it was not specifically abrogated by future legislation, and some have argued that the “Roman-Dutch common law” of the Cape Colony is still the common law of Botswana.¹²⁵ If this can be sustained, it could be an avenue, via the common law, for the use of aboriginal title as a common law doctrine in Botswana. Most pertinent to the current discussion, however, is the land framework created by Britain during the Protectorate era.

B. The Protectorate Land Framework

Thus far, the focus has been on the means by which Britain gained external sovereignty and some measure of internal sovereignty over the Bechuanaland Protectorate, and how it created a framework for its governance. Most important, however, is the consequence this had for land rights in the Protectorate and the acquisition of title over San territories.

At first, it would seem that merely creating a protectorate would not have vested Britain with the power to annex land. As a matter of international law, establishing the protectorate vested Britain with external sovereignty over Bechuanaland, but it did not automatically vest Britain with either internal sovereignty or title to lands within the Protectorate’s borders. Britain acquired some measure of internal sovereignty, however questionably and incompletely, through the 1891 Order and Proclamation.¹²⁶ Under international law, some further act by municipal law was required to obtain title over territory in the Protectorate.¹²⁷ This

the 10th day of June, 1891, shall be deemed to apply, or to have applied, to the said Protectorate unless specially applied thereto by Proclamation.

125. See, e.g., Pain, *supra* note 115, at 163–64; TSHOSA, *supra* note 119.

126. See *supra* notes 105, 106 and accompanying text; see also TSHOSA, *supra* note 119, at 39–40.

127. As Lindley explained, “[a]s regards protectorates, it is clear that the transfer of the external sovereignty only does not entitle the protecting Power to deal with the property within the protected territory . . . any rights which the protecting Power possesses in regard to property must be based upon, and limited by, agreement with the local authority.” LINDLEY, *supra* note 97, at 337. Moreover, a similar view was held regarding title and the acquisition of internal sovereignty; that is, as a matter of international law, the occupation of a country did not automatically vest the occupying country with title. Consider for example Oppenheim’s view:

A question of some importance is how far occupation affects private property of the inhabitants of the occupied territory. As according to the modern conception of State territory, the latter is not identical with private property of the State, occupation only brings a territory under the sovereignty of the occupying State, and therefore does not affect existing private property of the inhabitants. In the age of discoveries, occupation was indeed considered to include a title to property over the whole occupied land; but nowadays this can no longer be maintained. Being now their sovereign, the occupying State may impose any burdens it likes on its new subjects, and may, therefore, even confiscate their private property; but occupation, as a mode of acquiring territory, does not of itself affect private property thereon. If the Municipal Law of the occupying State does give it a title to private property over the

type of domestic law presumably could not be enacted without first having internal sovereignty. The distinction between sovereignty and title in international law,¹²⁸ however, did not have equal status under English colonial law.

Because of feudal influences and the notion that the Crown ultimately owned all of the land in England, acquisition of sovereignty under English law was linked to proprietary rights in a way that depended on the method of acquisition and whether territory acquired was occupied.¹²⁹ If lands were unoccupied, *terra nullius*, then acquisition of sovereignty vested the Crown with absolute title.¹³⁰ If the lands were already occupied, and acquisition occurred by conquest or cession, then the Crown received the public property rights of the former ruler and also the power at the time of conquest or cession to seize private property.¹³¹ Different principles applied to protected states and protectorates, however, in virtue of lying beyond the Crown's dominion,¹³² and it is likely that, to acquire title, the Crown would have needed to gain internal or complete sovereignty over the Protectorate. The Crown could then exercise its prerogative through an act of state to seize territory, or subsequently to annex it through its legislative powers.

The question of whether internal sovereignty is needed to gain title was, in effect, made moot in the Bechuanaland Protectorate, by the decision *Rex v. Earl of Crewe ex parte Sekgome*, which held that unlimited British jurisdiction existed as of 1891.¹³³ In particular, the court ruled that

whole occupied land, such a title is not based on International Law.

LAASA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 390 (3d ed. 1920).

128. See also discussion in WESTLAKE, *supra* note 116, at 86–90.

129. See generally MCNEIL, *supra* note 109, at Ch. 4 “Acquisition of Territorial Sovereignty.”

130. *Id.* at 135.

131. *Id.* at 162 n.10. Acquisition of new territory by act of state is a prerogative power of the Crown. *Id.* at 131, 162. Once the territory became part of British dominion and its inhabitants became British subjects, the Crown could no longer by act of state seize property, although it retained legislative powers to extinguish property rights until the introduction of English law or the creation of a legislative assembly. *Id.* at 164.

132. See, e.g., *id.* at 110.

133. *R v. Earl of Crewe (ex parte Sekgome)*, 2 K.B. 577 (1910). See generally A.J.G.M. Sanders, *Sekgoma Letsholathebe's Detention and the Betrayal of a Protectorate*, 23 *COMP. & INT'L L.J. S. AFR.* 348 (1990); TSHOSA, *supra* note 119, at 40. The Sekgome decision concerned the British detention in Gaborone, under the High Commissioner's power to provide for the “peace, order and good government” of the Protectorate following the 1891 proclamation, of the Chief Sekgome of the Tawana tribe. The Chief was considered a threat to the peace after a struggle for the chieftainship. After denial of his challenge by a court in the northern Cape, Sekgome applied for a writ of habeas corpus to the Divisional Court of the King's Bench (which also rejected the request), and then appealed to the Court of Appeal. The three judges gave separate judgments but agreed that the appeal should be dismissed. *Sekgome*, 2 K.B. at 603.

although the Bechuanaland Protectorate was a foreign country which had not been settled, conquered, ceded, or annexed, it nonetheless was “under His Majesty’s dominion in the sense of power and jurisdiction, [though] not under his dominion in the sense of territorial dominion.”¹³⁴ This judicial interpretation of the Foreign Jurisdiction Act declined to limit the Act as providing only for extraterritorial jurisdiction over British subjects absent specific agreement.¹³⁵ Instead, it declared support for “the interpretation [of jurisdiction] which has been acted upon for so many years in Orders of Council and the proclamations thereunder applying to the provisions of the Foreign Jurisdiction Act . . . to natives of such foreign countries as well as to British subjects”¹³⁶ The court thus upheld the validity of a protocol that the Crown had, in effect, unrestricted jurisdiction over the Protectorate, even though Britain had not acquired the Protectorate as a “territorial dominion.”¹³⁷ The Crown could therefore legislate over and subject to its administration all the inhabitants of Bechuanaland Protectorate. This decision, although it interpreted the 1891 Proclamation, was actually made in 1910, after the Crown had made its first acquisitions of property. It nonetheless laid the legal framework for the wholesale annexation of the Crown lands in which the San largely resided.¹³⁸ The *Sekgome* decision illustrates how the colonial powers twisted the classical concept of the protectorate in international law to suit their own expansionist purposes.¹³⁹

134. *Id.* at 603–04.

135. *Id.* at 596. *See also* WILLIAM EDWARD HALL, A TREATISE ON THE FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN (1894).

136. *Sekgome*, *supra* note 117, at 596.

137. *Id.*

138. *Id.*

139. As Oppenheim explained,

In the second half of the nineteenth century, the desire of States to acquire as colonies vast territories which they were not at once able to occupy effectively led to agreements with the chiefs of natives inhabiting unoccupied territories, by which these chiefs committed themselves to the “protectorate” of States that are members of the Family of Nations. These so-called protectorates are certainly not protectorates in the technical sense of the term, which denotes that relationship between a strong and a weak State where by a treaty the weak State has put itself under the protection of the strong and transferred to the latter the management of its more important international relations. Neither can they be compared with the protectorate which members of the Family of Nations exercise over such non-Christian States as are outside that family, because the respective chiefs of natives are not the heads of States, but heads of tribal communities only. Such agreements, although they are named “protectorates,” are nothing else than steps taken to exclude other Powers from occupying the respective territories. They give, like discovery, an inchoate title, and are the precursors of future occupations.

OPPENHEIM, *supra* note 127, at 388.

Three types of land holdings were eventually recognized by the Protectorate Administration: freehold title, Crown lands, and “Native Reserves.”¹⁴⁰ This tripartite division would remain largely intact until after independence. Establishing freehold title for white farmers and Cecil Rhodes’ British South Africa Company came first. The Administration set up a court to receive claims of white settlers supposedly based on chiefs’ grants to settlers.¹⁴¹ Successful petitioners were imbued with freehold title despite “subsequent protests by some of the African grantors,” some of whom “could not truly have intended to give away rights in land which they could hardly comprehend.”¹⁴² In 1898, the British South Africa company, seeking to stem German expansion from the colony of South West Africa, brought Boer families to settle in the Ghanzi district on a leasehold basis. The settlement in the Ghanzi lands, traditionally inhabited by the Nharo San, was based on concessions by the Tawana, whose sovereignty over the area was nonetheless questionable. Thus “the administration adopted the argument that the land in any event was *terra incognita*,” despite what probably was an intrusion into Nharo lands.¹⁴³ The great majority of the land in the Protectorate was not converted into freehold, and nearly all was converted into tribal reserves or Crown (and then State) lands.¹⁴⁴

The first “Native Reserves” were designated by proclamation in 1899, for the Kwena, Ngwakwetse, Ngwato, Kgatla, and Tawana, five of the eight most powerful Tswana tribes.¹⁴⁵ The tribal reserves “generally attempted to recreate and preserve traditional territories and tenurial practices” of the locally dominant Tswana tribe, and within the reserves the tribes maintained substantial autonomy over land administration.¹⁴⁶

140. See also discussion in Frimpong, *supra* note 80, at 385.

141. Proc (Nov. 15, 1893), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 65–69. See also Ng’ong’ola, *Land Rights for Marginalized Ethnic Groups in Botswana, with Special Reference to the Basarwa*, 41 J. AFR. L. 1, 6 (1997).

142. Ng’ong’ola, *supra* note 141, at 7.

143. *Id.* at 8. Other lands secured under freehold title included those in the Tati district obtained by concession from the Matebele Chief, “who was controversially recognized as the political sovereign for the area.” The lands near the Transvaal in the southeast were granted to railroad magnate Cecil Rhodes in 1905 and 1911; in return for the grant, Rhodes offered to underwrite some of the Protectorate’s administrative costs. *Id.* at 7. See Proc No. 4 (Feb. 7, 1905), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 139; Proc No. 2 (Jan. 2, 1911), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 251–59.

144. Ng’ong’ola, *supra* note 141, at 8.

145. Proc No. 9 (Mar. 29, 1899), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 115–18. The other major tribes, the Maletse, the Tlokwa and Barolong, had their lands designated accordingly in 1909, 1933 and 1935.

146. Ng’ong’ola, *supra* note 141, at 8. The exceptions regard the creation of tribal territories in land not traditionally acknowledged as tribal, namely the creation of the Tati and Tlokwa reserves

Over the next three decades four more tribal reserves were created, but, in total, eight of the nine reserves were set aside for the eight most powerful Tswana tribes.¹⁴⁷ No tribal reserves were established for the San, despite their status as first occupants; even though the Central Kalahari Game Reserve was created in 1961, it did not, in practice, provide the same security as did the tribal reserves.

Lands other than tribal reserves and freehold were almost entirely designated as Crown lands. In 1904, Britain made its first acquisition of title based on parcels from the Kwena, Ngwaketse, and Ngwato (Tswana) tribes.¹⁴⁸ The Preamble to the 1904 Order declared that “whereas the Crown had jurisdiction over Bechuanaland Protectorate,”¹⁴⁹ and “whereas the Chiefs Khama of the Bamangwato, Sebele of the Bakwena, and Bathoen of the Bangwaketse, have abandoned all rights and jurisdiction in and over certain portion of their former territories;” therefore “His Majesty, by virtue and in exercise of the powers on this behalf by ‘The Foreign Jurisdiction Act 1890’ or otherwise in His Majesty vested,” demarcated the Crown lands.¹⁵⁰ The Order vested “all rights of His Majesty in or in relation to any Crown lands” in the South African High Commissioner.¹⁵¹ In describing the boundaries of the lands the Order mentioned “Native Reserves and territories” which “have been or shall be more particularly described” by Proclamation.¹⁵²

The most comprehensive and controversial annexation of lands was made by a 1910 Order¹⁵³ that covered large swaths of the territory inhabited by San groups. The Order declared that “[i]n addition to the Crown Lands defined” by the 1904 Order (i.e., the parcels from three

from freehold land by Proc No. 2 of 1911. Proc No. 2, *supra* note 143.

147. Ng’ong’ola, *supra* 141, at 10. On the whole reserves were created for the Kwena, Ngwaketse, Ngwato, Tawana, Kgatla, Maletse, Tlokwa, and a ninth reserve was created in the Baralong farms area in the south. Proc No. 28 (Nov. 3, 1909), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 205. *See also* Proc No. 44 (1933); Proc No. 77 (1935), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105.

148. Orders in Council (May 16, 1904), in BECHUANALAND PROTECTORATE 1891–1914, at 5–6, *supra* note 105; *see also* Bishop, *supra* note 60, at 106.

149. It employed the same language as the earlier legislation. *See, e.g.*, Orders in Council (May 9, 1891), *supra* note 105.

150. Orders in Council (May 16, 1904), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105.

151. *Id.*

152. The lands from this first acquisition were eventually transferred as freehold to the British South Africa company for its railway project. Ng’ong’ola, *supra* note 141, at 10 n.43. *See* Proc No. 4 (Feb. 7, 1905), *supra* note 143 (declaring that “the property of and in all lands within the boundaries described in the Schedule . . . shall . . . be vested in the Company absolute”).

153. Order in Council of (Jan. 10, 1910), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 9.

Tswana tribes), “all other land situate within the limits of the Bechuanaland Protectorate,” with the exception of the Tati District,¹⁵⁴ “native reserves,” specific grants on behalf of the Crown, and the Baralong farms, shall “vest in His Majesty’s High Commissioner for South Africa and be subject to all the provisions of the said Order in Council as Crown Lands.”¹⁵⁵ In this regard, the 1910 Order “had the effect of vesting in his Majesty’s High Commissioner vast expanses of territory which had not been secured for the Crown in the required legal manner,” “effectively claim[ing] title to land belonging to Basarwa, Kgalagadi and other voiceless minority groups.”¹⁵⁶

The implication of this legislation for the San was that their traditional territories now sat in the Crown lands or Tswana tribal reserves (or, as was the case for some of the lands of the Nharo San of western Botswana, freehold estates held by white farmers). Although tribes in the “native reserves” retained substantial autonomy over the administration of land and were allowed to continue use of customary law and procedures,¹⁵⁷ this did not substantially enhance the rights of the San, for as noted earlier Tswana custom excluded San claims. Patterns of San occupation in Crown lands for the most part continued “without significant perceptible changes,” but traditional land rights were not as secure as they were in reserves.¹⁵⁸ The administration generally did not demand rent for use or occupation, but at the same time it did not find it necessary to consult, or for that matter compensate, communities when it used the lands for other purposes. As Ng’ong’ola remarks, “the fiction of *terra incognita*, first encountered in the demarcation of the Ghanzi freehold farms, was steadfastly asserted.”¹⁵⁹ With the exception of conversion of some Crown

154. The Tati District was later annexed as Crown land. Orders in Council (May 4, 1911), in BECHUANALAND PROTECTORATE 1891–1914, at 13, *supra* note 105.

155. *Id.*

156. Clement Ng’ong’ola & Bathalefi Moeletsi, *The Legal Framework for the Assessment of Land Rights for Basarwa and Other Marginalized Ethnic Groups in Botswana*, in NORAD’S SUPPORT OF THE REMOTE AREA DEVELOPMENT PROGRAMME IN BOTSWANA 20–21 (1996), *quoted in* SAUGESTAD, *supra* note 21, at 98. Ng’ong’ola is correct that the Order included lands in what are now Ghanzi and Kgalagadi districts, among others that significant San populations traditionally inhabit. The Order did not provide any details about the legal basis of acquisition, merely adding the usual preamble about jurisdiction. Nonetheless, as explained in the aboriginal title part, I disagree with Ng’ong’ola’s claim that title was vested in the Crown and that the San became “tenants at will,” for I think the stronger case is that no extinguishment was made by the 1910 order itself, whatever its future consequences.

157. See Frimpong, *supra* note 80, at 387 (commenting that “[i]t was basically this [customary] system of land tenure that the British sought to preserve by the creation of the native reserves, and the system remained operational until the country became independent.”).

158. Ng’ong’ola, *supra* note 141, at 10.

159. *Id.*

lands into tribal land, the basic division of tribal reserves, Crown (now State) lands, and freehold estates has remained basically intact.

C. The Creation of the Central Kalahari Game Reserve

Because virtually no lands had been expressly set aside for San groups,¹⁶⁰ an especially important development was the 1961 creation of the CKGR, which at 52,347 square kilometers is the largest protected area in Botswana and one of the largest protected areas in Africa.¹⁶¹ The CKGR was established partly based on the recommendation of the Protectorate's "Bushman Survey Officer" George Silberbauer, who conducted a study of the San inhabitants, primarily the G/wi and G//ana, and the marginalized Tswana Kgalagadi tribe in the Ghanzi district in which the CKGR is located.¹⁶² The Ghanzi district, which occupies a large portion of western Botswana, consisted of Crown lands under the 1910 Order,¹⁶³ as well as freehold farms in the west granted to Afrikaaner settlers in 1899.¹⁶⁴ The Ghanzi farm economy grew in the early twentieth century, and during this period most of the San either worked on the farms as laborers or moved to other parts of the district, including the area that is now the CKGR. The result "was a restructuring of the social landscape of the Ghanzi region and the marginalization and impoverishment of a sizable proportion of the [region's] San population."¹⁶⁵ Silberbauer's report makes clear that farming provided jobs but also reduced the availability of game and land. Moreover, wages for herding fell, as farmers fenced their lands and hired higher-skill Tswana labor.¹⁶⁶ It thus became increasingly evident that social and economic transformation, whatever its benefits, threatened traditional lifestyles of the San.¹⁶⁷

160. In a few instances, small settlements were created before the creation of the CKGR. The Olifantskloof settlement lasted only two years, and a similar fate befell the government settlement at Letlhkane in the eastern Kalahari. It was established for San who wished to raise crops and included a school. HITCHCOCK, *KALAHARI COMMUNITIES*, *supra* note 14, at 23.

161. High Comm'r Notice No. 33 (1961); Fauna Conservation Proc. No. 22 § 1(A)(5); First Schedule (1961). *See also* Erni, *supra* note 27, at 8.

162. GEORGE B. SILBERBAUER, *REPORT TO THE GOVERNMENT OF BECHUANALAND ON THE BUSHMAN SURVEY* (1965). Although the Survey was not published until 1965, Silberbauer's research began in 1958. *Id.* at 8.

163. Orders in Council (May 4, 1911), *supra* note 154 and accompanying text.

164. *See* Hitchcock, *Seeking Sustainable Strategies*, *supra* note 24.

165. *Id.*

166. SILBERBAUER, *supra* note 162, at 118, 121.

167. The idea of setting aside land for San struck officials after a series of investigations into the serf status of San were made in the 1920s and 1930s by entities including the British government, the League of Nations, and the International Labor Organization, as well as the Protectorate administration. Hitchcock, *Seeking Sustainable Strategies*, *supra* note 24; Hitchcock & Holm, *supra*

Silberbauer's "Bushman Survey Report" emphasized the importance of conserving land for the San inhabitants of the CKGR area "who have expressed their wish to remain where they are, in their present environment, and who wish to continue to follow their present life of hunter-foodgatherers."¹⁶⁸ Silberbauer stressed that the aim was "to allow [the San] the right of choice of the life they wish to follow."¹⁶⁹ A similar perspective on San autonomy was later espoused in various National Development Plans and papers on rural development.¹⁷⁰ Despite Silberbauer's emphasis on the creation of a protected zone for San groups,¹⁷¹ the Protectorate Administration in establishing the CKGR weakened the provisions protecting the San and instead focused on wildlife conservation.¹⁷² The 1961 Fauna Conservation Proclamation did make an exception to its prohibition against hunting in the CKGR for the "reasonable food requirements" of subsistence hunters,¹⁷³ and also excepted hunters from the license requirement,¹⁷⁴ but Silberbauer's recommendations were largely ignored when the regulations over entry to the CKGR were promulgated.¹⁷⁵ Draft provisions to secure land rights for the San were struck,¹⁷⁶ and the only concession specifically granted to them was a right for "Bushm[e]n indigenous to the Central Kalahari Game Reserve" to enter the CKGR without first obtaining a permit from the Ghanzi District Commissioner.¹⁷⁷ The CKGR regulations also limited the San hunting privileges set forth in the Fauna Conservation Proclamation and proscribed residents from keeping domestic animals, even though

note 52, at 315.

168. SILBERBAUER, *supra* note 162, at 133.

169. *Id.*

170. *See, e.g.*, Hitchcock, in KHOISAN IDENTITIES, *supra* note 24, at 303.

171. This emphasis is not only evident from the cited passages, but also from how the deliberately titled "Bushman Survey Report" had as its central focus the San.

172. On the other hand, a letter from the Resident Commissioner to the High Commissioner in South Africa stressed that it was important to "protect the food supplies of the existing Bushmen population in this area which has been estimated to approximately 4,000 from the activities of the European farming community at Ghanzi . . ." Government Savingram No. 10840 111 (25) of February 9, 1961 from the Resident Commissioner of Mafeking to the High Commissioner of Cape Town, *quoted in* "Update on the Situation of the CKGR Residents of Botswana", at <http://www.kalahari.peoples.org/documents/RKHCKGRupdate.02.htm> (last visited Jan. 18, 2004).

173. Fauna Conservation Proc., *supra* note 161, § 4.

174. *Id.* § 57(4).

175. Central Kalahari Game Reserve—Control of Entry Regulations, GN 38 of 1963.

176. *See* Ng'ong'ola, *supra* note 141, at 11; SPINAGE, *supra* note 89, at 31.

177. Bishop, *supra* note 60, at 113; GN 38 of 1963, *supra* note 175. It was thus up to the government to decide what San were indigenous to the CKGR. Given the relative mobility of many San, it can be seen how it could have been manipulated by officials to exclude them. *Id.*

some residents had dogs they used for hunting.¹⁷⁸ The Administration's early divergence from Silberbauer's emphasis on protecting San lands had important ramifications, as it foreshadowed the government's later rationalization of policies that further limited the rights of CKGR residents but purported to protect wildlife.¹⁷⁹

The weakness of San hunting rights in the CKGR reflected broader inequities over hunting regulation. The Protectorate administration accorded the major Tswana tribes substantial autonomy in hunting regulation but gave no such autonomy to San groups (although San did continue to hunt).¹⁸⁰ Although San in Tswana lands had some of the customary rights that the Tswana possessed, as against the Protectorate administration, those in Crown lands, including the Ghanzi, Chobe, and Kgalagadi districts, did not.¹⁸¹ Residents of areas within Crown lands, like the San in the CKGR, instead were subjected to greater bureaucratic control.¹⁸² The Protectorate passed a series of highly restrictive hunting laws that applied to those of European descent and non-tribal groups, including, by implication, the San.¹⁸³ In particular, the latter, under a 1904 Proclamation, could exempt themselves from certain regulations only by showing they had a "Paramount Chief" who could permit them to hunt,¹⁸⁴ an inapt standard that was difficult for the San to meet given their

178. Bishop, *supra* note 60, at 113.

179. Spinage suggests that Silberbauer's recommendation of a reserve for the San was rejected partly because it would have been opposed by white farmers in Ghanzi to the west, and the Ngwato to the east, who depended heavily on San labor that they did not wish to see depart. SPINAGE, *supra* note 89, at 60. Although the San's progressive expulsion from the CKGR has recently received media attention, from the 1930s to 1970s San groups were removed from other national parks and game reserves. Hitchcock, *Seeking Sustainable Strategies*, *supra* note 24. The impetus for the creation of game reserves in Botswana and the passage of the 1940 enabling legislation came from the 1933 Convention Relative to the Preservation of Fauna and Flora in Their Natural State, known as the London Convention, and a following 1938 conference. See LNTS 172 1936, 241-72. The London Convention of course included Britain as a party and its provisions, under article I(1)-(3), thus extended to the Bechuanaland Protectorate as a territory under Britain's protection. *Id.*

180. Tribal autonomy was the policy when the British acquired jurisdiction over Bechuanaland Protectorate in 1885. The first Assistant Commissioner was directed "not to interfere with the Native Administration; the Chiefs are understood not to be desirous of parting with their rights of sovereignty, nor are Her Majesty's Government by any means anxious to assume the responsibilities of it." SPINAGE, *supra* note 89, at 11. For a policy codified in the May 1891 Orders in Council, see *supra* note 105 and accompanying text.

181. In 1891 the administration directed its jurisdiction, with a few exceptions, not to extend tribal reserves, given the absence of an appropriate treaty provision. No such limitation, however, was provided for Crown lands which were therefore subject to proclamations and other means of regulation. See Orders in Council of May 9, 1891, *supra* note 105.

182. See also Ng'ong'ola, *supra* note 141, at 10.

183. The laws started with the 1886 Game Law and 1891 Game Law (Amendment) Act.

184. Proc. No. 22, (Sept. 24, 1904), in BECHUANALAND PROTECTORATE 1891-1914, *supra* note 105, at 138. See also SPINAGE, *supra* note 89, at 30.

comparatively non-stratified social organization.¹⁸⁵ Otherwise the San were subject to the Game Law Act's requirement of hunting licenses, its definitions of hunting seasons, and its restrictions on the species that could be hunted, as well as the constraints imposed by the Act's amendments.¹⁸⁶ Although after 1910 the Protectorate had jurisdiction over tribal reserves and could regulate their hunting practices, it generally chose not to do so, preserving tribal autonomy with only narrow exceptions, while continually introducing new regulations for other lands.¹⁸⁷ Many of these regulations may have reasonably been motivated by the desire to curb the rapid decline in wildlife stocks, as Spinage for example notes the "appalling destruction" that occurred in the nineteenth century "encouraged by European traders."¹⁸⁸ Yet, the regulations were adopted with little consideration for, or input from, the San, a problem that has continued to afflict Botswana's regulation of hunting.¹⁸⁹

It was not until 1940 that the Protectorate Administration recognized the distinctive needs of subsistence hunters in Crown lands, when residents of the Kgalagadi District were allowed to apply for a permit to hunt "in reasonable quantities for food."¹⁹⁰ Moreover, the 1961 Fauna Conservation Proclamation—which overhauled hunting regulation, introduced new restrictions, license requirements and quotas; expanded enforcement powers; and increased scheduled protected species—applied almost exclusively to areas outside of Tswana tribal reserves,¹⁹¹ that is, Crown lands and freeholds, the former of which included many San inhabitants. Tribes controlling the reserve lands were allowed to develop their own regulations.¹⁹² No broader exception for subsistence hunters was

185. See SAUGESTAD, *supra* note 21. As Saugestad remarks, the "fluid composition of Bushmen bands and leadership based on consensus has made it difficult for outsiders to identify positions of leadership." In the same respect, it made San leadership appear "weak" in contrast to the hierarchical, stratified structure of the Tswana. *Supra* note 21, at 91.

186. SPINAGE, *supra* note 89, at 13–15 (listing a host of proclamations and notices regulating hunting from 1891 to the Fauna Conservation Proc of 1961); Game Law Amendment Act 1886, §§ 2, 3, 4.

187. See, e.g., SPINAGE, *supra* note 89, at 14–16.

188. *Id.* at 26–27.

189. Hunting laws were overhauled by proclamation in 1925 and again in 1940. Proc. No. 17 and Proc. No. 19. The latter law, the Bechuanaland Protectorate Game Proclamation, was enacted in response to the 1933 London Convention. *Supra* note 179. It enabled the creation of game reserves (such as the future CKGR) and introduced fees for licenses to hunt small game. *Id.* Neither made exception for the San.

190. High Comm'r Notice No. 42. See also SPINAGE, *supra* note 89, at 30.

191. Fauna Conservation Proc. § 4, stating that "except where the context requires otherwise, this Proclamation shall not apply to Africans in tribal territories." *Supra* note 161. Exceptions included § 62 on the export and import of game and § 65(4) on dealing in trophies. *Id.*

192. SPINAGE, *supra* note 89, at 29. Nonetheless the San regulations tended to reflect the 1961

provided until the 1967 Fauna Conservation Amendments.¹⁹³ As Ng'ong'ola concludes regarding the pre-independence era, “[t]he underlying premise of the numerous statutes, rules, and regulations was that no one had an inherent or indigenous right to hunt or gather on Crown lands.”¹⁹⁴

In part because of the absence of targeted, beneficial land reforms and the refusal to acknowledge San hunting rights, conditions for the San improved only in certain areas with the creation of Bechuanaland Protectorate. San serfdom remained widespread at the beginning of the twentieth century, and although the Protectorate banned it in 1936, it continued without formal sanction into the 1950s.¹⁹⁵ Administration officials expressed concern from time to time about the slavery-like status of relations between some San and Tswana, but more often they shifted responsibility to Tswana leaders instead of undertaking real reforms.¹⁹⁶

Proclamation’s provisions. *Id.*

193. See SPINAGE, *supra* note 89, at 179. See also 1967 Fauna Conservation Protection Amendment, *supra* note 161.

194. Ng'ong'ola, *supra* note 141, at 10.

195. Proc. No. 15 of 1936. Russell cites the following position of the Ngwato District Commissioner:

[T]he most important accomplishment of the past year has been the announcement to thousands of Masarwa by an official that they are free . . . On the whole I think the position of the Masarwas as observed by me . . . is fairly satisfactory . . . It is true that they do not obtain much in the way of payment for their services but their work is not difficult and they are quite contented . . . I do not think we should try to revolutionise their evolution. Present conditions are favourable for the Masarwa to improve themselves . . . The time will arrive when they will not be willing to work for almost nothing, and then their masters will have the choice of paying them or losing their services.

District Commissioner, Serowe, Oct. 3, 1936 “Comment on the Masarwa Census,” *quoted in* Margo Russell, *Slaves or Workers? Relations Between Bushmen, Tswana and Boers in the Kalahari*, 2 J. S. AFR. STUD. 178, 184–85 (1976). Some key reforms were undertaken by Tswana leaders like Khama III, who mandated that the San be compensated with cattle for their labor. In 1911, he prohibited the payment of tribute by San clients to their Tswana patrons; other Tswana chiefs such as Chief Gaseitsiwe of the Ngwaketse and Chief Sebele I of the Kwena followed suit. Hitchcock, *supra* note 14, at 20.

196. HITCHCOCK, *KALAHARI COMMUNITIES*, *supra* note 14, at 21. Indeed sometimes officials expressed reservations about the liberation of Basarwa. Hitchcock provides an excerpt of the following 1928 letter from the Resident Magistrate in Francistown to the Government Secretary:

[I]t seems to me that the sudden release of more or less savage Masarwa who have been under control and authority of their lords and masters, the Bechuana, may wander around the country stealing and killing cattle when they feel inclined, and if they collect together in big communities . . . the Government may have a difficult business at hand.

Id. (quoting Letter from Resident Magistrate in Francistown to the Governor Secretary in Mafeking (Nov. 12, 1928)), *in* Botswana National Archives file S.43/7.

VI. THE POST-INDEPENDENCE ERA: BUILDING A NATION BUT NEGLECTING HISTORY

The demise of the Bechuanaland Protectorate and the establishment of an independent Republic of Botswana in 1966 set the stage for intense efforts to build a nation in what was then one of the world's poorest countries. Constitutionalism, land reform, infrastructure creation, economic development, environmental and conservation provisions, social policy, and other ambitious initiatives played key parts in this enterprise. Although this effort proved successful along many dimensions, as Botswana's remarkable development record attests, in other respects it has dramatically failed San groups. This failure, like the subordination of San groups in the Protectorate period, cannot be attributed to any single factor. An overarching problem in the post-independence period, however, has been the government's resistance to acknowledging the contingencies of history and ethnicity, in favor of visions of a developed, ethnicity-blind state. This problem has impeded the rectification of past inequities discussed in prior sections and has prevented effective protection against new threats to San groups. I will discuss four elements of the government's agenda that have particularly affected the San.¹⁹⁷ The first element was the creation of a strong anti-discrimination regime that made recognition of tribal and ethnic differences difficult (even in response to past injustices), but that at the same time elevated the status of dominant Tswana tribes in certain respects. The second element was land reform, which weakened direct Tswana control over land in some ways, but which also introduced new problems and again declined to recognize San land rights. The third element consisted of hunting regulation, which finally recognized subsistence hunters' needs in 1967, but then progressively burdened them with additional requirements. The fourth element was development and social policy, which provided some benefits but also created government dependence and thus government influence, which was ultimately used as a lever in moving San groups out of the Central Kalahari Game Reserve.

197. It should be noted that the first part of the paper represents an extension of this analysis, bringing us to contemporary conditions.

A. An Ethnicity-Blind Antidiscrimination Regime

Botswana's independence in 1966 brought the adoption of a constitution with strong anti-discrimination provisions. In particular, section 15(1) states that "no law shall make any provision that is discriminatory either of itself or in its effect,"¹⁹⁸ and (2) provides that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."¹⁹⁹ The term "discriminatory" is defined by subsection (3), which specifies that it 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.²⁰⁰

The language of this provision, with its focus on differential treatment, appears to make it difficult for affirmative measures to be enacted in favor of certain ethnic or racial groups. Some exceptions to the prohibition are set forth, starting in subsection (4). Subsection (4) exempts from application laws that make provision "for the application in the case of members of a particular race or tribe of customary law with respect to any matter" that excludes any laws regarding the matter that otherwise would apply.²⁰¹ The exception for the application of customary law could be effective if San customary law were afforded greater recognition, but in most contexts such a provision likely operates to benefit the more powerful Tswana groups. Subsection (4) also allows for divergences from the prohibitions of subsections (1) and (2) that are "reasonably justifiable in a democratic society."²⁰² Although the text of section 15(3) closely read does not seem to bode especially well for affirmative measures, one could persuasively argue that some of these measures would be "reasonably justifiable in a democratic society," because properly designed affirmative support for historically oppressed minorities is likely to contribute to

198. BOTSWANA CONST. § 15(1).

199. *Id.* § 15(2).

200. *Id.* § 15(3).

201. *Id.* § 15(4)(d).

202. *Id.* § 15(4)(e), and § 15(6). A few limited and specific exceptions are made, for example, for service qualifications for public officers. *Id.* § 15(5).

democratic values. The San, as discussed above, were subjected to decades of political exclusion and economic exploitation. The formal establishment of democratic institutions has not adequately realized their political voice, providing some basis for consideration of affirmative measures falling under section 15(4).

Botswana's antidiscrimination regime has affected Botswana ethnic groups in different ways. In some respects, it has strengthened Tswana cultural norms at the expense of other groups. The government has stressed that all persons are first and foremost citizens of Botswana, but, as Saugestad points out, "this meant that the culture and language of the numerically dominant Tswana people became the dominant symbol" for the nation. "Basarwa" identity, by contrast, "simply does not exist as a category in official documents and discourse."²⁰³ Notwithstanding its ethnicity-blind aspirations and rhetoric, the government's strategy has been to suppress the tribal identities of non-Tswana groups while elevating certain features of Tswana culture, such as the Setswana language, to national norms, obscuring their contingent ethnic character and making them instruments for national development.²⁰⁴ The nation-building imperative and the wish to avoid anything resonating with the legacy of South African apartheid have deeply informed the government's approach toward the San, as the government has consistently refused to acknowledge the particular aspects of San culture and history, and instead has focused on assimilating San groups into the broader society. Especially telling is the following statement from the government's recent report to the UN Committee on the Elimination of Racial Discrimination:

Having had to contend with racist regimes in the then South Africa, Rhodesia and South West Africa for a long time, and having interacted with people raised in those societies, Botswana was always determined to give due regard, in the formulation of education and land planning policy and other matters, to ensuring

203. SAUGESTAD, *supra* note 21, at 177.

204. Botswana's report to the CERD committee declares that the "population of Botswana is comparatively and generally homogenous" and that while "several other languages [are] spoken in the country," "Setswana," the national language, "is . . . spoken by over 96 [percent] of the population," including many non-Tswana who seek expanded language rights. *Fourteenth Periodic Reports of States Parties Due in 2001: Botswana*, U.N. Doc. CERD/C/407/Add. 1 (May 8, 2002), at www.unhchr.ch/tbs/doc.nsf (last visited Apr. 14, 2004). The government of Botswana's predilection for not considering ethnicity or tribal status in general, while nonetheless elevating the status of certain (Tswana) tribes, is reminiscent of the nation building strategies pursued in other African countries that have suppressed potentially fractionalizing ethnic and tribal identities to the end of promoting consensus or majoritarianism.

that race relations are normal. For example, in integrating foreign investors, minorities and remote area dwellers into the mainstream of society, emphasis is placed on shared public amenities such as schools, medical facilities and utilities, as well as on mixed neighbourhoods so designed by settlement planners. Everyone, regardless of their ethnicity or race, is free to settle anywhere in the country within the parameter of the law and policy. This way, friendship, tolerance and understanding are developed among ethnic groups.²⁰⁵

The government's concern for avoiding anything resonating with apartheid in the provision of benefits, neighborhood design, and other areas is obviously compelling. What is questionable, however, is the assumption that avoiding apartheid, and ensuring "normal" race relations (a notably vague expression), entails that remote area dwellers and minorities should be integrated "into the mainstream of society," particularly when the terms of integration are dictated by outside actors. The potential for conflict between integrative ideals and the freedom to "settle anywhere in the country" is exhibited by the government's policy of expelling residents from the CKGR in the name of providing them with more benefits.²⁰⁶

B. Land Reform

The second element of Botswana's nation-building strategy that has deeply affected the San is land reform. With the Republic of Botswana's founding, the Crown lands of the Bechuanaland Protectorate became State lands, accounting for about forty-seven percent of Botswana's total territory at independence.²⁰⁷ More importantly, however, the government significantly modified for the first time since the early twentieth century the administration of the forty-eight percent of Botswana constituted by

205. *Id.*

206. *Id.* The CERD report shows how the government fails to recognize the relevance of major social and historical differences distinguishing Botswana. Unlike South Africa, it was never heavily settled by a subsequently dominant white population. One might have hoped for the government to recognize the difference between providing remedial measures for historically oppressed indigenous peoples and ratifying racial domination by descendants of formal imperial powers. It is ironic that South Africa, notwithstanding the bitter legacy of apartheid, has in some respects made greater progress in acknowledging the unique history of its San inhabitants, for example, through the transfer of tens of thousands of hectares of land to the Khomani San.

207. State Land Act, Law No. 29 of 1966. The percentage has since fallen with some State lands being converted into Tribal lands, but the former still account for a large portion of Botswana's territory. See Ng'ong'ola, *supra* note 141, at 11.

tribal lands.²⁰⁸ The Tribal Land Act (TLA), the first pillar of Botswana's land framework, did not alter the basic distinction in Tswana customary law among residential, arable, and grazing land.²⁰⁹ It did, however, shift authority over the allocation and regulation of tribal land from chiefs and other tribal leaders to formally neutral, but nonetheless Tswana-dominated, land boards that were empowered to dispense customary and common law land grants.²¹⁰ A land board was established for each of the nine tribal reserves designated by the Protectorate government,²¹¹ as well as for Tati concession, and the Chobe, Kgalagadi, and Ghanzi districts.²¹²

The TLA vested "[a]ll right and title" to the land of each tribal reserve to its corresponding land board "in trust for the benefit and advantage of the tribesmen of that area and for the purpose of promoting the economic and social development of all the peoples of Botswana."²¹³ The TLA defined "tribesman" as "a citizen of Botswana who is a member of *the tribe* occupying the tribal area,"²¹⁴ a definition that reinforced the view that the TLA excluded the San and other minority groups from consideration and functioned to enhance the power of the locally dominant Tswana tribe. Land rights could be granted to non-tribesmen only when specifically mandated by the Minister of Lands and Housing.²¹⁵ The TLA vested all powers held by a chief under customary law in the land boards, including the power to grant and to cancel land rights, to hear appeals, to impose use restrictions,²¹⁶ and to establish lands outside grazing areas as "commonage for the use of tribesmen or for any specified class or category thereof."²¹⁷ Occupancy of land by customary tenure was

208. Tribal Land Act, No. 54 of 1968, in LAWS OF BOTSWANA, Ch. 32:02 [hereinafter TLA]. For helpful discussion of the Tribal Land Act and its subsequent amendments, see Kwame Frimpong, *The Administration of Tribal Lands in Botswana*, 30 J. AFR. L. 51 (1986).

209. See Frimpong, *supra* note 80, at 388.

210. See Ng'ong'ola, *supra* note 141, at 15–16.

211. TLA, *supra* note 208, § 3 and First Schedule. The tribal territories listed are those of the Ngwato, Tawana, Kgatleng, Kweneng, Ngwaketse, Maletse, Tlokweng, and Barolong Farms. *Id.* at First Schedule.

212. The Ghanzi tribal district excluded the CKGR, which was still classified as State land. Tribal Land Act, *supra* note 208, at Fifth Schedule. The government changed the State lands of Chobe, Ghanzi, and Kgalagadi to tribal lands by Tribal Land (Amendment) Act No. 21 of 1976 [hereinafter TLAA]. This is partly the reason why tribal lands by 1997 had grown to about 70% of the total area of Botswana, whereas State lands, primarily allocated for fauna and flora conservation, had shrunk to about 25%. See Ng'ong'ola, *supra* note 141, at 11, 13.

213. TLA, *supra* note 208, § 10.

214. *Id.* (emphasis added).

215. *Id.* § 20(1).

216. *Id.* § 13(1).

217. *Id.* § 18(1). Land boards were only empowered to describe grazing areas and not to expand, limit, or otherwise define them. *Id.* § 17(3).

prohibited until a grant certificate was obtained from the land board.²¹⁸ Furthermore, the TLA also imbued land boards with the authority to grant common law leaseholds or ownership rights over parcels in tribal lands “to any person” in the form of short-term leases determinable on a monthly basis and long-term leases requiring the Minister’s written consent.²¹⁹ The scope of these powers is especially important in assessing the viability of aboriginal title claims.

Although one of the purported aims of creating the land board system was to democratize access to and control of land in tribal areas, its success in this regard has been mixed. On the one hand, individuals do not have to obtain land from the ward heads—or consequently, the chief—but only need to get their consent for an allocation by the land board.²²⁰ The land board is not beholden to the chief in the same respect as the ward heads, and it may be that allocations do not depend as much on the power of the local tribe. On the other hand, the selection procedures of the original TLA appeared mainly to shift authority from the chief to the Minister of Lands and Housing. One appointment is made by the chief, while six are made by the minister (three are from a six-candidate slate elected by the *kgotla*), two are made by district council representatives, and two are made by representatives of the Minister on issues of agriculture, commerce, or industry.²²¹ Although the structure weakened the Chief’s control over land issues, it did not automatically lead to greater accountability for local groups, particularly if they did not already exert influence in the *kgotla* or district council. Moreover, the definition of “tribesman,” with its focus on “the tribe occupying the tribal area,” may have been used as a rationale to exclude minority groups from consideration by Tswana-dominated land boards.

The government made major changes to the TLA in 1993.²²² The amendments eliminated the TLA’s section 10(2), which made an exception from land board jurisdiction for “any land or right water” held by a person in his personal or private capacity.²²³ The effect was to make all customary land rights dependent on board approval.²²⁴ Most significant,

218. *Id.* §16.

219. *Id.* §§ 23, 24. See discussion in Ng’ong’ola, *supra* note 141, at 15–16. Section 33 of the TLA provided for compensation for takings from customary rightholders. *Id.* § 33.

220. Frimpong, *supra* note 80, at 388.

221. See TLA, *supra* note 208, First Schedule.

222. TLAA, *supra* note 212.

223. *Id.*

224. *Id.* § 7(b). The Amendment also authorized the creation of land tribunals to adjudicate appeals of land board decisions. *Id.* § 40.

however, was the substitution of “citizens of Botswana” for “tribesmen” in section 10 of the TLA, requiring that the land boards hold tribal lands “in trust for the benefit and advantage” of the former group rather than the latter and for the purpose of promoting the social and economic development “of all peoples of Botswana.”²²⁵ Nonetheless, as Ng’ong’ola points out, subsequent regulations focused more on enhancing the minister’s political control of the boards than on accommodating customary practices, like hunting, of non-Tswana groups, such as the San.²²⁶ Bishop notes that “the main concern expressed by the San over this new system of land allocation is that the institutions that have power over land allocation are still dominated by non-San,” and that they “are still considered ‘non-tribesmen’ and ‘lacking in Chiefly organization’ by members of the various Tswana tribes who continue to dominate land granting institutions and government.”²²⁷ Further reforms of the TLA framework are likely necessary to ensure that land governance truly accommodates the rights of the San and other minority groups over their territories.

The other pillar of the government’s post-independence land policy is the Tribal Grazing Lands Policy, instituted in 1975.²²⁸ The Tribal Grazing Lands Policy (TGLP), has several aims, including reducing overgrazing and range degradation, decreasing rural inequality, and promoting sustainable growth of the livestock industry.²²⁹ By the early 1970s, Botswana had experienced a major increase in cattle herds.²³⁰ Improvements in water borehole technology and eagerness to use Botswana’s vast veld resources caused a “land-grab” as herds spread across the Kalahari. The World Bank-funded TGLP sought to promote sustainable economic development by dividing grazing lands into commercial, communal, and reserved areas, and encouraging owners of large cattle herds to move into the commercial areas where they would

225. *Id.* § 7(a), TLA § 10. This amendment could benefit or disadvantage the San, as it further strengthens the view that members of minority groups within a tribal reserve, as “citizens of Botswana,” are entitled to land rights just as are members of the locally dominant Tswana tribe. On the other hand, it could be interpreted as enabling outside residents of a tribal reserve to enter and seek land or water rights from land boards with jurisdiction over minority group lands. Hence, “activists and researchers on Basarwa issues [believe] that the 1993 amendment may have been a ploy to allow further penetration of remaining Basarwa territories by Tswana cattle barons in need of additional cattle post areas.” Ng’ong’ola, *supra* note 141, at 18 (citing Liz Wily, *Hunter-Gatherers in Botswana and the Land Issue*, 2 INDIGENOUS AFFAIRS 12 (1994)).

226. Ng’ong’ola, *supra* note 141, at 16–17.

227. Bishop, *supra* note 60, at 119.

228. HITCHCOCK, KALAHARI COMMUNITIES, *supra* note 14, at 30.

229. *Id.*

230. Frimpong, *supra* note 80, at 390.

fence off their ranches under leaseholds and pay rents to the district land boards,²³¹ in theory weakening the harmful incentives behind the “tragedy of the commons.” Communal areas were to continue as they had under the customary system, with cattle owners having non-exclusive usage rights.

Assessments of the implementation, however, indicated that virtually no land was set aside as reserved, even though the government recognized that reserved areas were the only “safeguards for the poorer members of the population.”²³² Commercial ranches, on the other hand, were designated in areas containing significant San populations.²³³ Commercial ranchers also used communal land, squeezing out the small cattle owners for whom the communal land was intended under the TGLP, or exhausting their own resources on commercial leaseholds and then returning their herds to communal areas.²³⁴

San groups and their allies responded to the TGLP’s shortcomings with a variety of legal claims, an effort to get appendices attached to the TGLP “that would allow people continued rights to land for resource procurement, residential, and agricultural production purposes,” and an attempt to persuade the government and district councils to reserve blocks of land large enough to sustain San hunter-gatherers and agriculturalists.²³⁵ The Attorney General’s chambers determined that the appendices were illegal, however, and land boards proved reluctant to set aside land for people that they viewed as nomadic foragers.²³⁶ A consultant to the Attorney General’s chambers issued a controversial opinion in 1978. The consultant wrote:

As far as I have been able to ascertain, the Masarwa have always been true nomads, owing no allegiance to any Chief or tribe, but have ranged far and wide for a very long time over very large areas of the kalahari in which they have always had unlimited hunting rights, which they even enjoy today in spite of the Fauna Conservation Act. The right of the Masarwa to hunt is, of course, very important and valuable as hunting is their main source of

231. See HITCHCOCK, KALAHARI COMMUNITIES, *supra* note 14, at 30.

232. *Id.* at 7.

233. See Ng’ong’ola, *supra* note 141, at 20.

234. Frimpong, *supra* note 80, at 391. See also discussion in Good, *supra* note 12, at 214–15. On the other hand the regulations in 21(4) required each land board to examine its registry for certificates of customary land grants, to certify whether rights exist, and to state whether the owners of such rights had been informed of proposed lease and consented. Existing customary rights are likely protected under the regulations. See Ng’ong’ola, *supra* note 141, at 20–21.

235. See HITCHCOCK, KALAHARI COMMUNITIES, *supra* note 14, at 31.

236. Good, *supra* note 12, at 213.

sustenance . . . without much clearer information it is impossible to give a confirmed opinion about the Masarwa. Tentatively, however, it appears to me that (a) the true Masarwa can have no rights of any kind except rights to hunting.²³⁷

Although it provided some recognition of San hunting rights, the opinion delivered a blow to San land advocacy through its explicit use of the “nomad” misconception.²³⁸ The government nominally disavowed the consultant’s suggestion that the San could be denied land rights based on ethnic affiliation,²³⁹ but it generally did not reverse land board decisions that denied San rights.²⁴⁰ Although some Remote Area Dwellers have obtained residential rights and rights to fields for agricultural use, water and grazing rights in RADP settlements remain with the government. Thus, lacking rights of exclusion, Remote Area Dwellers have seen numerous people move in with their livestock.²⁴¹ Moreover, efforts to get the new arrivals to leave have tended to fail, partly because some of those moving in sit on land boards and district councils.²⁴²

C. Hunting Regulation

Botswana’s independence saw the enactment of the first broad exception for subsistence hunters from hunting restrictions in the 1967 amendment of the Fauna Conservation Act.²⁴³ The amendment stated that, subject to contrary regulations for controlled hunting areas and with the exception of conserved species, those persons would be exempt from the Act’s restrictions who are “entirely dependent . . . on hunting and gathering veld produce . . . where the animal is hunted for the reasonable food requirements of the hunter or of the members of the community to which he belongs.”²⁴⁴ Regulations applicable to specific tribal areas were also adopted that were generally drafted through close consultation with tribal leaders.²⁴⁵ There is no indication, however, that a similarly participatory approach was used with San groups. The tribal regulations

237. Opinion in *Re: Common-Leases of Tribal Land*, Ministry of Local Government and Lands File 2/1/1, reprinted in HITCHCOCK, *KALAHARI COMMUNITIES*, *supra* note 14, at 32.

238. HITCHCOCK, *KALAHARI COMMUNITIES*, *supra* note 14, at 32.

239. *See id.* at 33.

240. *Id.*

241. Hitchcock, in *KHOISAN IDENTITIES*, *supra* note 14, at 310.

242. *Id.*

243. Fauna Conservation (Amendment) Act No. 47 of 1967.

244. *Id.* § 4(3).

245. *See, e.g.*, discussion in *SPINAGE*, *supra* note 89, at 21.

tended not to make any exceptions for subsistence hunters, and so even those customary rights retained by San who resided in tribal reserve areas were curbed. The government made key changes to hunting regulation in the CKGR and elsewhere in 1979.²⁴⁶ The 1979 legislation authorized regulations permitting “the hunting on State Land of an animal, other than a conserved animal, by a person belonging to a community which is entirely dependent for its living on hunting and gathering veld produce.”²⁴⁷ The original Fauna Conservation Proclamation and subsequent regulations, it may be recalled, provided an exception for subsistence hunters, allowing subsistence hunters to obtain the “reasonable food requirements” for their bands without obtaining any license, for those species not listed in a schedule of conserved species.²⁴⁸ The 1979 Fauna Conservation Amendment, however, without consulting the relevant populations, imposed a new requirement on such subsistence hunters to obtain a Special Game License (“SGL”) as described in the Unified Hunting Regulations.²⁴⁹

The government issued the more restrictive regulations out of concern for dwindling numbers of wildlife in the Kalahari, but aimed to enable poor rural groups, and specifically Remote Area Dwellers, who were dependent on wild game to continue to hunt.²⁵⁰ The Unified Hunting Regulations instituted a single regulatory regime for all of Botswana, eliminating the discrete systems for tribal reserves. The Regulations required Remote Area Dwellers who hunt scheduled species, including San residents of the CKGR, to obtain SGLs. The Regulations limited the issuance of the licenses to people defined as “nomadic” and who use traditional hunting weapons such as bows, arrows, spears, and snares and not “hunting aids”, such as horses or dogs. Hitchcock observes that, in practice, game officials “chose to give people SGLs . . . if they were not wearing pants and instead wore a breech cloth made of skin.”²⁵¹ The SGLs were available without a fee and were valid year-round. Many rural groups who depended on hunting viewed the SGLs as crucial to survival. Their popularity grew during the 1980s, and by the mid-1990s more than two thousand SGLs were being granted each year.²⁵² The government

246. See generally Fauna Conservation (Amendment) Act. No. 1 and Unified Hunting Regulations, Laws of Botswana Ch. 38:01.

247. Fauna Conservation (Amendment) Act No. 1, at § 4(b); Laws of Botswana Ch. 38:01, § 4(3).

248. *Id.*

249. See also Bishop, *supra* note 60, at 116.

250. See Hitchcock, *supra* note 23; Fauna Conservation (Unified Hunting) Regulations, 1979.

251. HITCHCOCK, KHOISAN IDENTITIES, *supra* note 14.

252. Hitchcock, *supra* note 23.

eventually viewed the increase in licenses as unsustainable, and in the late 1990s it curtailed their issuance.²⁵³

D. San Social and Development Policy: the Remote Area Development Programme

A special development program initially designed for the San and then for other poor rural groups was initiated by the Ministry of Local Government and Lands in 1974.²⁵⁴ The Bushman Development Programme (BDP) was incorporated as a project in the Fourth National Development Plan and called for promotion of economic opportunity, provision of infrastructure, and human resource development. Several guiding principles for the BDP were identified, including the promotion of the San's rights as citizens of Botswana, consultation with and participation by local groups for development projects and responsiveness to local conditions, integration of San into Botswana's larger society and economy (contingent on the former's agreement), and enhancement of San self reliance.²⁵⁵ Under the BDP, or as it later became known, the Remote Area Development Programme,²⁵⁶ the Ghanzi District Council set aside land for the San residing and working in the Ghanzi Farms. A survey of the area was conducted by a liaison between the BDP and the District Council, which indicated that 4,512 San lived in the area. Childers recommended that four settlement areas be established. In 1977 the Bushman Development Officer submitted a project proposal to the government, which in turn allocated blocks of land for the settlements at just 400 kilometers apiece.²⁵⁷ Problems for the San included the government's reluctance to allow residents to fence their areas (thus to protect their land against outside cattle herders) and insufficient water supplies exacerbated by diversion to livestock. Nonetheless, the number of settlements established under the RADP increased to over sixty, with a population of thousands.²⁵⁸

253. *Id.*

254. The RADP also received major support from outside sources, such as the Norwegian Development Organization.

255. Hitchcock, *Seeking Sustainable Strategies*, *supra* note 24.

256. The change in appellation of the Bushman Development Program to the Remote Area Development Program reflected the government's desire to avoid ethnic identification and associations with apartheid; instead, it classified those covered by the program as "Remote Area Dwellers." Nonetheless, the fact remained that 70–80% of Remote Area Dwellers were San. SAUGESTAD, *supra* note 21, at 127.

257. Hitchcock, *Seeking Sustainable Strategies*, *supra* note 24.

258. See HITCHCOCK, *KALAHARI COMMUNITIES*, *supra* note 14, at 16.

The proliferation of settlements was part of a shift in the RADP from economic development and local institution-building to resettlement and infrastructure creation. Hitchcock relates a statement made at the second RADP workshop in 1979:

The Remote Area Development Program (RADP) is an integrated rural development program which aims at bettering the general living standard of the poverty stricken communities by providing them with relevant education, health facilities, and healthy water supplies; over and above that by helping them to settle in one place so that they can be supplied with social services.²⁵⁹

This policy statement foreshadowed much later justifications made by the government for removing residents from the CKGR and placing them in government-created settlements. As part of the RADP, the government assured residents of the CKGR that they would receive land, water, social services, and economic development assistance only if they left the CKGR.²⁶⁰ The strategy to resettle the San in government villages reflected the government's definition of the "beneficiaries" of the initial program, as "people living outside of village settlements."²⁶¹

The arrival of Botswana's independence brought sovereignty for the nation and democracy for most of its inhabitants, but the government's exercise in nation-building failed to address, among other San concerns, those pertaining to land, hunting, and development. The bureaucratic, top-down, and ethnicity-blind approach taken by the government had damaging implications for it denied San the benefits of Botswana's transformation while burdening them with many of its costs.

VII. RIGHTS-BASED DEVELOPMENT AND ABORIGINAL TITLE IN BOTSWANA

San groups have become increasingly organized and assertive at local, national, and international levels,²⁶² and San mobilization has flourished in Botswana and more broadly in southern Africa since the early 1990s. To be sure, San groups in Botswana had previously advocated for land rights, better working conditions on ranches and farms, and other issues, particularly with the adoption of the Tribal Grazing Land Policy. A key

259. See HITCHCOCK, *KALAHARI COMMUNITIES*, *supra* note 14, at 34.

260. Bishop, *supra* note 60, at 114–15.

261. SAUGESTAD, *supra* note 21, at 133.

262. See *generally id.* at 196–208.

step, however, was taken at a regional conference on development programs for San held in Windhoek, Namibia, in 1992. At this Conference San representatives voiced support for the formation of committees at local, regional, and international levels as well as a regional network. Some of the most important actors in the struggle for San groups have been First People of the Kalahari, the Kuru Development Trust, the Working Group of Indigenous Minorities in Southern Africa (WIMSA), and the South African San Institute. In terms of substantive issues, four sets of concerns in particular have been stressed by San NGOs: subsistence hunting rights; land rights; rights to benefits from tourism and wildlife-related conservation and development projects; and cultural and language rights.²⁶³ These organizations' emphasis on rights is striking in contrast to the government's focus on assimilation, and provides further support for rights-based and participatory approaches to development policy instead of the bureaucratic, top-down method that dominates many countries, including Botswana. I will now briefly discuss applicable human right norms, focusing on the two most important instruments to which Botswana is a party, the Convention on the Elimination of Racial Discrimination and the International Covenant on Civil and Political Rights (ICCPR). I will then set forth an extended defense for the viability of San groups' aboriginal title claims in Botswana.

A. *International Human Rights Norms*

The Committee on the Elimination of Racial Discrimination and the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recently delivered critical reports on the government's treatment of the San. The August 2002 CERD report was particularly detailed in its assessment and recommendations. The Committee expressed concern about, among other things, the "expressions of prejudice against the Basarwa/San people, including public officials," the poverty of marginalized ethnic groups, and the "ongoing dispossession" of the Basarwa/San from their lands. The Committee also expressed concern about reports stating that the resettlement of the San outside of the CKGR "does not respect their political, economic, social and cultural rights," or the San's linguistic and cultural rights.²⁶⁴ The Committee thus recommended that "no decisions

263. IWGIA Report, *supra* note 29, at 277.

264. *Committee on the Elimination of Racial Discrimination, Concluding Observations*, COMMISSION ON HUMAN RIGHTS, 61st Sess., U.N. Doc. CERD/C/61/CO/2.

directly relating to the rights and interests of members of indigenous peoples be taken without their informed consent.”²⁶⁵ Furthermore, the Committee advocated that negotiations be resumed with San and NGOs on this matter and that a rights-based approach to development be adopted, and²⁶⁶ that Botswana “fully recognize and respect the culture, history, languages and way of life of its various ethnic groups . . . and adopt measures to protect and support minority languages.”²⁶⁷ In addition, the Special Rapporteur, as noted earlier, expressed concern over the “dispossession” of San from their “traditional lands to make way for game reserves and national parks.”²⁶⁸ What effect these pronouncements will have on the government’s conduct remains uncertain, but they provide a standard by which such conduct must be assessed.

In September 2000 Botswana ratified the ICCPR.²⁶⁹ While its initial report was due in December of 2001, it has still not been submitted to the Human Rights Committee.²⁷⁰ Botswana has not, however, ratified the ICCPR’s Optional Protocol, which enables individuals of the ratifying country to bring “communications” before the Committee. Nonetheless, once the government submits its report, the Human Rights Committee is likely to address San issues, particularly in view of its recent prominence and emergence in the CERD and Special Rapporteur reports.²⁷¹

Substantively, there are problems with Botswana’s treatment of the San under the ICCPR’s protections for national minorities. Article 27 provides that:

265. *Id.*

266. *Id.*

267. *Id.*

268. *Economic and Social Council, Indigenous Issues*, Commission on Human Rights, 58th Sess., Agenda Item 15, U.N. Doc. E/CN.4/2002/97/Add. 1.

269. *See Botswana—Treaties: Ratifications and Reservations*, at <http://www.hri.ca/fortherecord/2002/vol2/botswanarr.htm> (last visited June 10, 2004). Unfortunately, the International Covenant on Economic, Social and Cultural Rights has not been ratified.

270. Article 40 of the ICCPR requires states to “submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.” International Covenant on Civil and Political Rights, G.A. Res. 2200, 99 U.N.T.S. 171, U.N. Doc.A/6316 (1996). Reports must “indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.” *Id.* The Committee then is to “study” the report and transmit its “general comments” to the party. *Id.* *See generally* HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 710 (2000).

271. In the 1990s the Human Rights Committee reformed its method to enable greater participation by other parts of the UN. *Id.* at 711, 713 (reproducing, in part, Thomas Buergenthal, *The Human Rights Committee*, in THE UNITED NATIONS AND HUMAN RIGHTS, Ch.10 (Philip Alston ed., 2000)).

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.²⁷²

An individual's right to enjoy the culture of her group is construed in broad terms and, particularly where the group is an indigenous minority, may include the group's relationship to territory and usage of natural resources. In particular, Comment 3.2 to the ICCPR elaborates that:

The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time one or other aspect of the rights of individuals protected under that article—for example to enjoy a particular culture—may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of indigenous communities constituting a minority.²⁷³

Moreover, some restrictions on hunting and other resource rights constitute violations of article 27 and the right to practice one's culture. These views have been expressed by the Committee regarding communications under the Optional Protocol. For example, in *Kitok v. Sweden*, the Committee stressed that:

[W]ith regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.²⁷⁴

The Committee also emphasized that “the enjoyment of these rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”²⁷⁵

272. International Covenant on Civil Political Rights, G.A. Res. 2200, 99 U.N.T.S. 171, U.N. Doc. A/6316 (1966) art. 27 [hereinafter “ICCPR”].

273. ICCPR, *supra* note 272, cmt. 3.2.

274. *Commission on Civil and Political Rights, The Rights of Minorities*, Commission for Human Rights, 50th Sess. U.N. Doc. A/43/40, Annex VII (1994) (citing *Kitok v. Sweden*, Communication No. 197/1985 (1988)) [hereinafter *The Rights of Minorities*]. Human Rights Committee, *Mahuika et al. v. New Zealand*, Comm. No. 547/1993, 27 October 2000. UN Doc. CCPR/C/70/D/547/1993.

275. *Id.*

The Committee's emphasis on participation is especially apt in this context given the notable failure of Botswana's government to incorporate community positions into the regulatory decisions that have been imposed on San groups. This failure is particularly important given the Committee's view in the *Mahuika* opinion that the acceptability of measures that interfere "with the culturally significant economic activities of a minority" turns on "whether the members of the minority in question have had the opportunity to participate in the decision-making process" and "whether they will continue to benefit from their traditional economy."²⁷⁶ Opportunities to participate in decisionmaking and rights to continued benefits from traditional activities have rarely been granted to the San.²⁷⁷ Finally, the Committee has recognized under article 27 "the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong,"²⁷⁸ and subsequently has elaborated that article 27 not only protects traditional means of livelihood but also allows for the adaptation of such means to "the modern way of life and ensuing technology."²⁷⁹ This provision contravenes the restrictions imposed on San hunters regarding the use of modern weapons and methods.

B. Land Rights: Is An Aboriginal Title Claim Viable?

San groups have recently advocated vigorously for their land rights. In June 1997, First People of the Kalahari (First People) organized a workshop of CKGR community representatives leading to the establishment of a negotiating team that, among other goals, would seek the transfer of ownership rights in the CKGR to residents.²⁸⁰ The government initially did not respond to requests for negotiations and, instead, cut off services to the CKGR in January 2002, causing the negotiating team to launch a legal challenge that is currently pending in

276. *Mahuika et al. v. New Zealand*, *supra* note 274.

277. The regulations themselves give little recognition for traditional hunting and gathering activities. San NGOs and others attest to the lack of consideration given San groups in the drafting of legislation and regulatory provisions.

278. HUMAN RIGHTS COMMITTEE, VLEWSON, Communication No. 167/1984, *Ominayak v. Canada*, para 32.2, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

279. *Mahuika*, *supra* note 276, at 5.

280. The negotiating team consisted of representatives from villages in the CKGR, a delegate from First People, the Kuru Development Trust, and WIMSA. SASI also contributed to the legal team. See Kxao Moses #Oma, *Indigenous Self-Organisation in Southern Africa and the Experience of WIMSA*, in 20/21 INDIGENOUS AFFAIRS 10 (1999).

Botswana's High Court.²⁸¹ One strategy that may bolster San land claims or buttress the bargaining position with the government is the consideration of aboriginal title.

Neither Botswana's constitution nor its legislation expressly provides for aboriginal title claims, and Botswana's courts have not yet recognized such claims. A critical issue is how to demonstrate the applicability of the doctrine of aboriginal title as a matter of municipal law. Doing so would not be an easy task for several reasons. First, aboriginal title has principally been developed under Anglo-American common law and against the background of British colonial jurisprudence, not under the Roman-Dutch legal heritage of southern Africa. Second, the doctrine has mainly emerged in regard to former settled colonies rather than protectorates. Third, indigenous claims in other countries have often been buttressed by treaties or legislation, whereas in Botswana agreements were concluded only with certain Tswana leaders while the San were not accorded political recognition.²⁸²

One strategy to combat these problems is to argue that the doctrine of aboriginal title is a principle of customary international law, and as such is applicable as Botswana's municipal law. In determining whether a principle is one of customary international law, two elements are considered. First, one must consider whether there has been sufficient constancy and uniformity of practice consistent with the principle. Second, one must consider whether the practice has been accompanied by a sense that it is obligatory.²⁸³ A wide array of materials may be considered in identifying a principle of customary international law, such as treaties, Security Council resolutions, General Assembly resolutions and declarations,²⁸⁴ judicial decisions,²⁸⁵ "teachings of the most highly qualified publicists of the various nations,"²⁸⁶ and legislation. Numerous

281. WIMSA has taken part in negotiations in South Africa over land restitution in the Kalahari Gemsbok National Park, and in Namibia regarding the Khwe land dispute with the government over West Caprivi. #Oma, *supra* note 280, at 21.

282. On the other hand, even if it turns out to be right that "the doctrine would be useful to the Basarwa cause only to the extent that the State would be compelled to take full cognizance of Basarwa rights in its management of national parks, game reserves, and other resources on State land," Ng'ong'ola, *supra* note 141, at 25-26, this would seem to make aboriginal title more than "moot," as traditionally many San have lived on state lands, including in particular the Central Kalahari Game Reserve. *Id.* at 25.

283. *See, e.g., The Paquete Habana*, 175 U.S. 667 (1900). *See also* Statute of the Permanent Court of International Justice, art. 38(2) [hereinafter P.C.I.J. Statute].

284. *See, e.g., Nicaragua v. U.S.*, 1986 I.C.J. 14; *Western Sahara*, 1975 I.C.J. 12 (advisory opinion).

285. P.C.I.J. Statute, *supra* note 283, art. 38(4).

286. *Id.*

countries have either explicitly or implicitly recognized the doctrine of aboriginal title. Countries have recognized indigenous land rights in their constitutions,²⁸⁷ through treaty,²⁸⁸ and by local legislation. Support for aboriginal title can also be found in international treaties and declarations,²⁸⁹ and the declaration and program of action from the 1993 UN World Conference on Human Rights.²⁹⁰ Judicial decisions in Australia, Canada, Malaysia, New Zealand, and the United States (among other countries) have recognized the doctrine of aboriginal title or indigenous land rights more generally. In addition, the International Court of Justice in the *Western Sahara* case declared that when a people inhabiting a territory have “a social and political organization,” the territory cannot be regarded as *terra nullius*.²⁹¹ This criterion has been interpreted in broad terms and from the perspective of aboriginal groups rather than Western conceptions.

Once aboriginal title has been recognized as a doctrine of customary international law, the second step is to consider whether customary international law is part of Botswana’s municipal law. The colonial era did not see a formal position taken on customary international law’s application to domestic law in proclamations or decisions, and the current constitution does not specifically incorporate international law into domestic law. Because the Bechuanaland Protectorate lacked external sovereignty, and the rule of British colonial law under the 1931 Statute of Westminster was that colonial territories were treated as part of Britain, it would appear that customary international law was the law of the Bechuanaland Protectorate.²⁹² In 1891 the law of the Bechuanaland Protectorate was declared to be that of the Cape Colony,²⁹³ which in turn was, as some call it, Roman-Dutch common law (a mix of Roman-Dutch law and English common law).²⁹⁴ A number of scholars agree that these

287. Examples include those of Canada, Colombia, Brazil, Panama, Guatemala, Peru and the Philippines. T.W. Bennett & C.H. Powell, *Aboriginal Title in South Africa Revisited*, 15 S. AFR. J. HUM. RTS. 449, 453 (1999).

288. These include the United States and Norway. *Id.*

289. See, e.g., *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, International Labour Organization, Convention No. 169, June 27, 1989 72 ILO Off. Bull. 59 (entered into force Sept. 5, 1991).

290. *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, 32 I.L.M. 1661 (1993).

291. *Western Sahara*, 1975 I.C.J. at 39.

292. TSHOSA, *supra* note 119, at 43.

293. Proc. of June 10, 1891, *supra* note 122, at 34.

294. TSHOSA, *supra* note 119, at 41–43, noting that, regarding the 1891 proclamation, “the dominant view is that this clause introduced the Roman-Dutch Law instead of the English common law into the territory. But, at the same time, as in Namibia and Zimbabwe, the said Roman-Dutch law

elements of Roman-Dutch common law were not automatically superseded at independence,²⁹⁵ but rather “continue[] to operate alongside the general law of Botswana found in statutes, subordinate legislation and judicial decisions.”²⁹⁶ As Chief Justice Hayfron-Benjamin stated in a 1979 decision, “the common law of Botswana is the Roman-Dutch law of the Cape Colony.”²⁹⁷

The rule of Roman-Dutch and English common law, however, is that customary international principles are laws of the land;²⁹⁸ hence courts are required to apply customary principles unless there is a legislative provision to the contrary, or application is prohibited by state doctrine or *stare decisis*.²⁹⁹ Although there have been few instances in which courts of Botswana have engaged the issue of whether customary international law is part of municipal law, they have borrowed international norms on some occasions³⁰⁰ and borrowed from the law of the Australia, Canada, Great Britain, South Africa, and the United States in many instances.³⁰¹

was greatly influenced by English common law principles and concepts,” particularly through the High Commissioner of South Africa’s legislation that introduced elements of English common law. *Id.* at 41. Moreover, the law of the Cape Colony itself involved both Dutch and English common law elements, insofar as the Cape was alternately controlled by the Dutch and British in the late 18th and early 19th centuries. *Id.* at 21.

295. See Pain, *supra* note 115. See also TSHOSA, *supra* note 119, at 64.

296. TSHOSA, *supra* note 119, at 64.

297. Civil Appeal 14 of 1978 (Sept. 28, 1979) (unreported), cited in A.J.G.M. Sanders, *Constitutionalism in Botswana: A Valiant Attempt at Judicial Activism, Part I*, 16 COMP. & INT’L L.J. S. AFR.350, 364 n.13 (1983).

298. John Dugard, *International Law is Part of Our Law*, 88 S. AFR. L.J. 13 (1971); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 43 (1990). See also observation by Blackstone: “the law of nations, whenever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be part of the law of land.” Quoted in TSHOSA, *supra* note 119, at 66–67.

299. TSHOSA, *supra* note 119, at 44, 68 (discussing *Agnes Bojan v. The State*, Miscellaneous Case No. 6/1993 (HC) (unreported)).

300. *The Attorney General of the Republic of Botswana v. Unity Dow*, CA No. 4/91 (1992), reprinted in *THE CITIZENSHIP CASE* (Unity Dow ed., 1994). The case *Att’y Gen. of Bots. v. Unity Dow* involved a woman who married a U.S. citizen. She gave birth to two children who, under the 1984 Citizenship Act, were denied Botswanan citizenship because their father was not a citizen of Botswana and they were not born out of wedlock to a Botswana mother. *Id.* at 30. Dow claimed that the Act discriminated against female citizens of Botswana married to foreigners. The High Court concluded that the Act violated the Constitution’s prohibitions of discrimination. While the presiding judge qualified his opinion by stating that mere signature of a treaty does not give it force of law in Botswana, he cited the 1967 UN Declaration on the Elimination of All Forms of Discrimination Against Women of 1967, the 1989 Convention on the Rights of the Child, and the African Charter on Human and Peoples’ Rights. *Id.* at 30, 39, 41.

301. See, e.g., *Mochele Pheto v. The State*, Criminal Appeal 170 of 1977 (applying judicial practice of South Africa); *Moagi v. State*, Criminal Appeal 73 of 1978 (citing with approval *Griffin v. California*’s interpretation of the Fifth Amendment as precluding comment by prosecution or directions by trial court when such silence could be evidence of guilt); *Modukwe v. State*, Review Case 117 of 1980 (unreported). These cases are discussed in Sanders, *Constitutionalism in Botswana*,

One might also leave customary international law to the side, and argue more directly for the use of aboriginal title because of its specific recognition in Roman-Dutch common law. Although aboriginal title, strictly speaking, has not yet been recognized as a common law doctrine in the Roman-Dutch legal tradition of South Africa, it not been rejected either, and it *has* been recognized as a customary principle falling within the rubric of the nation's Restitution Act.³⁰² The strongest basis, however, is rooted in the common law element of Roman-Dutch common law. The principle that indigenous customary rights preexisted and, under certain conditions, survived colonial acquisitions of sovereignty has been recognized as either a common law or *sui generis* legal norm by courts in a number of legal systems derived from the Anglo-American tradition including Australia,³⁰³ Canada,³⁰⁴ Malaysia,³⁰⁵ New Zealand,³⁰⁶ and the

supra note 297, at 361–70. An argument for the recognition of aboriginal title is also strengthened by the principle of liberal construction employed in interpreting constitutional provisions in Botswana. TSHOSA, *supra* note 119, at 62.

302. As previously noted, the Bechuanaland Protectorate received the law of the Cape Colony in June 1891. It continued through the independence of the Republic of Botswana in 1966. Proc. No. 35 (Dec. 8, 1909), in BECHUANALAND PROTECTORATE 1891–1914, *supra* note 105, at 225–26. As Pain puts it, a “timeless reception” of Roman-Dutch common law was effected.” Pain, *supra* note 115, at 164. It is unknown whether South Africa will recognize a common law or other basis for aboriginal title. No decision has directly considered *common law* aboriginal title, but the 2001 Richtersveld decision considered claims by aboriginal groups, including the San, who were forced from the Richtersveld area in the northwestern Cape region after diamonds were discovered in 1925. Richtersveld Community v. Alexkor Ltd., LCC 151/98 (Constitutional Court of South Africa 2001). The groups brought their claim to the Land Claims Court for restitution on a theory of aboriginal title. They argued that they had customary title that was not extinguished prior to 1913 and was, therefore, within the ambit of the Restitution of Land Rights Act of 1994. Restitution of Land Rights Act No. 22 of 1994. *See also* T.H. Bennett, *supra* note 287, at 450. To be eligible under the Act for the return of their lands or restitution, claimants must have lost their land after June 19, 1913. This reflected the Act's primary purpose of rectifying the injustices of apartheid. The 1913 date was chosen since during that year the first ‘pillar of apartheid,’ the Natives Land Act, No. 27 of 1913, was enacted. The Land Claims Court ultimately denied the claim on grounds that the statutory threshold of racial discrimination had not been met. The Court explicitly left open the possibility for a common law aboriginal title claim, although it did not directly address it because its jurisdiction was limited to claims under the Restitution Act. *See* Richtersveld, *supra*, at para. 47 n.102. Last year, however, the Supreme Court of Appeal granted leave to appeal and set aside the judgment of the Land Claims Court. Richtersveld Community v. vs. Alexkor Ltd., 6 BCLR 583 (South African Supreme Court of Appeal (2003)). Alexkor was permitted to appeal to the Constitutional Court of South Africa. Alexkor Ltd. v. Richtersveld Community, CCT19/03, (2003). The Constitutional Court found in favor of the Richtersveld community, ruling that it had land rights preexisting Britain's annexation in 1847 and that the community was dispossessed through racially discriminatory laws or practices. *Id.* While the Court declined to consider whether a common law concept of aboriginal title exists in South Africa, it did recognize it as a customary principle falling within the scope of the Restitution Act. There is a good chance that the Court would have followed the path of other jurisdictions in elaborating a common law conception had there not been legislative support.

303. *See, e.g.*, Yarmir v. N. Territory, 156 A.L.R. 370 (Federal Court of Australia 1998); Mabo v. Queensland, 107 A.L.R. 1 (High Court of Australia 1992). As summarized in *Ward v. W. Austl.*,

United States.³⁰⁷ The doctrine of aboriginal title has also been recognized in decisions of the Imperial Privy Council regarding Southern Rhodesia and Nigeria.³⁰⁸ In this light, one can conclude that “English common law has long accepted the principle that the right to follow customary activities and practices by the prior occupants of a settled colony survived the assumption of sovereignty by Britain.”³⁰⁹

As a customary principle based on the prior occupation of indigenous groups, aboriginal title is rooted in possession. Hence, it is structurally similar in certain respects to a common law property right. It is nonetheless distinct and *sui generis* because it took form prior to the assertion of British sovereignty.³¹⁰ It was thus “wholly wrong,” as Justice Hall declared in the *Calder* decision, to conclude that “after conquest or discovery the appellant’s predecessors have no rights at all except those subsequently granted or recognized by the conqueror or discoverer.”³¹¹ Instead, courts have required that the sovereign demonstrate some further

Native, or aboriginal, title is a concept of the common law. It is the means by which the common law recognises [sic] rights enjoyed by indigenous inhabitants of land by reason of their occupation of that land and reconciles the rights of those inhabitants with rights obtained by the Crown upon claiming sovereignty over the land.

Ward v. W. Austl., 159 A.L.R. 483, 497 (Federal Court of Australia 1998).

304. See, e.g., *Delgamuukw v. B.C.* [1997] 153 D.L.R. 4d 193; *R. v. Van Der Peet*, [1996] 137 D.L.R. 4d 289; *Calder v. Att’y Gen. of B.C.* [1973] 34 D.L.R. 3d 145. Constitutional rights form a key part of the later jurisprudence, based on § 35(1) of the Canadian Constitution Act of 1982, and courts distinguish between title and rights. See, e.g., *Delgamuukw, supra*. Nonetheless, the court in *Delgamuukw* stressed that the common law right preceded, and is protected by § 35(1): “[a]boriginal title is a *sui generis* trust arising from the occupation of Canada before the assertion of British sovereignty. The existence of an aboriginal right at common law is sufficient, but not necessary, for the recognition and affirmation of that right by § 35(1).” *Id.* at 195.

305. See, e.g., *Adong Bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor*, 1997(1) M.L.J. 418 (High Court (Johor Bahru)).

306. See, e.g., *Faulkner v. Tauranga Dist. Council* 1996(1) N.Z.L.R. 357; *Te Weehi v. Reg’l Fisheries Officer* 1986(1) N.Z.L.R. 680; *R. v. Symonds*, 1847 N.Z.P.C.C. 387.

307. See, e.g., *Mitchel v. United States*, 34 U.S. 711 (1835); *Worcester v. Georgia*, 31 U.S. 530 (1832); *Johnson v. McIntosh*, 21 U.S. 543 (1823).

308. *In re Southern Rhodesia*, 1918 AC 211 (P.C.); *Amodu Tijani v. Sec’y, S. Nigeria*, 1921 (2) AC 399 (P.C.) (noting that the original communal right is presumed to continue to exist unless the contrary is established by the context or circumstances). Although these doctrines have been modified or superseded in various ways, their recognition of the doctrine of aboriginal title has not been modified.

309. Such “rights to customary activities and practices” are construed expansively, as they refer to a “continuum of rights” extending from activities relating to personal relationships (such as marriage and divorce), to hunting, fishing and other food gathering practices linked to land and waters, and to possession of land constituting “customary title.” Rt. Hon. Sir Douglas Graham, *The Legal Reality of Customary Rights*, pub. by New Zealand Treaty of Waitangi Research Unit (2001) 4, 6.

310. See, e.g., *Delgamuukw*, 153 D.L.R. 4d at 242; see also *Roberts v. Canada*, [1989] 1 S.C.R. 322, 340 (holding unanimously that aboriginal title predated British colonization and claims of sovereignty).

311. *Calder v. Att’y Gen. of B.C.*, [1973] 34 D.L.R. 3d 145, at 146.

act of extinguishment. As stated in *Western Australia v. Commonwealth*, “[a]t common law, a mere change in sovereignty over a territory does not extinguish pre-existing rights and interests in land in that territory. Although an acquiring Sovereign can extinguish such rights and interests in the course of the act of State acquiring the territory, the presumption in the case of the Crown is that no extinguishment is intended.”³¹² “In short,” as the court in *Ward v. Western Australia* concluded, “indigenous inhabitants who had rights in land as the occupiers thereof did not become trespassers on that land by the establishment of a colony and assertion of sovereignty by the Crown.”³¹³ A viable doctrine of aboriginal title exists that has been recognized as part of, yet distinct from, the English common-law tradition.³¹⁴

If, by virtue of customary international law, Roman-Dutch common law, constitutional common law, or some combination thereof, aboriginal title is properly part of Botswana’s municipal common law, the next question would be whether it applies in the case of the San groups. There is no simple test for evaluating aboriginal title claims, and methods have varied across time and jurisdiction. Assessments usually involve inquiry into the following criteria: whether the relevant indigenous group occupied the claimed lands at the time of colonization; whether the occupation was of sufficient continuity and duration; whether the claimant group is “aboriginal,” existing as a distinct cultural group over time, and living according to a set of laws or quasi-legal social norms (especially ones regulating land use); and finally, and often most important, whether aboriginal title has been extinguished by subsequent exercises of legal

312. *W. Austl. v. Commonwealth*, (1995) 183 C.L.R. 373, at 422 (citations omitted).

313. *Ward*, 159 A.L.R. at 497. See also *Symonds*, 1847 N.Z.P.C.C., at 390–91; *Amodu Tijani*, 1921(2) AC at 407.

314. Although one might object that the Roman-Dutch law inherited by Botswana does not embrace the doctrine of aboriginal title and hence no common law notion of aboriginal title should be recognized in Botswana, such an objection would be unpersuasive. First, as noted earlier, Botswana’s Roman-Dutch common law tradition incorporated much English common law by way of the High Commissioner of South Africa’s legislation. Also in the Cape Colony, Roman-Dutch law was not used exclusively, and in that sense whether it includes aboriginal title or not should not be dispositive. Note also Tshosa’s observation that Cape law was influenced by English law and that judges had an English common law background. TSHOSA, *supra* note 119, at 41–42. Second, even where British colonies have subsequently taken on a different legal system, courts have found the operation of aboriginal title. In particular, Canadian courts ruled that, notwithstanding the application of French law in Quebec, aboriginal title existed as a necessary element of British sovereignty. See *R. v. Adams*, [1996] 138 D.L.R. 4d 657, at 32–33; *R. v. Côté*, [1996] 138 D.L.R. 4d 385, at 42. As Bennett observes, such decisions lend weight to the proposition that aboriginal doctrine in former British colonies should be construed not so much as an element of common law, but rather as one of *constitutional* common law. Bennett, *supra* note 287, at 462. One might persuasively treat aboriginal title as a constitutional common law principle for Botswana.

authority.³¹⁵ If title has not been extinguished, it gives a right of occupation against all but the sovereign and is inalienable to anyone other than the state.³¹⁶

Addressing the question of prior occupation first, it is accepted that San groups inhabited what is now Botswana prior to the establishment of the Bechuanaland Protectorate in 1885. The specific questions about whether particular San groups inhabited the corresponding territories to which they made claims would be more complicated. Such questions would require a fine-grained analysis of history and land use. This is not the place in which to pursue such questions closely, but some general points may be made regarding application of the law. First, there is no reason that what apparently was a primarily hunter-gatherer lifestyle should preclude any particular claim. The criterion for occupancy is not based on some Eurocentric requirement of agricultural production. The analysis in *Ward* is instructive as the court concluded that, notwithstanding the mobility of the aboriginal groups in seeking food and other resources and the inexactness of boundaries of the territories over which they ranged, “the ever-changing locale of a nomadic community will not be inconsistent with occupancy for the purpose of that element of native title.”³¹⁷ Although a “truly random presence on land, unconnected with the economic, cultural or religious life of the community” would not constitute occupancy, the latter is not to be understood as common law possession. Rather, it should be construed as “an acknowledged connection with the land arising out of traditional rights to be present on, and to use, the land.”³¹⁸ It is therefore “necessary to look at [the] question from the standpoint of the indigenous community,” and to ask whether “the degree of presence on the land [is] consistent with the demands of the land and the needs of a community pursuing traditional practices, habits, customs and usages that form the way of life of that community.”³¹⁹ There is no strict requirement of exclusivity, insofar as occupation “need not be exclusive to one community” but may in certain conditions be shared among several communities.³²⁰

Canada takes a similarly broad approach to what constitutes occupancy by an aboriginal group. The leading case, *Delgamuukw*, required that

315. For a comparable framework, see e.g., Bennett, *supra* note 287, at 463–78.

316. See *Ward*, 159 A.L.R. at 510.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 510–11.

aboriginal groups show that they occupied the lands in question at the time of the Crown's assertion of sovereignty. The court added that occupation must be evaluated in terms of both common law and aboriginal perspectives.³²¹ The common law focus on physical occupation is to be interpreted broadly. Thus, it is not limited to construction of dwellings or enclosure of fields but may include "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources."³²² Above all, the analysis is flexible and accommodating. "In considering whether occupation sufficient to ground title is established, the group's size, manner of life, material resources, and technological abilities, and the character of the lands must be taken into account."³²³ A group need not show that present and prior occupation of lands has been unbroken, but evidence of present occupation may be used as proof of pre-sovereignty occupation. Although "at sovereignty, occupation must be exclusive," (a requirement interpreted liberally in *Ward*),³²⁴ it should also be noted that "shared, non-exclusive aboriginal title short of aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved."³²⁵

A proper analysis of aboriginal title claims requires close evaluation on a case-by-case basis of the full context and details of occupation and land use. One can observe, however, that San groups are likely to be able to demonstrate occupancy in the sense articulated in *Ward*, *Delgamuukw*, and other leading decisions, for they occupied significant tracts of land at the time of the Protectorate's establishment in what are now the districts of Kgalagadi, Ghanzi, Ngamiland, and the Central District (and possibly others). There has been substantial continuity of occupation for many of the groups in these areas. Moreover, it should be noted that the requirement of continuity is not construed strictly, but rather is satisfied by "substantial maintenance of the connection" between the land and the people.³²⁶ Regarding exclusivity, the San groups frequently have used customary rules defining areas of territory in an exclusive manner for hunting, foraging, residing, and other uses. The connection of San groups to their territories has not in any sense been "random"³²⁷ but rather has

321. See *Delgamuukw*, 153 D.L.R. 4d 193.

322. *Id.*

323. *Id.*

324. See, e.g., *id.* at 258–59; *Ward*, 159 A.L.R. 483.

325. *Delgamuukw*, 153 D.L.R. 4d 193.

326. See *R. v. Van Der Peet*, [1996] 2 S.C.R. 507, 557; see also *Delgamuukw*, 153 D.L.R. 4d at 257–58; *Ward*, 159 A.L.R. at 502; Bennett, *supra* note 287, at 467.

327. *Ward*, 159 A.L.R. 483.

emerged out of a complex interaction of social, ecological, and cultural variables. Many of the groups constituting the San are also likely to meet the threshold of being distinct cultural groups over time. While the collective identity of the San has recently been vociferously asserted in different fora, the identities of constituent groups stretch far into history.

If a group claiming aboriginal title is able to meet the foregoing occupancy and other requirements, the next question is whether such title has been extinguished by subsequent acts of the Crown. Explaining why, and under what conditions, extinguishment occurs requires a brief discussion of the common law concept of radical title. Under English law, the Crown could extinguish aboriginal title because of its acquisition of sovereignty over the lands and hence possession of “radical title.”³²⁸ Radical title is a concept adopted from feudal theory that was used in the colonial context and which relates to the doctrine of tenure. The doctrine of tenure was a legal fiction, stretching back to the Norman Conquest of 1066, and postulating that the Crown owned all of the land in England, whether mediately or immediately, and that the King was viewed to be “Lord Paramount” of lands that were thus held by others in tenancy.³²⁹ It was assumed when the Crown acquired territory beyond England that the doctrine of tenure would operate.³³⁰ Hence, “the Crown was invested with the character of Paramount Lord in the colonies by attributing to the Crown a title . . . that was called a radical, ultimate or final title.”³³¹

Radical title enabled the Crown to acquire land in demesne (i.e., Crown land) and hence to become absolute beneficial owner, or to grant tenures over which it would be Paramount Lord.³³² Colonial lands that were considered *terra nullius* were automatically acquired as Crown lands (the Crown became seised in demesne) under the feudal analogy whereby an occupant of a manor “by taking livery or occupying a manor acquired possession of the waste lands thereof.”³³³ By contrast, where the Crown

328. See discussion in *Mabo*, 107 A.L.R. at 33.

329. *Id.*, at 31–32. As Blackstone remarked: “it became a fundamental maxim, and necessary principle (though in reality a mere fiction) of our English tenures, that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has, mediately or immediately, been derived as a gift from him to be held upon feudal services.” See COMMENTARIES, Book II, 50 (1809).

330. See, e.g., MCNEIL, *supra* note 109, at 217.

331. *Mabo*, 107 A.L.R. at 33.

332. *Id.*

333. MCNEIL, *supra* note 109, at 135. Nonetheless, as Bennett notes, the presumption that aboriginal title is not extinguished absent an express provision has held true even for *terra nullius* in some cases, such as in Australia. Bennett, *supra* note 287, at 471. See, e.g., *W. Austl.*, (1995) 183 C.L.R. at 433. As a result, “titles were not necessarily extinguished on the assertion of sovereignty, even when a territory was placed at the disposal of the Crown for sale or grant to settlers.” Bennett,

gained sovereignty over lands through conquest or cession it did not automatically gain an absolute beneficial ownership. As stated in *Mabo*, “if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.”³³⁴ Such a rule was used, as the *Mabo* court notes, regarding the conquests of Ireland and Wales.³³⁵ Indigenous groups in some British dependencies thus came to be seen as holding usufructuary titles³³⁶ that burdened the Crown’s radical title.³³⁷ Although the Crown could extinguish the usufructuary title and obtain fee simple over the lands, doing so required some act beyond acquisition of sovereignty.³³⁸

Hence an act of extinguishment by the Crown is viewed by courts as a precondition of the sacrifice of aboriginal title, and the colonial power is presumed not to have intended to abolish title by acquisition of sovereignty.³³⁹ At least since the New Zealand decision *Te Weehi v. Regional Fisheries Officer* courts have required that any act allegedly extinguishing aboriginal title manifest a “clear and plain intention” to do so.³⁴⁰ Such an intention, as elaborated by the court in *Mabo*, “is not revealed by a law that merely regulates the enjoyment of native title or creates a regime of control that is consistent with the continued enjoyment of native title.”³⁴¹ For extinguishment to occur, a right must be created and exercised that is incompatible with the continued enjoyment of title.³⁴² It is not enough that the sovereign act creates a right the exercise of which merely *could be* incompatible. For example, even if a reservation is made

supra note 287, at 471.

334. *Mabo*, 107 A.L.R. at 34.

335. *Id.* (citing *The Case of Tanistry*, 80 ER 516 (1608); *Witrong and Blany*, 3 Keb 401, 402 (1674)).

336. Usufructuary rights are actually derived from Roman civil law, and may be defined as “a right to use another’s property for a time without damaging or diminishing it. . . .” BLACK’S LAW DICTIONARY, 1543 (7th ed. 1999).

337. See *Admin. of Papua and New Guinea v. Daera Guba*, (1973) 130 C.L.R. 353, at 397; *Amodu Tijani*, 1921(2) AC at 403.

338. As *Mabo* finds, “it is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.” *Mabo*, 107 A.L.R. at 35.

339. Bennett, *supra* note 287, at 470–71.

340. *Te Weehi*, 1986(1) N.Z.L.R. 680, at 691–92. See also *Mabo*, 107 A.L.R. at 45.

341. *Mabo*, 107 A.L.R. at 46.

342. *Id.* On the other hand, courts have accepted the view that aboriginal title may under certain conditions be extinguished by “necessary implication,” the most common situation being where the sovereign grants tenure to a third party, allowing them to use the land in a way that is inconsistent with the exercise of rights implicit in aboriginal title. Bennett, *supra* note 287, at 473.

for a public purpose other than the benefit of indigenous groups, “a right to continued enjoyment of native title may be consistent with the specified purpose . . . and native title will not be extinguished.”³⁴³ Regulations that merely impair aboriginal rights do not extinguish the underlying title, even if there are several kinds of rights that are curtailed or eliminated, so long as those rights are not *essential* to the title.³⁴⁴

An especially important question in Botswana is whether Britain’s 1904 and 1910 acquisitions of Crown lands in demesne extinguished San title claims. Although the 1904 Order acquiring lands from the Ngwato, Bakwena, and Ngwaketsi, in view of the recognition of them as tribes with preexisting control of the land over which they “abandoned all rights and jurisdiction,” may have constituted a cession,³⁴⁵ the more important legislation for the San was the sweeping 1910 Orders in Council. It vested in the South African High Commissioner the remaining territory of Bechuanaland Protectorate, other than the land set aside for tribal reserves and other specific exceptions.³⁴⁶ One might argue that prior to the 1910 Order the San held usufructuary rights over their lands.³⁴⁷ Usufructuary rights presuppose that the Crown holds the radical title, or, in more archaic terms, that it is Paramount Lord. There is nothing to indicate the Crown held radical title before it was found to have complete jurisdiction, however, over lands primarily inhabited by the San. The sovereignty it held was only external, and so, as a matter of international law, Britain would not have held title and, perhaps as a matter of English law as well. To be sure, “[O]nce the Crown has asserted its sovereignty over an area, or engaged in activity tantamount to its assertion, that territory will be treated as British for municipal purposes,” regardless of international criteria.³⁴⁸ What is less clear is why radical title would have preceded the court’s recognition of Britain’s unlimited jurisdiction, which is what the concept of “usufructuary rights” prior to 1910 suggests. One might further question whether the “power and jurisdiction” over all inhabitants by the *Sekgome* court’s interpretation of the Foreign Jurisdiction Act³⁴⁹ encompassed the transfer of such title to the Crown. Bishop points out that one could claim that the British annexation of Crown lands was an act of state, the argument being that “once the British Crown acquired authority over the

343. *Mabo*, 107 A.L.R. at 50.

344. *Ward*, 159 A.L.R. 483.

345. See also Bishop, *supra* note 60, at 106. See generally MCNEIL, *supra* note 109, at 117.

346. Orders in Council (Jan. 10, 1910); see discussion *supra* note 120 and accompanying text.

347. See, e.g., Bishop, *supra* note 60, at 108.

348. McHugh, *supra* note 108, at 85.

349. See *supra* note 133 and accompanying text.

lands of the Protectorate,” . . . “annexation of Bechuanaland Protectorate territory fell squarely within a valid exercise of the British Crown’s royal prerogative and within its unlimited jurisdiction over external affairs.”³⁵⁰ This argument could be correct, insofar as one could claim that the *Sekgome* decision confirmed Britain’s sovereignty over the Protectorate, and accordingly, by an act of state, not capable of challenge by municipal courts, Britain annexed the lands as described in the 1910 Order.³⁵¹

It is necessary to distinguish two New Zealand decisions that at first seem to suggest a different conclusion. One decision is the *Te Teira Paea v. Te Roera Tareha* case before the Privy Council.³⁵² The case emerged in the context of an agreement between the New Zealand government and certain Maori groups which provided that a certain parcel of land, controlled by the government by virtue of an 1867 proclamation issued after the New Zealand Settlement Act of 1863, be allotted to a Maori chief and held in trust by him for specified beneficiaries. Other Maori groups brought a suit, claiming that they were the proper beneficiaries by aboriginal custom and usage that gave them an entitlement overriding the interests of those specified in the agreement. The court addressed the issue of whether customary title had been extinguished, and accordingly turned to the Settlement Act and the subsequent proclamation. The Act:

empowered the Governor in Council to declare any district in which lands of rebellious natives or tribes were situate to be a ‘district’ within the provisions of the Act, and to take out such district lands for settlement and colonization, and these lands were to be Crown lands. Loyal natives having any interest in the lands thus taken were to be compensated . . . [or] trusts might be declared either of the money or of the land given in compensation.³⁵³

Under the Act’s authority, in 1867 the Governor stated by proclamation that certain lands would be a “district” under the Act. The Governor further declared that such lands would be “reserved and taken for the purposes of settlements,” and that “no land of any loyal inhabitant within the said district will be retained by the government, and further, that all rebel inhabitants of the said district who come in within a reasonable time and make submission to the Queen will receive a sufficient quantity of

350. Bishop, *supra* note 60, at 107.

351. See June 1910 Order in Council, *supra* note 120. See also MCNEIL, *supra* note 109, at 162 (“The Crown has prerogative power to acquire new territory by act of state”).

352. *Te Teira Paea v. Te Roeria Tareha*, [1902] AC 56.

353. *Id.* at 61.

land within the district for their maintenance.”³⁵⁴ Reviewing the proclamation, the Privy Council ruled that all of the lands within the district ceased to be “native lands” under the Native Land Act. They also found that all aboriginal titles were extinguished, with such titles in the future depending entirely on government grants.³⁵⁵

A second, more recent case involving the same 1863 Settlements Act also concluded that aboriginal title was extinguished.³⁵⁶ A subsequent Order in Council declared that specific lands henceforth constituted a “district” within the Act, and that “the same are hereby set apart and reserved as sites for settlements and colonization . . . [and] three-fourths in quantity of the said lands shall be set apart for such persons of the tribe Ngaiterangi as shall be determined by the Governor.”³⁵⁷ The Parliament then enacted the Tauranga District Lands Act of 1867, which validated grants and contracts concerning the lands made pursuant to the Order. The Act also declared that the lands specified in the Order were:

duly and effectually declared to be a District within the provisions of [the 1863 Act] and that the whole of the said land was duly and effectually set apart reserved and taken under the said Act as sites for settlements for colonization and was duly and effectually declared to be required for the purposes of the said Act and to be subject to the provisions thereof.³⁵⁸

Under the Maori Affairs Act, the land was vested in trustees in 1972 with the order describing the land as “Maori freehold land.” A certificate of title was issued in 1986 in the name of the current trustees.³⁵⁹ The question then arose whether Maori title survived the legislation and the trust. Unlike the 1865 Order, which “set apart and reserved” the lands, the 1867 Act declared that they were “set apart reserved and taken.” The High Court ruled that the Crown by the latter law annexed the district lands and thereby extinguished customary title.³⁶⁰

The unfavorable dispositions of these cases might seem to make San claims to Crown lands in Botswana inauspicious. Such a view is unwarranted, however, because there are several features of Britain’s

354. *Id.*

355. *Id.* at 61–62.

356. *Faulkner v. Tauranga Dist. Council*, [1996]1 N.Z.L.R. 357.

357. *Id.* at 361 (citing May 18, 1865 Order in Council).

358. *Id.* (referring to Tauranga District Lands Act of 1867).

359. *Id.*

360. *Id.* at 364. There were further considerations as well, relating to the Native Land Court Act of 1894, but such considerations are not of immediate concern here.

acquisition in Botswana that distinguishes it from the New Zealand legislation. Although both decisions found such title to be extinguished, the latter's relevant legislation was significantly more explicit. The Tauranga legislation, for example, expressly stated that the land was "duly and effectually set apart reserved and taken under the said Act as sites for settlements for colonization."³⁶¹ Similarly, the 1863 legislation in the *Te Teira Te Paea* decision empowered the governor "to take out such district lands for settlement and colonization." It further stated that "these lands were to be Crown lands," and that some aboriginal groups would be provided with compensation or made beneficiaries of a trust.³⁶² Such specific, targeted efforts to create new uses of land from extinguished rights have little in common with announcing that vast sweeps of veld, thinly populated and encompassing around 300,000 square kilometers,³⁶³ constitute "Crown lands," without any further uses, plans, or potential beneficiaries divulged. In this regard, one could argue that the 1910 Order, in referring generally to "all other lands situate[d] within the limits of the Bechuanaland Protectorate"³⁶⁴ did not demonstrate a sufficiently "clear and plain intention" to extinguish native title.³⁶⁵

Bishop argues that "aboriginal title . . . survived the change of sovereignty in 1910, albeit in somewhat diminished form."³⁶⁶ Ng'ong'ola, taking a more pessimistic view, asserts that "[l]egal title to [San] lands and territories passed to the Crown" and the San thus became "tenants at will."³⁶⁷ One could persuasively argue, however, that the 1910 legislation did not quash aboriginal title. First, it is reasonable to think that the property rights of the San were presumptively retained, following Lord Sumner's statement in the *Southern Rhodesia* case that "upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them or forbore to diminish or modify them."³⁶⁸ Although this presumption is to be applied

361. *Id.* at 361.

362. *Id.* at 364–65 (quoting *Teira Te Paea*, [1902] AC at 65).

363. This figure can be obtained by multiplying Botswana's current land area (about 582,000 km) by 47%. This roughly equaled the amount of Crown land at independence, which had remained largely unchanged since the early twentieth century. The 47% figure is taken from Ng'ong'ola, *supra* note 141, at 11.

364. *Supra* note 120.

365. See, e.g., *Te Weehi*, 1986(1) N.Z.L.R. at 691–92; *Mabo*, 197 A.L.R. at 45–46.

366. Bishop, *supra* note 60, at 109. In my view, however, the *acquisition* of sovereignty would not by itself have changed San rights on the current aboriginal title doctrine. Rather, it is the 1910 Order vesting Crown lands in the High Commissioner, an *exercise* of sovereignty, that is cause for concern.

367. Ng'ong'ola, *supra* note 141, at 9–10.

368. *Southern Rhodesia*, 1918 AC at 233.

with respect to the acquisition of sovereignty rather than consequent exercise of royal prerogative, it is excessively formalistic to infer that the Crown could extinguish all rights of the San merely by stating generally that all lands within the Protectorate but outside certain specified categories would be Crown lands vested in the High Commissioner.

The *Western Australia* case provides support for this interpretation. The court reviewed the province of Western Australia's claim that aboriginal title had been extinguished during the establishment of the colony. The court assessed the lieutenant governor's proclamation announcing that he had the power "to grant unoccupied lands" in the territory, and also assessed the regulations governing such grants, which allotted land according to the amount invested by the grantee. The court additionally examined the colonial administration's decision to sell all lands not already granted or appropriated for public purposes³⁶⁹ and its decision that land would be granted to purchasers "in free and common Soccage yielding and paying . . . a quit-rent of one pepper-corn by the year."³⁷⁰ The court nonetheless found this evidence insufficient to demonstrate the extinguishment of aboriginal title. A puzzle also emerges from the *Mabo* case. Regarding the theory of royal prerogative by which title supposedly vested in the colonial administration, the court observed that:

the management and control of the waste lands of the Crown were passed by Imperial legislation to the respective Colonial Governments as a transfer of political power or governmental function not as a matter of title The Imperial Parliament retained the sovereign—that is, the ultimate—legislative power over colonial affairs, at least until the adoption of the Statute of Westminster and it is hardly to be supposed that absolute ownership . . . was vested in colonial governments while the ultimate

369. Earlier, instructions had been conveyed to the governor as follows:

And it is Our pleasure that all the waste and uncleared Lands within Our said Territory which shall remain after making such reservations as before mentioned for the public Service shall be granted in our Name and in our behalf to private persons willing to effect settlements thereupon and subject nevertheless to the several rules and conditions hereinafter particularly mentioned.

W. Austl., (1995) 183 C.L.R. at 428 (quoting RUSSELL, A HISTORY OF THE LAW OF WESTERN AUSTRALIA AND ITS DEVELOPMENT FROM 1829 TO 1979, at 348 (1980)).

370. *Id.*

legislative power over that land was retained by the Imperial Parliament.³⁷¹

The court noted that no such problem would arise with radical title. Although the language of the Orders of 1904 and 1910 is difficult to reconcile in this regard (the High Commissioner was vested with the lands and empowered to make grants and leases) it still raises the question of why an absolute, as opposed to radical, title would be vested in the South African High Commissioner when the Imperial Parliament presumably retained ultimate legislative authority. This is particularly noteworthy in view of the absence of a specific acquisition of radical title; that is, if one accepts the view that the Crown acquired absolute ownership through the 1910 Order, one has to explain why there was no antecedent instrument imbuing the Crown with radical title. One can point to *Sekgome*, or to the May 1891 legislation, but this would be implausible as neither had any direct relation to property issues.

Ultimately most pertinent, however, is the *Mabo* case principle that the Crown's appropriations of waste land that are not devoted to inconsistent uses are not incompatible with aboriginal title. Given the specificity of the issue and the distinctions at stake, it is worth quoting *Mabo*'s language on the matter:

Where the Crown has validly and effectively appropriated land to itself *and* the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that *have been validly appropriated for use* (whether by dedication, setting aside, reservation or other valid means) *and used* for roads, railways, post offices and other permanent public works *which preclude* the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g., land set aside as a national park).³⁷²

This framework could be applied to the present situation. The vesting of Crown lands in the High Commissioner represented an appropriation by the Crown of land to itself (or, more accurately, the High Commissioner)

371. *Mabo*, 107 A.L.R. at 38.

372. *Mabo*, 107 A.L.R. at 50 (emphasis added).

but such appropriations by themselves do not extinguish aboriginal title. As the conjunctive statement that begins the excerpt makes clear, some further inconsistency must exist. Indeed, it would be difficult to make sense of the *Wik* case if matters were otherwise because *Wik* found that grants of pastoral leases of Crown lands did not extinguish aboriginal title. Appropriation of the Protectorate Crown lands was not by itself inconsistent with the continuing right to enjoy native title, as should be evident from *Mabo's* explanation of inconsistency, which focuses on inconsistencies of use. The appropriation was not made with an eye toward specific uses for much of the vast ranges of territory encompassed by the 1910 Order. More narrowly, at the time of the issuance of the Order, it was not the case that the lands vested were to be used in ways precluding the continuing concurrent enjoyment of the San.³⁷³ The order did not specifically grant or lease any of the Crown lands, nor was it accompanied by any legislation doing so. It merely empowered the High Commissioner to do so in the future, but such a capacity does not represent in itself an inconsistent use, at least on the *Mabo* framework. Whatever problems exist in this regard emerged in the future. Using *Mabo's* approach, therefore, the mere vesting of the Crown lands in the High Commissioner in 1910, without more, did not negate aboriginal title. Title was neither extinguished nor diminished, though it was put in a more tenuous position.

The next question is how the post-1910 uses of land affected San title. By most accounts, San groups continued to engage in their customary land and resources uses after the 1910 Order, and the Order did not have any immediate or powerful transformative effect. Ng'ong'ola observes that in Crown lands "tribal modes of occupation generally continued without perceptible changes," and that plenty of evidence that San hunting, gathering, and foraging continued in this period, notwithstanding changes that were slowly taking hold.³⁷⁴ The analysis during the period after 1910 but before 1966 would have to be conducted on a case-by-case basis regarding specific territories used by the San and whatever uses were established by the Protectorate administration. But it is likely that in many situations aboriginal title would be preserved, given the continuing practices of San groups during this period. The next major piece of land

373. One might also observe that the British did little to modify land rights in any systematic way subsequent to the Order and prior to independence. The major exception is the Central Kalahari Game Reserve, discussed below. It was not until the 1968 Tribal Land Act that further major changes occurred systematically.

374. See Ng'ong'ola, *supra* note 141.

legislation was the Tribal Land Act of 1968.³⁷⁵ The TLA vested the customary rights of tribal chiefs in the district land boards, but it also created land boards for the districts with large San populations (such as Kgalagadi and Ghanzi). As noted, the Act vested “all rights and title” to the land of each tribal reserve in its corresponding land board “in trust and for the benefit and advantage of the tribesmen of that area . . . ,” language that poses problems for aboriginal title claims regarding lands within tribal reserves. Yet, following the case-by-case, contextual approach of *Mabo*, this language should not be construed as automatically extinguishing title. It is also imperative to note that the TLA and subsequent amendments apply only to tribal lands, not to Crown lands, for example, where many San groups reside. Thus, these land reforms would pose no obstacle to aboriginal title claims regarding Crown lands.

VIII. CONCLUSION

Botswana's government has distinguished itself from those of many other developing countries by its strong record of poverty reduction and economic expansion and its support for liberal democracy. It is all the more disappointing, therefore, that the same government has made so little progress in its relations to indigenous groups and particularly the San. As this article has argued, the reasons for this failure are manifold, and stretch back into the pre-independence era, when other ethnic groups in Botswana were afforded land rights and sovereignty that the San were denied. Until they are properly addressed, the historically-entrenched inequities that exist between the San and Tswana groups are likely to frustrate or even preclude a just resolution of the crisis over the Central Kalahari Game Reserve and other disputes between the San and the government.

375. *Supra* note 208.