

DITSHWANELO – The Botswana Centre for Human Rights

SHADOW REPORT

TO

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DISCRIMINATION**

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A Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination

1. Introduction

Background Information – Botswana

Botswana is a landlocked country situated in Southern Africa. It shares its borders with Namibia, Zambia, Zimbabwe and South Africa. More than half of the country lies within the tropical zone north of the Tropic of Capricorn and it has a land area of approximately 581, 730 square kilometres. The population of Botswana is estimated at 1,700,000.¹ The majority of the population lives along the eastern corridor in some of the largest traditional towns in Southern Africa. The rest of the country is sparsely populated. Botswana has experienced a high degree of urbanization and the urban population accounts for about 25% of the total population. The population contains significant diversity in language and culture, approximately 60% of the people are of Tswana heritage, 3-4% of the population comprises the Basarwa or San peoples, other groups include the Herero, Kalanga, Mbukushu and Yei peoples.²

Botswana gained independence from Britain in 1966, after being a British protectorate from 1885. It has been hailed as a shining example of democracy in Africa and enjoys socio-economic stability. Since independence, Botswana has experienced one of the world's fastest growing economic rates – between 11and 13% annually. Despite the praise it has received, 43.6% of the population lives below the poverty datum line.³ Unemployment figures officially stand at 23.8%, but unofficial estimates place it closer to 40%.⁴ HIV/ AIDS has also seriously affected the population with an infection rate of 38.5% in the adult population (ages 15 – 49 years)⁵, diminishing the average life expectancy in Botswana from 65 in 1988 to a prediction of 34 in 2009.⁶ The richest 10% of the population possess more than half of the country's capital, while the poorest 10% account for less than 1% of the nation's income and consumption.⁷ Clearly, there is a need for more people to be actively engaged in development.

The national language of Botswana is Setswana and is spoken by over 96% of the population. English is the official and business language of the country and about 40% of the population can read and speak English.

¹ Government of Botswana, "Consolidated Report on the International Convention on the Elimination of Racial Discrimination," 2002.

² *Africa- The South, 1st Edition* (Lonely Planet Publications, Hawthorne, 1997) p. 114.

³ Fakuda-Parr, S., 2003, *UNDP Human Development Report 2003*, Oxford University Press, New York.

⁴ CIA World Factbook: Botswana, found at www.cia.gov/publications/factbook/print/bc.html [accessed 28 September 2005].

⁵ UNAIDS see: www.unbotswana.org/bw/un aids.html (28 July 2005).

⁶ UNDP, Human Development Report 2005: The World at a Crossroads .

⁷ UNDP, see statistics on Botswana for 2004 at: hdr.undp.org/statistics/data/cty/cty_f_BWA.html.

Botswana has a republican form of Government headed by a President. The legislature is composed of 57 elected members, and four additional members of parliament are nominated by the President. Parliament acts in consultation with the House of Chiefs, which is comprised of 15 tribal chiefs who play an advisory role to the Parliament.

DITSHWANELO- The Botswana Centre for Human Rights

DITSHWANELO, is located in Gaborone and Kasane, Botswana. The Centre is an advocacy organization that plays a key role in the promotion and protection of human rights in Botswana. The Centre seeks to affirm human dignity and equality irrespective of gender, ethnicity, religion, sexual orientation, social status or political convictions. In pursuit of this mission, DITSHWANELO educates, researches, counsels, and mediates on issues of Human Rights, with specific reference to the marginalized and disempowered. It is the only Human Rights advocacy group that exists within Botswana, does not receive funding from the Government of Botswana and is completely independent of the Government of Botswana.

This report is a follow-up to the report submitted by DITSHWANELO - The Botswana Centre for Human Rights, in August 2002. The August 2002 report concentrated solely on the situation of the Basarwa or San peoples in the Central Kgalagadi Game Reserve in Botswana. However, our report for 2005 shall focus on a broader range of issues related to the guidelines for the CERD report, which shall include an update on the situation of the Basarwa since 2002, the plight of illegal immigrants and refugees, issues relating to access to justice, including the death penalty and the topic of education in Botswana. DITSHWANELO will not be addressing issues relating to ethnicity in any detail in this report, as we note that other partner non-governmental organisations will be doing so.

DITSHWANELO is pleased to see that the Government of Botswana has taken the need to report to CERD seriously in 2005, considering the fact that it had previously failed to dialogue with the Committee for a period of 18 years⁸ and hopes that this will continue to open up discussion on key Human Rights issues.

CERD Concluding Observations 2002

The Committee Report of 2002 highlighted some concerns with respect to the Convention on the Elimination of Racial Discrimination and Botswana. It raised the following concerns:

- a) The Constitution of Botswana did not seem to fully respond to the requirements of the Convention. (See page 6 on Indigenous Peoples and page 9 on The Constitutional (Amendment) Act)

- b) It noted the lack of information presented about ethnic and linguistic composition of the population

⁸CERD/C/61/CO/2, Committee on the Elimination of Racial Discrimination, "Concluding Observations of the Committee on the Elimination of Racial Discrimination" 5-23 August 2002, p.1.

- c) The discriminatory character of the Chieftainship Act and the Tribal Territories Act, which only recognized the Tswana-speaking tribes. In this light it noted that all tribes in Botswana should be ensured equality within the Constitution and the relevant domestic laws should be amended accordingly. (See page 6 on Indigenous Peoples – page 9 The Constitutional (Amendment) Bill)
- d) The treatment of the Basarwa people. (See pages 6 – 11 on Indigenous Peoples)
- e) The significant numbers of individuals living below the poverty line in Botswana (See page 16 on Refugees in poverty, page 18 on the Death Penalty and the link with ethnicity and page 21 on Access to Justice)
- f) Recommended that the State of Botswana must identify the specific needs of persons belonging to the minority and indigenous peoples. (See page 21 – Access to Justice)

2. Indigenous Peoples -- The Case of the Basarwa / San since 2002

a) History

The Basarwa have been known variously as the Bushmen, San, Remote Area Dwellers (RADs) and *Batho ba Tengyanateng*.⁹ The Basarwa¹⁰ have inhabited Southern Africa for at least 40,000 years. The origin of the word Basarwa was explained as being “*ba ba-ba-sa-ruing dikgomo*” (those who not rear cattle¹¹). The Basarwa have reluctantly accepted this name, because the implication of the name is that the norms is to “rear animals” and so people who do not are defined in negative terms.¹²

The Basarwa may be categorized as “indigenous peoples” because they are said to be descendants of the original populations residing in the area now known as Botswana. The traditional Basarwa or San peoples were nomadic hunters and gatherers, who travelled in small family bands. They followed the water, game and edible plants; everything they needed for daily subsistence was carried with them. Water was easily obtained from underground sources. The concept of private ownership of land did not exist in their culture, as it is understood in present day Botswana. Traditionally, every Basarwa group is familiar with the environment in a particular area and re-location to a new area, with a new habitat, can have an acute and adverse effect.¹³

⁹ A report by Alice Mogwe, Commissioned by the Botswana Christian Council (BCC), “Who was (T)Here First?”, December 1991- March 1992, p.2.

¹⁰ The name Basarwa is the officially recognized term, which is a Tswana derivative.

¹¹ This is the translation from Setswana into English.

¹² *Op Cit*, “Who was (T) Here First?”, p. 3.

¹³ *Ibid*, p.6.

The Basarwa argue that historically they preceded the settlement of black people and white people in Botswana. They argue that in 1885, the British Government failed to determine who else occupied the area and thereby entered into an agreement with the Bantu people only. Effectively, this meant that independence was eventually granted to the major Tswana groups in the 1960's. Without the formal acknowledgment of the Basarwa peoples' existence within the Kalahari, there was no opportunity for land use patterns in the Basarwa traditional areas to find "official recognition".¹⁴ When the Kalahari Desert was declared Crown land by the former colonial Government, the Basarwa and other major inhabitants became unlawful occupiers on their traditional lands. The major implication of the declaration was the denial of land entitlements to specific groups and this contributed to the marginalisation still being experienced by the Basarwa today.¹⁵ The creation of "settled communities" in the name of development has placed them in a difficult position. Such policies have continuously encroached upon their way of life and concomitant land use patterns.

b) The case of the CKGR

I. The Negotiation Process

The Negotiating Team, as it was known, was formed from a group of interested parties, including communities residing in the CKGR, the First Peoples of the Kalahari (FPK), the Working Group on Indigenous Minorities in Southern Africa (WIMSA), the KURU Development Trust, the Botswana Council of Churches and DITSHWANELO. It was engaged in negotiations with the Government between 1998 and 2001 and it worked together with the Department for Wildlife and National Parks to develop a 'Management Plan' for the CKGR and Khutse Game Reserves. This plan sought to enable sustainable use of natural resources and wildlife inside the CKGR by the Basarwa communities.

On 31 January 2002, the Government of Botswana ceased the provision of basic and essential services to all Basarwa and Bakgalagadi¹⁶ remaining in the CKGR (Central Kalahari Game Reserve). This decision critically altered the previously stated intention of the Government, which had consistently proclaimed that they would not force people to relocate. Immediately after the Government cancelled the services, officials dismantled the existing service infrastructure, such as water tanks, and dumped the community's water reserves into the ground. Following the decision by the Government to cease the supply of basic and essential services to the CKGR, the Negotiating Team was left with no choice but to take the matter to court for their immediate and necessary resumption.

¹⁴ Alice Mogwe, "Will basic Human Rights and individual freedoms continue to be protected?", in Brothers, S. et al. (eds.) Botswana in the 21st Century, The Botswana Society, pp. 49-67.

¹⁵ Alice Mogwe and Daniel Tevera, "Land Rights of the Basarwa People of Botswana," in Environmental Security in Southern Africa, ed. Tevera D. and Moyo, S. (Southern African Regional Institute for Policy Studies, SAPES Books: Harare, 2000) p.79.

¹⁶ Both Basarwa and Bakgalagadi have lived in the CKGR, although 'Basarwa' tends to be understood to include the Bakgalagadi

Subsequently, the First Peoples of the Kalahari (FPK) made an attempt in 2002 to supply the remaining residents with water, but the Government forbade the organisation from doing so. Officials even went as far as denying access to the reserve to Amogelang Segootsane, a Mokgalagadi man who attempted to bring water to his family after they refused to relocate. However, since July 2002, DITSHWANELO, through consultations with the Government of Botswana, has enabled him to provide water and food to his family members who remain in the CKGR.

II. The Court Case

In April 2002, the High Court ruled against the Basarwa on technical grounds.¹⁷ The Court of Appeal considered the case and ruled it was to be referred back to the High Court as the matter had been brought as an urgent issue. The Court of Appeal directed that both sides identify the issues upon which they both agreed to be placed before the High Court. The case returned to the High Court in 2004 and the trial is still ongoing. The issues under consideration in the present trial are: 1. whether it was lawful for the Government to terminate basic and essential services to the residents; 2. whether the Government has the obligation to restore services to the residents; 3. whether the residents were in possession of their land and were deprived of such possession forcibly, wrongly, and without their consent; and 4. whether the Government's refusal to issue game licenses to the residents and its refusal to allow them to enter the CKGR is unlawful and unconstitutional.

III. Recent developments

In September 2005, following an outbreak of sarcoptic mange amongst some of the domestic stock of the residents, the CKGR residents and their livestock were removed. The Department of Wildlife and National Parks issued a press release on 14 September 2005 with respect to the CKGR as follows:

“In order to prevent further disease transmission between domestic animals and wildlife and contamination of the wildlife gene pool by crossbreeding, those residents in the CKGR have been given notice to remove all their domestic animals from the Reserve in 14 days. All the animals in the Reserve have been imported from Kaudwane, New Xade or Xere settlements. Many of these animals (goats, sheep, horses and donkeys) were either part of the compensation packages for people relocated in 2002 or earlier or have been acquired with money received from compensation for relocating. Any animals remaining after 14 days will be removed or destroyed.”

This announcement, in conjunction with a Government decision that also prevented anyone from taking water to those who remained in the CKGR, would have had a marked impact on the Basarwa in the CKGR as they are forced to rely solely on gathering, due to the ban on hunting in the Reserve in place since January 2002.

¹⁷ Roy Sesana, Keiwa Setlhobogwa and 241 Others v. Attorney General, available at http://san.org.za/wimsa/ar2001_02_p.25.htm .

Without their livestock – which was removed in accordance with the Government decision, and with no right to hunt – the remaining residents of the CKGR are limited to gathering to sustain themselves. Some (approximately 17 people remain at the settlement of Metsiamanong) rely on natural sources of water and others (approximately 10 - 14 at the settlement of Gugamma) who challenged the Government decision of September 2005, are able to provide themselves with water.

Following this legal challenge by Amogelang Segootsane and his wife Gabosediwe Tshotlego, the High Court ruled, pending the outcome of the main court case, that the Government had acted ‘unreasonably and unjustifiably’ by making its September 2005 decision.¹⁷

The High Court ruled that Amogelang and Gabosediwe may:

- i) enter, remain and exit the CKGR
- ii) bring water into the CKGR for their family use; and
- iii) keep their goats inside the CKGR at their settlement (Gugamma)

All of these orders are subject to ‘such limitation as shall be placed on (these rights) ... aimed at the proper management of the Reserve’.

The practical implications of this judgement are limited as although it rules that the September 2005 decision and the removal of animals were ‘unreasonable and unjustifiable’, it also states that the Government may still issue further orders if they are in the interests of good management of the CKGR. This crucial proviso severely weakens the ruling as it effectively means that the Government can again make similar policy decisions, regardless of their impact on the Basarwa, if they are issued for the benefit of the reserve. DITSHWANELO was reliably informed in January 2006, that the decision is to be appealed by the State.

c) Separate, but not equal

Since independence, the Government of Botswana has endeavoured to build a ‘united’ nation based on equality of all citizens. With this aim in mind, it was decided that every Motswana would be considered indigenous and thereby place all ethnic groups and tribes on an equal footing. The Government does not believe in the separate but equal maxim; “separate is not, and can never be considered equal”¹⁸ All tribes were to be treated equally to avoid heightening any differences and thereby hoping to maintain a peaceful society. This is what is referred to as ‘formal equality’, as it is based on seeing everyone in the same form or image. But, treating people equally does not make people equal in terms of results.

¹⁷ Amogelang Segootsane and Gabosediwe Tshotlego and Attorney General in Re: Roy Sesana, keiwa Setlhobogwa and Attorney General Misc No 52 of 2005

¹⁸ Sidney Pilane, Presidential Spokesperson in Dixon, R., “San fighting to keep their Kalahari hunting grounds,” *Sunday Independent*, 16 January 2005, p. 16.

This approach has had some very negative consequences for Botswana. Effectively, it has pushed all non-Tswana groups towards assimilation into the dominant Tswana culture. The national language became Setswana and Tswana customary law was extended to all ethnic groups, in addition the citizens of Botswana as a whole became known as Batswana, regardless of their ethnic background. Many minority groups have felt great pressure to assimilate.

'Substantive equality' is concerned with making sure people are equal in substance. It is based on the idea that perspectives and a history of negative treatment of minority peoples by others, puts them at a distinct disadvantage when placed alongside the majority. Often to eliminate these disadvantages, these groups require special status, different or sometimes preferential treatment. As we can see the Government of Botswana's approach to equality eliminates any discussion based on substantive equality.

d) The Constitutional (Amendment) Act 2005

In 1995, a Member of Parliament tabled a motion to request Government, in order to promote Nation Building, to amend Section 77, 78 and 79 of the Constitution in order to make them tribally neutral. Parliament then established a Presidential Commission of Inquiry, known as the Balopi Commission, to determine whether these articles were indeed discriminatory, and if so, to make recommendations "to seek a construction that would eliminate any interpretation that renders the sections discriminatory; to review and propose the most effective method of selecting Members of the House of Chiefs and to propose and recommend measures to enhance the efficiency and effectiveness of the House of Chiefs".¹⁹

Following the release of the Commission's report, Parliament adopted a motion to amend Sections 77, 78 and 79 of the Constitution in order to render them tribally neutral. On 28 July 2005, Parliament passed the Constitutional (Amendment) Act which attempts to address the language of discrimination without dealing with the underlying politics of discrimination inherent in the legislation.²⁰ While it has been passed by parliament and assented to by the President, it has not yet commenced. A commencement notice is required through a Statutory Instrument. Consequently, it is not clear what the current status is of S.14 (3) (c). While the new Act uses the term 'Ntlo ya Dikgosi'- which is a Setswana translation of 'House of Chiefs'- to avoid all connotations that the term 'Chief' has in English, it is still based on the existing structure of inequality amongst the tribes. The number of seats will be increased from fifteen to thirty-three or thirty-five, the eight *ex-officio* chiefs from the eight Tswana tribes will retain their favoured status, though under territorial, not ethnic titles. Five members will be appointed by the President and will be accountable to him, which is criticized because of the increase in power that it gives to the President and may lead to political appointments. The Chiefs who will fill the other twenty seats will be selected by twenty regional electoral colleges, which supporters hope will be more representative of the minority groups.

¹⁹ Balopi Commission Report, p.9.

²⁰ DITSHWANELO Press Release, "Bill fails to ensure equal recognition and treatment of all ethnic groups," 18 April 2005, available at: www.ditshwanelo.org.

It was aimed at making the Constitution 'tribally neutral'. One of its measures was to remove S. 14 (3)(c). This section of the Constitution was as follows:

S. 14 (3)(c)

i) Imposes a limitation of the freedom of movement of all 'who are not Bushmen' for the 'protection or well being of the Bushmen' and

ii) provides this limitation for 'defined areas of Botswana'. In effect, only residents of the CKGR, eg the Basarwa and Bakgalagadi peoples, are permitted to enter the CKGR without permits. Everyone else must obtain permits prior to entry.

The removal of this section of the Constitution has been condemned by some as politically expedient, given the pending decision of the current court case relating to the Basarwa. The provisions of S. 14 (3)(c), however, did not clearly define the nature of the Bushmen's rights. Did S. 14 (3)(c) seek to protect a right to occupy, or merely a right for the Basarwa to use and enjoy certain areas of Botswana? Until there is clarity about what has been removed, it is difficult to foresee the implications of this removal, or the potential for discrimination. (Please see Appendix for Brief Comment on Constitutional (Amendment) Bill 2004 – DITSHWANELO – The Botswana Centre for Human Rights 20 May 2005)

What is clear, however, is that the Constitution is outdated. It is not possible to say that the Constitution will become 'tribally neutral' by removing the reference to 'Bushman'. It was drafted in 1965 and it reflects a very different era. By believing that this amendment to the Constitution is sufficient, the Government has failed, once again, to appreciate the implications and benefits of a 'rights-based' approach to development. It is clear that a thorough Constitutional review is an appropriate route to follow.

e) Increasing tension

Recent incidents within the CKGR during October 2005 have indicated that the tension between the Basarwa and the Government of Botswana officials is heightening. Accusations of the police carrying out forced removals of the Basarwa from the CKGR at gunpoint have been made. The First People of the Kalahari claim the police were setting fire to their huts.²¹ The Department of Wildlife and National Parks however states a different story. "The residents of Molapo settlement in the CKGR requested that they be transported back to the village where they came from, New Xade. Government facilitated their transport – 34 people in total – to the village on the 7th and 8th of October 2005."²² Government officials have resorted to filming such incidents to avoid accusations and they stated that they have filmed and documented this incident and any accusations of mistreatment are false. Presidential spokesman, Jeff Ramsay, admitted that whilst they deny

²¹ IRIN, "Botswana: Government denies claims of ethnic cleansing," 10 October 2005, found at: www.irin.org.

²² Ibid.

that there is ethnic cleansing taking place in the CKGR, tensions had escalated in recent weeks when a “group of people tried to enter the park and police fired rubber bullets and teargas”.²³

f) Conclusion

Since independence in Botswana, many Basarwa from all over the country have been disempowered. They have faced many challenges to their human rights, including displacement from lands which they had occupied, loss of livelihood, torture, discrimination and a lack of recognition. The hunter-gathering livelihood of the Basarwa is as valid a land use option as any other and it should be recognised as such. Loss of land occupation has led to a loss of culture and a loss of self-worth amongst their communities. Additionally, the Basarwa remain the poorest of the poor in Botswana. Even at a time when the international donor agencies are withdrawing from Botswana, citing it as a middle-income country, there remains hunger and malnutrition in the Basarwa communities of the Western district. The Basarwa should be given the capacity to access resources and development on an equal basis with other Batswana.

In order to achieve this, the Government should continue and extend their policy of Community Based Natural Resource Management, which provides an opportunity for the self-empowerment of the Basarwa. Education should be more culturally sensitive and allow for mother tongue education. The Tribal Land Act, the Chieftainship Act and the Constitution should all be amended to ensure substantive equality for all, in particular the Basarwa.

Amongst other locally based NGO's in Botswana, DITSHWANELO has been calling repeatedly upon the Government to return to constructive negotiations and make every effort to find a sustainable solution to this issue. This was one of the recommendations of DITSHWANELO in its report to CERD in 2002. There are currently (February 2006) encouraging indications that the Government of Botswana appears to be ready to explore the option of a negotiated settlement. However, there is a need for serious commitment from all parties concerned. Engagement with Basarwa communities is essential to ensure that they have a say in their own development processes. According to a rights-based approach to development, all people should be allowed to benefit from economic, social and political development, but such development should not be at the expense of their cultural identity.

3. Illegal Immigrants in Botswana

a) Botswana – a country of immigration

From the early 1980's onwards, the Government of Botswana had maintained an open immigration policy; earning Botswana a reputation as a country of immigration and attracting large numbers of skilled expatriate workers. The hope was that this would help the economy of Botswana by providing investment and skilled labour particularly since the population of Botswana was relatively small. At the same time, the Government

²³ Ibid.

of Botswana invested heavily in the education and training of nationals to improve the skilled labour force. A localisation policy was implemented, whereby Batswana were trained to eventually take over corporate or institutional positions held by non-citizens. This however led to increased competition for the labour force and combined with the high unemployment rates has increased tensions between Batswana and foreigners.

During the 1980s and 1990s the Government of Botswana offered attractive incentives and benefits for foreign workers. Tensions in the employment sector have emerged between citizens and non-citizens as the number of Batswana remaining in the country to work increases at the same time as foreign workers enter the country.

b) Current illegal immigrant issues in Botswana

Authorities have recently moved to amend the Immigration Act of 2003, which will see stiffer fines for illegal immigrants. These fines will range from between P300 (US\$ 60) to P 4000 (US\$ 800). Prison sentences may also be imposed.²⁴ “The original Act was lenient, and was encouraging aliens to overstay in the country,” stated the principal immigration officer, Jimmy Kabelo.²⁵ The Immigration Act is the legal statute, which governs matters of migration to Botswana. It also covers the deportation of unwanted aliens and prohibited immigrants allowing for their detention in prison when necessary.

There has been a call for a review of the immigration policy in Botswana due to the thousands of undocumented immigrants from Zimbabwe. The current political situation in Zimbabwe has created many economic problems for the country itself and the Southern African region as a whole. Many Zimbabweans are finding themselves in extremely desperate financial circumstances. This has resulted in a situation whereby many Zimbabweans flee across the borders to neighbouring countries, seeking to improve their financial situation and to find work.

There has continued to be illegal immigration from Zimbabwe over the past two years. Immigration authorities in Botswana estimated that in 2004 they deported approximately 2,500 Zimbabweans per month who were said to be residing in Botswana illegally.²⁶ Due to the strength of the Pula (Botswana currency) and the reputation for economic growth in Botswana, many perceive Botswana as a place in which they can find the answers to their financial hardship. This tends to be cited as having had a negative impact upon Botswana’s economy, due to the high cost of deportations and the stepping up of police patrols. In November and December 2004, it was estimated that the cost of repatriating illegal immigrants from Zimbabwe cost the Government of Botswana US\$ 33,800.²⁷ In addition, the Government is in the midst of constructing a 500km

²⁴ IRIN, *Botswana: Stepping Up Efforts to Handle Illegal Immigrants*, 26 January 2005, found at: www.irinnews.org.

²⁵ IRIN, *Botswana: Stepping Up Efforts to Handle Illegal Immigrants*, 26 January 2005, found at: www.irinnews.org.

²⁶ IRIN, *Botswana: Stepping Up Efforts to Handle Illegal Immigrants*, 26 January 2005, found at: www.irinnews.org.

²⁷ IRIN, *Botswana: Stepping Up Efforts to Handle Illegal Immigrants*, 26 January 2005, found at: www.irinnews.org.

electric fence to try to prevent the crossing of cattle in order to control foot and mouth disease . However, there is concern that it may also be to control the influx of illegal immigrants between the border of Zimbabwe and Botswana.

c) Anti-Zimbabwean Sentiment

Following the widespread reporting of illegal immigration from Zimbabwe, anti-Zimbabwean sentiments have increased within Botswana. There is a perception that large sums of money are spent on repatriating or keeping Zimbabweans out of the country, when that money could have been spent on Botswana themselves. Many Botswana also believe that the increase in crime is attributable to the presence of Zimbabwean immigrants. In a press statement, the Ministry of Foreign Affairs and International Cooperation stated that it has never blamed all criminal acts on Zimbabweans, but that “it is equally true that a number of Zimbabweans in Botswana have been involved in criminal activities”.²⁸ Backing up this claim are statistics, which indicated in 2002 that there were 26, 214 Zimbabweans involved in criminal activities and as of March 2004 there were 681 Zimbabweans, held in prison.²⁹

However, the Government of Botswana’s increased attention to the situation and the heightened media coverage has contributed to a negative perception of the situation by the general public and a labelling of all Zimbabweans as criminal. This has led to the rise of *ad hoc* justice. In Oodi, a village near Gaborone, many unemployed youths volunteered to form traditional regiments (*mephato*) to patrol the village. Both organised and impromptu vigilante groups have a reputation for meting out ‘street justice’ when apprehending suspected criminals. This group has been accompanied by local police officers to stop villagers from meting out punishment to those they may arrest during the patrols.³⁰ In addition, decisions to expel all Zimbabweans out of villages are not uncommon. They have been ordered out from Oodi, Masunga and Tlokwenj.³¹

On the diplomatic level tensions have risen between the Governments of Zimbabwe and Botswana. Zimbabwe has accused Botswana of colluding with American authorities to overthrow the current government in Zimbabwe. Zimbabwean media reports have been used to demonstrate Botswana’s maltreatment of Zimbabweans within Botswana.

The Botswana Government asserts that Zimbabwean nationals are more than welcome to visit or conduct business in the country, so long as they enter by legal means and through regular border posts. Exemption certificates, which allow foreigners to reside in Botswana for a period longer than 3 months, had been issued

²⁸ Ministry of Foreign Affairs and International Cooperation, Botswana Government Statement on Zimbabwe migration issues, Government of Botswana, 2004, found at: www.sarpn.org.za/documents/d0000794/index.php.

²⁹ Ibid.

³⁰ Tlhobogang, B. , “Zimbabweans ordered out of Oodi,” *the Gazette*, 23 March 2005, p.2.

³¹ Ibid, the decision in Oodi was made at the *Kgotla*.

to 7,411 Zimbabweans in 2003, up by 61% from the previous year.³² Botswana was not prepared for the influx of Zimbabweans fleeing political repression and economic hardship in Zimbabwe since 2000. Botswana immigration policy and its border controls were unsuitable for the number and type of migrants from Zimbabwe. Rather than alter their practices, to adapt positively to policy shortcomings, the Government has imposed tougher, more exclusionary policies to control the situation – such as the imposition of stiffer penalties, detention policies, prison and the construction of an electric border fence.

Police raids on residential areas thought to house Zimbabwean nationals have increased, as have reports of police mistreatment of Zimbabweans. Accusations by Zimbabweans in the media have indicated that arrests often do not occur, but ill treatment (threats, beatings and verbal abuse) does occur. It is said that several Zimbabweans are often detained in police cells, in the prisons and at the Centre for Illegal Immigrants in Francistown. For example, in an alleged recent incident, a group of Zimbabweans were forced at gunpoint to have group sex by a group of soldiers and two special constables who were on overnight patrol. Those accused have since been charged with indecent assault³⁴

d) Conclusion

Adverse media and Government attention on the problems associated with Illegal immigration in Botswana have contributed to widespread hostility towards illegal immigrants, and Zimbabweans in particular. The State CERD Report 2005 submission by Botswana states, at paragraphs 201 to 206, that the Training Centre for the Botswana Police Service has introduced human rights training as part of its curriculum, for both junior and senior officers and that they attend human rights workshops. It is clear, however, that currently a policy of intimidation takes precedence over the policy of arrest, detention and return.

4. Refugees in Botswana

a) Confusing Domestic Refugee Law

The CERD State Party Report 2005 for Botswana gives no reference to any of the anomalies or difficulties currently facing refugees within the country. In reality, there is a clear need for a critical examination and review of the current domestic legislation, which is constituted by different provisions within the Immigration Act and the Refugee (Recognition and Control) Act, as well as Government policy for dealing with refugees and asylum seekers. The result is that the laws and policies of Botswana relating to refugees and asylum seekers are inadequate, outdated, confusing and unwieldy.

³² Ministry of Foreign Affairs and International Cooperation, Botswana Government Statement on Zimbabwe migration issues, Government of Botswana, 2004, found at: www.sarpn.org.za/documents/d0000794/index.php.

³⁴ Daily News, Monday 5 December 2005, page 21

b) The vulnerability of Asylum Seekers in Botswana

Asylum seekers and refugees in Botswana have very little in the way of domestic legal safeguards to uphold many of their basic human rights.

- Despite the fact that Section 6 (b) of the Refugee (Recognition and Control) Act stipulates that anyone seeking refugee status is to have their status determined within 28 days, in practice, asylum seekers are automatically kept in detention at the Centre for Illegal Immigrants in Francistown, about 400 km north of Gaborone for as long as it takes the Government to determine their status. This process can take up to 3 to 4 years in some cases.
- Whilst in detention, they are administered by the Prisons Act and under the general prison code of conduct and discipline contained in the Prison Regulations. For example, asylum seekers are required to wear leg-irons when visiting the hospital outside of the Detention Centre and are detained alongside illegal immigrants.
- No effective provisions have been made for the fast-tracking of vulnerable cases such as those of women and children, unaccompanied minors, the elderly, and high-risk or high-profile asylum seekers.
- If asylum is granted, the officially recognized refugee is moved to the Dukwi refugee camp. If refused however, there is no means of appeal against such a decision by the Refugee Advisory Committee (ie the body constituted to grant or deny refugee status within Botswana). Failed asylum seekers, without the protection that refugee status affords, are then extremely vulnerable. If an asylum seeker is denied refugee status, they (including women and children) are then considered to be an illegal immigrant and they sometimes remain in detention for extensive periods of time whilst they await deportation.
- Despite the fact that children are known to be detained in the Centre at Francistown, there are no schools or recreation facilities whatsoever at the Centre.

c) Botswana in contravention of the UNHCR guidelines on detention

Botswana, as a member of the Executive Committee to UNHCR (EXCOM) should in fact adopt the following EXCOM international recommendations concerning detention. As evident from the examples given above, however, Botswana continues to act in violation of them.

- In view of the hardship involved, detention should normally be avoided;

- Detention is only lawful if it is not arbitrary and it complies with national law, the 1951 Convention and international law;
- Detention must be 'necessary'. It is only considered necessary if it is to:

Verify identity;

Determine the elements on which asylum is based (ie the initial interview only);

Process asylum-seekers who have destroyed travel/identity documents or used fraudulent documents to mislead the authorities in the country of asylum;

Protect national security and public order (with evidence only)

- Detention is not necessary when the asylum-seeker:

Came directly from a country where his/her life or freedom was threatened;

Presents him/herself directly to the authorities; and

Can show good cause for illegal entry and presence.

Detention in the above circumstances, as happens in Botswana, is contrary to the norms of international law. Length detention as a part of regular refugee management, as happens in Botswana, is unacceptable.

- If deemed necessary, detention should only be imposed for a limited period of time;
- Fair and expeditious refugee status determination procedures must be maintained to protect refugees from unjustified and prolonged detention;
- Legal provisions and administrative practice should distinguish refugees and asylum-seekers from other aliens, so for example asylum seekers in detention should not be subject to prison regulations ;
- The detention of children and the primary care-givers of a family must be avoided unless it is the only means of maintaining family unity;
- Children must not be detained in prison like conditions. If children are detained, the detention facility must be suitable for children and they must be given access to education, recreation and play.

The Government of Botswana needs to address the implementation of these recommendations.

d) Refugees in poverty

Poverty is also a key issue for refugees in Botswana. Botswana ratified the 1951 Convention relating to the status of refugees, but with a reservation of article 17 relating to gainful employment. This reservation ensures that refugees are not entitled to, or encouraged into, formal sector employment in Botswana, despite many refugees having the ability and volition to make a valuable contribution to the economy and society as a whole. As a result, when they are employed it is frequently in the informal sector, without any standard legal safeguards and they are then at grave risk of exploitation.

The difficulty of securing work is exacerbated by Botswana laws which require every non-Motswana to have work and residence permits. In order for refugees to obtain work permits, they are required to prove that they have been offered a job. Due to heavy penalties for hiring illegal immigrants, employers with little understanding of refugee policies are reluctant to offer such jobs to refugees, hence refugees find themselves in a 'catch-22' position.

e) HIV/AIDS treatment

Refugees are currently excluded from both the National Anti-Retroviral Therapy programme and the Prevention of Mother-to-Child Transmission of HIV programme in Botswana. This clearly has adverse consequences for the health of refugees. By excluding them from the provision of HIV health care, refugees are discriminated against and they are forced to remain an untreated group within the community. When reviewing the decision not to include refugees in the HIV/AIDS treatment programmes, it should be remembered that this discriminatory policy may ultimately have an adverse effect on the rate of transmission of the disease.

f) Conclusion

There is an urgent need for a review of the refugee legislation in Botswana. It must be made coherent and be brought into line with international laws and guidelines relating to refugees. As the system currently stands in Botswana, asylum seekers face a lengthy status determination process, despite domestic laws that state a 28 day maximum for this procedure. They are held, including women and children, in prison-like conditions whilst in detention, often for an unknown length of time, despite this being in violation of UNHCR guidelines. Refugees are then often able to find work mainly in the informal sector, leaving them vulnerable to acute poverty and exploitation.

5. Prohibited Immigrants

a) The discretionary power of the President

There has been a recent court case in Botswana which has explored whether the Immigration Act in fact violates the Constitution by giving the President discretionary powers to declare a foreigner a prohibited immigrant. Without the need for the President to give reasons for such a decision, the power is open to abuse.

b) The Immigration Act

Prohibited immigrants are defined under section 7 of the Immigration Act as: (a) people who are likely to become a public charge “by reason of infirmity of mind or body” or because of insufficient means of support; (b) people who are “idiot or epileptic”, “insane or mentally deficient”, “deaf and dumb, or deaf and blind, or dumb and blind”; (c) people who are infected by a proscribed disease; (d) people who are or ever have been a prostitute or involved with prostitution; (e) people who have either been sentenced in Botswana or elsewhere for an offence which “if committed in Botswana, would be punishable with imprisonment without the option of a fine,” (f) people considered by the President to be undesirable inhabitants; and (g) the wife and minor children of the prohibited immigrant.

Section 7(f) specifically extends discretionary power to the President to declare any foreign resident or visitor a prohibited immigrant. This a broad power that is ambiguous and often leads to controversial decisions with respect to declaring individuals prohibited immigrants. It specifically states: “any person who, in consequence of information received from any source deemed by the President to be reliable, is declared by the President to be an undesirable inhabitant or visitor to Botswana” can be labelled a prohibited immigrant and given a notice of deportation. No appeal is allowed for people who under Section 7(f) have been declared a prohibited immigrant by the President. His decision is not subject to discussion and the person so declared has no right to have the President’s source of information disclosed in court.

c) The case of Professor Kenneth Good

The case that tested the constitutional validity of these provisions of the Immigration Act came before the High Court and the Court of Appeal and concerned the deportation of Professor Kenneth Good. In February 2005, Professor Good, an Australian citizen and lecturer for seventeen years at the University of Botswana, was declared a prohibited immigrant under section 7(f) of the Immigration Act and served with deportation papers, which called for his immediate removal from Botswana. No official reason was given for his declaration as a prohibited immigrant. However, there has been much speculation in the press and in public that the President’s decision was motivated by Professor Good’s outspoken criticism of the Government of Botswana. In the Mmegi newspaper of 6 January 2006, the President was reported to have said in December 2005, that following Professor Good’s ‘subversive activities’, the Government had decided not to renew Good’s work and resident’s permits.

Professor Good brought his case to the High Court and argued that the deportation order violated his constitutional rights. The judge stated that where there is a conflict between the Constitution and any other

law, the Constitution prevails.³³ Professor Good's case was the first such challenge to a Presidential order related to prohibited immigrant status.

Professor Good's legal team pointed out areas of the Immigration Act that they believed were not in line with the letter and spirit of the Constitution, as these provisions stripped the court of the power to review a presidential decree. The High Court also considered whether for the President not to be required to give reasons for his decision and/or the inability of the prohibited immigrant to appeal his decision violated the Constitution.³⁴

Professor Good's legal team insisted that his deportation had nothing to do with peace, stability or national security; arguing that "if indeed it was felt that he was a threat to national security, he could have been charged under the National Security Act or any other relevant criminal law in Botswana."³⁵ They also made the point that if he were a threat to the nation, then his contract with the University of Botswana would not have been renewed in July 2004, as the President also served as the Chancellor of the University.

The Court of Appeal ruled that the decision did not violate Professor Good's constitutional rights, but in his dissenting opinion, Lord Causfield, encouraged the legislature to review urgently the Immigration Act, to ensure that it is in line with Botswana's obligations under international mechanisms that it has signed. He specifically recommended changes to allow for those declared undesirable inhabitants to know why they have been so declared when there is no threat to the public interest.³⁶

d) Conclusion

The heart of the problem with respect to the above case is the broad power possessed by the President and the lack of accountability and transparency provided to the citizens of Botswana. It is not inconceivable that the President or Government could misuse the Immigration Act in order to control information and censor the freedom of expression of foreigners.

6. The Death Penalty

a) Executions update

³³ DITSHWANELO – the Botswana Centre for Human Rights, Press Statement, "High Court confirms supremacy of Botswana Constitution," 28 February 2005.

³⁴ Section 3 of the Constitution says that "every person in Botswana" is entitled to the protections of the law. The legal team argued that "every person" included non-citizens and that non-citizens could not be deprived of the process of judicial redress outlined in Section 18. Section 18 provides that any person alleging that his or her rights under sections 3 and 16 of the Constitution should have a hearing before the High Court.

³⁵ Staff Reporter, "Good Answers Mogae," *The Botswana Guardian*, 25 March 2005, p. 2.

³⁶ Amato, Rob, "Botswana appeal ruling denies basic legal rights," *the Sunday Independent* (South Africa) 31 July 2005.

The death penalty is still upheld within Botswana. Section 4 of the Constitution of Botswana provides that a sentence of death passed by a court of law is an exception to the protection of life under the Constitution. The death penalty is mandatory for murder, treason and piracy. There are no reported cases of death sentences for piracy or treason. In murder, one has to prove extenuating circumstances so as not to receive the death penalty.

Since Independence in 1966, 37 people have been executed after being convicted of crimes for which the sentence is death. The last executions were of Mr Douglas Simon, Mr Gouwane Tsae and Mr Joseph Mokhobo in September 2003. The largest number of people executed at one time were five, in 1995. Execution is carried out by hanging.

b) The link with ethnicity

There are real concerns relating to poverty, ethnicity and access to justice in Botswana and this becomes particularly acute when discussing the death penalty. The potentially catastrophic consequences of inadequate legal representation when accused of a capital crime are clear. Widespread poverty amongst some ethnic groups, such as the Basarwa, mean that there is little chance of affording a professional and experienced legal representation and it has been seen that the ineffectiveness of counsel appointed by the authorities (pro-deo counsel) can adversely affect the chances of an acquittal. The following case is a vivid illustration of this.

Case Study: Tlhabologang Maauwe and Gwara Motswetla³⁷

Gwara Brown Motswetla (Motswetla) and Tlhabologang Phetolo Maauwe (Maauwe) are two Basarwa/San men from the Central District in north-eastern Botswana. They are cousins who grew up and had been living at the Xaundicha Cattle Post, a three to four hour walk from the village of Manxotai.³⁷ Manxotai, with a population of about 400 people, is located in a rural area in the Tutume sub-district and is surrounded by cattle posts like Xaundicha. The Basarwa of the area are generally poor, have few economic and educational opportunities and hence depend upon employment by wealthier cattle owners and handouts from government assistance programs to survive. Neither Motswetla nor Maauwe went to school and they are both illiterate.

Both men were involved in an incident in 1995 which led to a man's death. They were subsequently charged with murder, convicted and sentenced to death in 1997.

There are a number of alarming features of this case, where their lack of knowledge of Setswana (the national language which is not their own) severely impaired their access to justice. For example, the manner in which the police interrogated Maauwe and Motswetla and the validity of their confessions is a highly contentious issue. Both Maauwe and Motswetla have attested that they were assaulted and severely beaten

³⁷ DITSHWANELO v Attorney General of Botswana MISCRA Case No 2 of 1999

³⁷ *Affidavit of Tlhabologang Maauwe*, DITSHWANELO v. Attorney General of Botswana, MISCRA Case No. 2 of 1999 (4 October 1999).

along with Gwati Monato and were intimidated into cooperating with the police while in their custody.³⁸ They have stated that they did not freely confess or give the police the statements taken down as their confessions. The police deny that the men suffered any physical mistreatment. Maauwe and Sebaka Nyatso were taken to a District Officer at Tutume to place their thumbprints on alleged confession statements taken down in the Kalanga language (one of the so-called minority Bantu languages and also not their own). Police took Motswetla to the District Commissioner in Masunga where he allegedly gave a confession statement. This statement was taken down in Setswana, and Motswetla's thumbprint appears on the document.

Maauwe and Motswetla have attested that they did not understand the documents on which they affixed their thumbprints, nor could they communicate with the District Commissioners when their confession statements were allegedly taken. They have stated that they did not speak and understand iKalanga or Setswana sufficiently to make confession statements.³⁹ According to Maauwe, "I never made the statement which is said to be the confession and I never had the ability to say those things in Setswana or iKalanga."⁴⁰ Both Maauwe and Motswetla have attested that they complied when asked for their thumbprints because they were afraid of the police.⁴¹ Given that the confessions were taken down and supposedly interpreted to Maauwe and Motswetla in iKalanga and Setswana, respectively, and not in their native tongue (Secherechere) their inability to understand and speak these other languages is an essential and disputed issue in the case.

Whilst waiting for their appeal to be heard following their conviction in 1997, Maauwe and Motswetla asked for an appropriate Sesarwa interpreter to be present in court because they had had trouble following the trial proceedings.⁴² Their letter stated, "We are Basarwa and do not understand Setswana well. Therefore we had difficulties in communication at the High Court."⁴³ During the proceedings there had been three-way translation: an interpreter translated between Sesarwa and Setswana, after which the Clerk of Court translated between Setswana and English.⁴⁴ According to Maauwe and Motswetla, the two men and the Sesarwa interpreter had trouble understanding each other as the interpreter spoke a different dialect of Sesarwa, while the Clerk and Sesarwa interpreter also appeared to experience difficulties in communication.⁴⁵ The letter to the Registrar was mailed on 20 June 1997 and the Registrar received it on 27 June. The Registrar, however, neither appointed new lawyers nor put the letter in Maauwe and Motswetla's file for the Court of Appeal to see.

³⁸ *Affidavit of Tlhabologang Maauwe* (28 April 1999); *Affidavit of Gwara Motswetla* (28 April 1999).

³⁹ *Affidavit of Tlhabologang Maauwe* (28 April 1999); *Affidavit of Gwara Motswetla* (28 April 1999).

⁴⁰ *Affidavit of Tlhabologang Maauwe* (28 April 1999).

⁴¹ *Affidavit of Tlhabologang Maauwe* (28 April 1999); *Affidavit of Tlhabologang Maauwe*, (2 August 1999), *supra* note 26; *Affidavit of Gwara Motswetla* (28 April 1999).

⁴² Letter from Tlhabologang Maauwe and Gwara Brown to the Registrar and Master of the High Court of Botswana (20 June 1997).

⁴³ *Id.*

⁴⁴ The official language for proceedings in the received courts is English.

⁴⁵ *Affidavit of Tlhabologang Maauwe* (28 April 1999); *Affidavit of Gwara Motswetla* (28 April 1999), *supra* note 199. There are many different Sesarwa dialects, some of which are unintelligible to speakers of another dialect.

DITSHWANELO intervened in this case in January 1999, when it was disclosed in the media that the two men were about to be executed. We obtained a stay of execution and this stay was confirmed in November 1999 when the Judge presiding over the proceedings declared a mistrial on the grounds that the two men had not received a fair trial. The two men were acquitted and discharged in March 2005 by the High Court, given that there had been an excessive delay in their prosecution, since being re-charged in February 2000⁴⁶. They have been imprisoned for ten (10) years since they were arrested in 1995 and yet the legal system has still not reached a resolution of their case. The Government has now stated that the two men are to be re-tried in July 2006 and DITSHWANELO is in the process of raising funds for their legal representation and rehabilitation after lengthy imprisonment. There are no facilities for rehabilitation in Botswana.

The main argument of DITSHWANELO in the above case was on the arbitrary imposition of the death penalty in that it can be disproportionately imposed on those who are marginalised and/or impoverished in society, on those who do not have access to adequate legal counsel and on those whose ethnicity means they have difficulty communicating in Setswana.

c) Other key concerns relating to the death penalty

I. Secrecy

It is a particularly disturbing feature of the death penalty in Botswana that executions continue to be carried out in secret, without the relatives of those executed being informed of the date and time. Only the accused is entitled to a minimum of 24 hours notice. According to Botswana law, the relatives are not permitted to attend the execution, or visit the burial ground. One such example is the case of Mariette Bosch, who was put to death in March 2001, before even her lawyers had been notified of the date. Three other men who were put to death in September 2003, had not even submitted their applications for a clemency hearing and were still consulting with their lawyers when they were executed.

DITSHWANELO continues to be denied access to condemned prisoners. For example, Mr Lehlohonolo Kobedi in 2003, wrote to DITSHWANELO requesting that we visit him on death row. However, the Commissioner of Prisons refused us permission and he was executed soon thereafter.

II. Delays

There are extensive delays in Botswana between sentencing and the carrying out of the death sentence. Such delays are not only cruel and degrading, but death by hanging is the ultimate form of cruel and inhuman punishment, both of which violate Botswana's various obligations under international human rights law, eg.

⁴⁶ Tihabolong Phetsolo Maaue and Gwara Brown Motswetla v The State, Miscellaneous Criminal Application No F74 of 2004 and http://www.ditshwanelo.org.bw/index/Current_Issues/Death_Penalty/Maaue%20Motswetla%20-%2022%20March%202005.htm

the provisions of the United Nations International Convention against Torture and other Cruel and Inhuman or Degrading Treatment.

III. The poor history of the Clemency Committee

To date, DITSHWANELO has been unable to find any case in which clemency was granted to a prisoner on death row by a President of Botswana. The Clemency Committee advises the President on the provision of clemency, but detailed information of the decision-making process has not been made despite requests to that effect by DITSHWANELO in 1999 and 2003. The lawyers acting for those on death row are not permitted to appear before the Clemency Committee. The condemned prisoner also lacks the right of appearance. The procedure is conducted in secret. Lawyers acting for the accused only learn that their application for clemency has been denied when they hear that their client has been executed. For example, this occurred in the cases of Mariette Bosch (2001) and Lehlohonolo Kobedi (2003). Objections to this procedure have been raised and efforts to engage the executive on the clemency policy have been made, but the Government continues to carry out executions and clemency hearings in secret.

Currently, a condemned prisoner Mr Oteng Modisane Ping is awaiting the outcome of his application for clemency submitted on 2 February 2006. His sentence of death was confirmed on the 26 January 2006.

d) Conclusion

In a modern democracy, there is no place for the death penalty, particularly when it is carried out in such a way as to discriminate against certain ethnic groups, in secret and with no public clemency hearing. Capital punishment in Botswana has the practical effect of being applied in a discriminatory way to the poor and illiterate of Botswana. By retaining the death penalty, Botswana is acting in violation of its international human rights obligations under the United Nations Convention against Torture and other Cruel and Inhuman or Degrading Treatment and is inadvertently rendering those who are poor and often from ethnic minority groups, more likely to be sentenced to death. It is acting in direct contradiction to its development blueprint, Vision 2016, which calls for a compassionate, just and caring nation by the year 2016.

7. Access to Justice

a) The link with poverty

Access to justice is a crucial issue within Botswana. It is important given the high proportion of citizens who live below the poverty line, many of whom are Basarwa and who have limited means of paying for legal representation. Many supporters of the Government expound the apparent democratic structures and entrenched respect for the rule of law in Botswana. A lack of universal and equal access to justice however, severely weakens this claim.

b) Two systems of justice

The court system is not the only path to achieving access to justice in Botswana.⁴⁶ Matters are often dealt with through the family structures, the ward, the *Kgotla* and the court system. Some obstacles faced by those seeking justice in Botswana are as follows:

1. Lack of knowledge about their rights and the law;
2. The financial costs of engaging the formal justice system;
3. The use of alienating, incomprehensible legal language;
4. The physical distance from urban areas where most legal services are located;
5. The delays in the processing of cases;
6. The ineffective regulation of the Pro Deo representatives;
7. The inability of the formal legal system to deal with the questions raised by the life experiences of the poor.
8. The very real effects of culture and gender on the ability of individuals to engage the formal justice system are often under-estimated by the courts.⁴⁷

Within Botswana there are two justice systems that work side by side. There are the Roman-Dutch law and Customary law systems. They are predicated upon the notion that the poor and the powerful have equal access to justice. However, many people cannot afford lawyers' fees and hence seek other forms of justice.⁴⁸ The minimum wage in Botswana for unskilled workers is P432 per month.⁴⁹ Lawyers' fees cost between P250 and P1000 per hour.⁵⁰ The costs are even higher in death penalty cases. The courts and their proceedings also often intimidate the poor person. Additionally, the length of court proceedings is often not conducive to those who need to seek justice.

Most legal services in Botswana are located in urban areas, so people in rural areas have limited access and forced to travel long distances. Within Botswana there is no State Legal Aid system, however *pro deo* counsel may be appointed for capital cases. There are however, many problems associated with the *pro deo* system in Botswana. Those who are accused in cases in which the punishment is death and cannot afford a lawyer are automatically assigned *pro deo* counsel. These lawyers are often under funded, and without sufficient resources. In the case of Tlhabologang Phetsolo Maauwe and Gwara Brown Motswetla of 1999

⁴⁶ DITSHWANELO, "Alternatives to the Pro-Deo System Workshop," 18 November 2004, Gaborone, Botswana, p. 27.

⁴⁷ Ibid, p. 29.

⁴⁸ In 1998, at the request of the Government, the Law Society of Botswana prepared a paper examining the possibility of a legal aid system in Botswana, but government officials reportedly feared that the system would simply enrich lawyers. Since 1998, the HIV/AIDS crisis has become a major focus of Government funding and it is doubtful the Government would be interested in re-examining the issue.

⁴⁹ Figure based on Botswana Department of Labour current hourly minimum wage for unskilled labour and the 45-hour work week .

⁵⁰ 58% to 231% of the monthly minimum wage respectively.

(DITSHWANELO v Attorney General of Botswana MISCRA Case No 2 of 1999) the High Court recognised that the effect of a lack of appropriate legal representation led to the denial of a fair trial.⁵¹ The University of Botswana Legal Clinic, Mabogo Dinku, Emang Basadi and DITSHWANELO are the only providers of free legal advice. These services are often limited due to their financial constraints, and mostly provide legal advice but not legal representation.

c) Conclusion

The Customary Law system is accessible to the majority of the Tswana people whose customary law is officially recognised. This system does not recognise the different cultures that co-exist within Botswana. Therefore, many people may find this system inadequate to address their concerns. The formal legal system is often inaccessible and without a legal aid system in Botswana, there will continue to be inequalities in the ability of people to access justice.

8. Education

a) An overview

Botswana had until December 2005, provided free non-compulsory education, although some expenses were still required to be met – eg. school uniforms, feeding and development fees. Children coming from destitute families were fully catered for by the local authorities under the National Policy for Destitutes. However, in January 2006, school fees were introduced as follows:

- Annual Junior Secondary fees : 300 pula
- Annual Junior Secondary fees : 450 pula
- Annual Tertiary fees: 750 pula

The Government has stated that no child will be excluded from the education system because of an inability to pay school fees, but concerns have been raised that this introduction of school fees seriously risks excluding the poor. We were not convinced that a thorough investigation and analysis of the means of individual parents has been carried out sufficiently to ensure that poor children are not excluded from the education system. Botswana has a reasonably well-developed system of education whereby both girls and boys have equal access to education. The Revised Policy on Education provides for seven years of primary, three years of junior secondary and two years of senior secondary education.

b) Ethnicity and education

⁵¹ DITSHWANELO Press Statement, “Legal Representation is not Accessible to Many Batswana,” 13 December 2002.

Children who are classified as 'remote area dwellers' do not actively participate in education by reason of their remoteness from educational facilities and the resulting high drop-out rate. Furthermore, Basarwa children and children from other ethnic minority groups face discrimination and disadvantage when forced to learn in the new and unfamiliar languages of Setswana and/or English. This lack of cultural sensitivity within Botswana's education policy is leading to cultural erosion and alienation of many ethnic groups and indigenous people in Botswana and needs to be addressed urgently.

c) Conclusion

Various pieces of legislation define a child differently within Botswana. The ages and definitions need to be clarified and standardised. There is also a shortage of human resources and funding for programmes related to children in Botswana. In particular, there is a shortage of nurses, teachers and social workers. The Government has expressed concern about the 'poaching' of Botswana nurses by countries in the North, eg the United Kingdom, resulting in a brain drain.

Further, there is lack of commitment by the Government to fully implement a nationwide strategy of teaching mother tongue languages. All of Botswana's languages should be encouraged and taught in schools in order to fully engage ethnic diversity and avoid the endemic cultural erosion that is taking place.

9. International Legal Commitments

Botswana has committed itself to the following international relevant conventions relevant to the elimination of racial discrimination:

a) ICERD

The Republic of Botswana acceded to the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') on 24 February 1974. ICERD places many obligations upon the signatories including the reaffirmation of the ills of discrimination on the grounds of race, colour or ethnic origin, the commitment to the prohibition and elimination of racial discrimination and the guarantee of equality before the law without distinction as to race, colour, national or ethnic origin.

"Racial discrimination" as defined in ICERD covers a wide range of instances of discrimination, including those against minority or indigenous peoples. Within the framework of ICERD, indigenous groups such as the Basarwa, women and those living in poverty, are entitled to many economic, social, and cultural rights as well as civil and political rights. A rights-based approach would be an alternative worth considering for all of the above mentioned groups within Botswana to ensure their rights under ICERD are being realised. Botswana should also make all efforts to sign and ratify the International Covenant on Economic Social and Cultural Rights (ICESCR).

b) Conventions relating to children

Botswana acceded to the Convention on the Rights of the Child in 1995, with a reservation to Article 1 relating to the definition of a Child. Botswana became party to the African Charter on the Rights and Welfare of the Child in 2001.

c) African Charter on Human and People's Rights

Botswana also acceded to the African Charter on Human and People's Rights in 1986. The provisions emphasize the importance of the right to development, the right to ensure African cultural values, and the right to be respected and treated equally. The Government of Botswana needs to adhere to these provisions with respect to the Basarwa as well as their treatment of minority ethnic groups.

d) The International Labour Organisation

The ILO Convention 169 of 1989 focuses on the Tribal and Indigenous Peoples. The Republic of Botswana is not a signatory to the ILO Convention No. 169. The Government's belief that all people of Botswana are indigenous prevents it from signing this document⁵². However, the Convention is pertinent to the standards applied internationally with respect to tribal and indigenous peoples. In particular, Articles 4-8, 13 and 14 are particularly relevant to the situation of the Basarwa in Botswana. The ILO Convention 169 clearly states that indigenous peoples have the right to be consulted in conjunction with development. It also states that they must be given ownership rights over traditional lands. The Basarwa have never been given ownership rights over their ancestral lands nor have any adequate measures been taken to address these claims.

e) Botswana's reporting record

The Government of Botswana has a poor ratification and reporting record with respect to many international treaties and conventions. There are a number of critical international instruments which Botswana has not ratified, for example the ICESCR. Botswana has a history of failing to file reports in a timely manner or at all, for example, Botswana has not submitted any report to the African Commission on Human and Peoples' Rights (against the African Charter on Human and Peoples' Rights), the Committee Against Torture (against CAT), the Human Rights Committee (against ICCPR). In a public statement, President Mogae, addressed Botswana's failure to fully comply with international Treaty obligations, by stating that the Government of Botswana is "too busy dealing with pressing local matters such as HIV/AIDS."⁵³

⁵² Stated in the opening address of President Festus Mogae of Botswana at the opening of the 5th CIVICUS World Assembly which took place in Gaborone, Botswana at the end of March 2004. The theme was 'Acting Together for a Just World' where over 700 delegates from 105 countries discussed issues of civic, economic, social and political justice which contribute to a divided world, see www.civicus.org.

⁵³ Tuthane, Leshwiti, 13 June 2005, "Mogae defends deportation of Good," *Mmegi*.

10. Recommendations

1) Indigenous Peoples

- It is important to note that there is a strong culture of consultation and discussion within Botswana. However, it would appear that this culture of consultation has not been adhered to with respect to the Basarwa of the CKGR. The need by the residents of the CKGR to seek legal redress from the High Court of Botswana has meant that there has been a great failure on the part of the Government of Botswana to seek a more peaceful resolution to the situation facing the Basarwa. DITSHWANELO has continually called upon the Government of Botswana to re-open negotiations with the CKGR Negotiation Team, with the aim of creating a situation which is less adversarial in nature than litigation. The Government should also engage regularly in constructive dialogue with its citizens on issues of national concern. DITSHWANELO is aware that there have been recent indications that the Government is seriously considering a negotiated approach to resolving the situation.
- CERD should continue to request that the Government of Botswana reports regularly to the Committee on the progress of the situation with the Basarwa.
- The Government of Botswana should commit itself to a thorough, consultative, constitutional review process, aimed at ensuring constitutional equality for all.
- Research and data collection on the ethnic composition of Botswana must be undertaken and the concept of substantive equality needs to be addressed.

2) Illegal Immigrants

- The Government of Botswana should ensure that it does not employ tactics of intimidation with respect to Zimbabwean immigrants. Police officials must be appropriately educated on the matter.
- The Government of Botswana should be an active participant in the resolution of the current crisis within Zimbabwe. Acute hardship in Zimbabwe is giving rise to an influx of Zimbabweans into Botswana and the Botswana Government should be using its influence to help resolve the political and economic causes for this immigration.

3) Refugees

- There should be a comprehensive review of outdated, unwieldy refugee legislation in Botswana to incorporate all its international obligations relating to refugees into domestic law.
- A review of the policies of the Refugee Advisory Committee should take place to ensure that the 28 day legal time limit for status determination in the Refugee (Recognition and Control) Act is adhered to.
- No women or children asylum seekers should be kept in detention in prison-like conditions in Botswana.
- The Government should implement the UNHCR Executive Committee's international recommendations relating to detention of asylum seekers
- Botswana should withdraw its reservation within the 1951 Convention relating to the employment of refugees. They should be encouraged into formal sector employment so that they are afforded the protection that such employment offers.
- The National Anti-Retroviral Therapy programme and the Prevention of Mother to Child Transmission of HIV programme should be extended to refugees.

4) Prohibited Immigrants

- The broad power of the President to declare an individual a prohibited immigrant, without any requirement to give reasons can lead to an infringement of internationally recognised human rights and should be critically examined as part of the Constitutional review process and related legislation.

5) The Death Penalty

- DITSHWANELO is committed to the abolition of the death penalty in Botswana. In a liberal democracy, such as Botswana, the death penalty is neither reasonable nor justifiable. There is no evidence that the death penalty is an effective deterrent to crime. In addition it is in contravention with international human rights standards, the right to life as is stated in the Constitution of Botswana, and the United Nations Convention Against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment which Botswana ratified in 2000. The death penalty should be abolished in Botswana.

- Furthermore, the link between pronounced poverty amongst certain ethnic groups and the resulting limited access to adequate legal advice in capital cases, has clear repercussions in terms of ethnic discrimination in Botswana.

6) Access to Justice

- The Government should provide sufficient funding and other resources for legal services for disadvantaged groups.
- The laws and legal procedures should be simplified to enable Botswana to understand and engage in the legal system.
- The law should be translated into all of Botswana's languages to ensure accessibility. There is a need for judicial reform to ensure the courts take realistic consideration of the effect of the court environment on disadvantaged groups. No basis of equality can be attained in Botswana if access to justice is denied in reality.

7) Education

- Equal and culturally sensitive access to education must be provided to all children in Botswana. The current ethnic discrimination endemic within the education system and the lack of ethnic languages being taught, must be addressed.
- More funding must be made available to programmes that address vulnerable children's needs. Orphan care centres must be adequately equipped.
- Professionals that deal with the special needs of children must be provided for in all parts of the country.

10. General Recommendations

We urge that the Government of Botswana invites the UN to send the following Special Rapporteurs to visit Botswana, in order that they make their own recommendations:-

- The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples;
- The UN Independent Expert on Minority Issues;
- The UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance;
- The UN Special Rapporteur on Prisons and Conditions of Detention in Africa;

- The UN Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa.

DITSHWANELO – The Botswana Centre for Human Rights

Gaborone, 13 February 2006

For all DITSHWANELO publications and press statements please refer to www.ditshwanelo.org.bw

APPENDIX

Brief comment on Constitutional (Amendment) Bill 2004 – DITSHWANELO – The Botswana Centre for Human Rights 20 May 2005

The Bill aims to make the Constitution ‘tribally neutral’. In doing so, it includes the removal of s14 (3) (c) from the Constitution of Botswana. There are other amendments in the Bill, however unlike s 14 (3) (c), they are based on recommendations from The Balopi Commission. There has been a more general press statement issued by DITSHWANELO on the Bill itself.⁵⁴ (Please see www.ditshwanelo.org.bw).

S 14 (3) (c):

- i) Imposes a limitation on the freedom of movement of all ‘who are not Bushmen’ for the ‘protection or well-being of Bushmen’ and
- ii) recognises ‘defined areas of Botswana’ to which the restrictions apply. Note that the ‘areas’ are not specified, however, entry into the CKGR is restricted in that those not resident in the CKGR require permits to enter the park, as opposed to those who are resident, who do not. Those who have been resident (and continue to be) are Basarwa/San and Bakgalagadi peoples.⁵⁵

On 23 January 2003, the grounds of the application were commonly agreed upon by both parties to the CKGR case.⁵⁶ These were that the court determines:

1. Whether it was unlawful for the Government of Botswana to terminate basic and essential services to the residents of the CKGR in January 2002
2. Whether the Government has an obligation to restore services to the residents

⁵⁴ Dated 18 April 2005 ‘Bill fails to ensure equal recognition and treatment of all ethnic groups’.

⁵⁵ A question currently before the courts is whether the effective forced relocation of those residents who eventually moved after 31 January 2002 was lawful. If it is deemed unlawful, those seeking to return to the CKGR will be able to exercise their freedom of movement without restriction. This will be in accordance with s14 (3) (c). If the section is removed before such a decision, the court may be asked to deal with the effects of such a removal which will have taken place during the case and before the decision concerning this question. For more information about the issue see DITSHWANELO Press Statements relating to Indigenous Peoples at www.ditshwanelo.org.bw

⁵⁶ See DITSHWANELO Press Statement 23 January 2003 at www.ditshwanelo.org.bw

3. Whether the residents were in possession of their land and were deprived of such possession forcibly, wrongly and without their consent and
4. Whether the Government's refusal to issue game licences to the residents and to allow them to enter the CKGR is unlawful and unconstitutional.

On 4 May 2005, the grounds for the application were summarised during the hearing by Justice Phumaphi⁵⁷ as being to determine:

1. Whether residents had been forced out of the CKGR
2. Whether termination of services to them by government was unconstitutional and
3. If they had been deprived of land they had lawfully occupied

Our observations are as follows:

1. s 14 (3) (c) does not clearly define the nature of 'right' which is protected on behalf of 'Bushmen'. It could be a right to occupation or usufructuary rights to use and enjoyment. In accordance with the laws of Botswana, State land cannot be owned⁵⁸ by individuals or legal entities. It can only be leased. There is no evidence (of which DITSHWANELO is aware) which suggests that the residents had leasehold rights in the CKGR.
2. s 14 (3) (c) states clearly that the intention of the restriction is for the 'protection or well-being' of Bushmen'. Protection from what and well-being in relation to what? The parameters of protection or well-being are not specified or implied.

However, George Silberbauer who was the first witness of the applicants and who drafted the documents which eventually led to the creation of the CKGR in 1961, testified to the fact that there had been encroachment by non-'Bushmen' into areas where the 'Bushment' had hitherto been living. Inevitably competition for flora and fauna threatened the well-being of the 'Bushmen'. There was also the matter of the settled white farmers who complained about the proximity of the 'Bushmen' to their farms.

3. Applicants have argued that they were 'in possession of their land' and Phumaphi J. spoke of 'lawful occupation'. There can be a difference between ownership and 'lawful occupation'. However, there is sufficient room for a blurring of interpretation and 'land ownership' could be inferred, though it is not necessarily implied. It is also not clear whether the Court will argue that occupation since 1961 has bestowed on the residents, a

⁵⁷ Mmegi 4 May 2005, p2

⁵⁸ The CKGR was Crown Land when it was created in 1961 and at independence from Great Britain in 1966, it became State Land.

right akin to ownership. Nevertheless, whether or not the paraphrasing by Phumaphi J. is accurate, the difference between the two kinds of rights would still remain an issue. Restrictions for the ‘protection of residents’, does not necessarily mean ‘protection of the right of ownership of the land’.

4. Prior to July 2004 when the hearing commenced, there had been an attempt by the applicants to broaden the grounds to include land rights, but this was not successful.
5. DITSHWANELO’s statement on the Bill identifies our central concern as being that Botswana has an outdated constitution. The constitution was drafted in 1965 and is reflective of its time and the history of the Bechuanaland Protectorate, with a focus on civil and political rights. That the Government assumes that the removal of s 14 (3) (c) which refers specifically to ‘Bushmen’ will achieve ‘tribal neutrality’ is reflective of a systematic failure of the Government to appreciate the implications of a rights-based approach to development. This approach is reflected too in other law reform measures effected in the country. For example, in 1998, the Penal Code was amended and made ‘gender neutral’ by criminalising lesbianism, which had hitherto not been criminalised. Until then only homosexuality had been an offence.

In our statement, we call for a comprehensive constitutional review process which will bring into being a constitution which is rights-based and which will incorporate civil, political, economic, social and cultural rights.⁵⁹ It is precisely because ‘third generation’ rights are absent, that equality is equated with sameness and equality in diversity is not recognised, respected or appreciated. Consequently, the concept of non-discrimination does not play as significant role as it should as it is not a salient feature in the protection system

6. The inclusion of s 14 (3) (c), which was not in the Balopi Commission Report⁶⁰, does give cause for concern. However, the proposed change may well proceed more from the notions of the kind of equality inherent in the current monocultural development paradigm than a specific focus on the CKGR case. This is further suggested by the failure of the Government to effect changes to legislation directed by the High Court in the case of the Wayei peoples. The court ruled that The Chieftainship Act was discriminatory and unconstitutional and ordered the government to amend it. This has not been done to date.

In conclusion:

1. s 14 (3) (c) provides the residents of the CKGR (Basarwa/San and Bakgalagadi) with a non-specific protection. Whether this is per se protected by a legally enforceable right, is not clear.

⁵⁹ Botswana has not committed herself to the Covenant on Economic, Social and Cultural rights, but has so that on civil and political rights.

⁶⁰ See DITSHWANELO Press Statement for more on the Balopi Commission recommendations.

2. The intention of the Bill and its removal of s 14 (3) (c) is to render the section ‘tribally neutral’. Superficially this is achieved by the removal of reference to a specific ethnic group which has the non-defined protection and possible kind of right. However, without clarity about what is being removed and the implications of such removal, the consequence may or may not be discriminatory

DITSHWANELO therefore recommends that CERD requests the following from the Government of Botswana:

- i) What was the reason for the creation of the CKGR?
- ii) What was meant by ‘protection’ and by ‘well-being’ in s 14 (3) (c) of the Constitution of Botswana?
- iii) Which rights exist (and what is their nature) which would be violated in the event of the violation of the restriction on the freedom of movement in s14(3) (c)?
- iv) Which remedies exist, if any, for the protection of the ‘rights’, if any?
- v) In the event of responses to these question comprising the process of the current court process, CERD could recommend that the removal of s 14 (3) (c) be suspended pending responses to the questions posed in order to ensure that the value of non-discrimination inherent in the ICERD to which Botswana has committed itself, is not compromised by such removal.
- vi) That it consider a comprehensive constitutional review process to ensure that non-discrimination forms an essential aspect for the protection of all peoples in Botswana.