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Dispossession in the Age of Humanity: Human Rights, Citizenship, and Indigeneity in the Central Kalahari.

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***Abstract:** Over the past fifty years, the Central Kalahari region of Botswana became a site of struggles over land and resources rights, identity, citizenship, and indigeneity. The policies of the government of Botswana towards the San express the dominant Tswana perspectives on humanity and what is considered human. Since independence in 1966 the goals of the government of Botswana have been to sedentarise the San and to transform them into 'modern' citizens who live in villages, keep livestock, and engage in agriculture and business. In this paper I analyse the case of the people of the Central Kalahari Game Reserve and their battles over rights and recognition as citizens of Botswana and as human beings. I examine how the government's decisions to deny Central Kalahari residents their distinct rights to natural resources such as wildlife – in spite of High Court decisions in the San's favour – as well as rights to services and development shared by other citizens - are linked to the dominant Tswana understanding of humanity.*

Keywords: Humanity, Indigeneity, Botswana, San, Human Rights

Introduction

During the past fifty years, the Central Kalahari region of Botswana and its peoples have been a locus of protracted and at times desperate and dramatic struggles over land and resource rights, identity, indigeneity, and citizenship. In the process, different perspectives on humanity, human rights, and equality emerged, both in the discussions about the Central Kalahari and its peoples and in the debates over Botswana government policies, programmes, and forms of governance.

Botswana states that it has the best coverage in Africa of what it describes as its ‘social safety nets’ (Seleka et al. 2007). One of the guiding principles in many policies and in the *Botswana Development Strategy Vision 2016* (Republic of Botswana 2011, 47) is the idea of a ‘compassionate and caring nation’ which is geared toward protecting people from hunger, thirst, and disease through the use of *botho*, a term which may be glossed as humanitarianism. *Botho* appeared in the *Vision 2016* as one of the essential ‘national principles’ that have historically guided the national development policy. Gulbrandsen (2012, 196) aptly expresses the self-image of Botswana state when he affirmed, ‘The state with all its welfare programmes, has always presented itself as benevolent, in close agreement with the Tswana virtues of the ruler as *motswanadintle*, meaning the one from whom good things are coming.’

According to Livingston (2008, 294), *botho* implies recognition that being human involves engaging in actions, words, and feelings that have effects on others, and that being human therefore entails responsibilities. State governance should therefore be characterized by responsibility for citizens. The government believes not only in the rights of its citizens, but also in the responsibilities of the state.

The government’s approach was recently reflected in Botswana’s intervention in the thirteenth annual meeting of the UN Permanent Forum on Indigenous Issues in May 2014, which stressed Botswana’s commitment to ‘fundamental freedoms and basic human rights’ inspired by ‘common beliefs based on the respect of the human person’ (Republic of Botswana 2014, 2). As an articulation of a democratic government’s liberal values, this was a standard intervention, fully in keeping with the diplomatic practice of UN member states. However, in the contrast between the government’s UN statement and its policies in practice, a different vision emerges.

In cases such as the Central Kalahari Game Reserve (CKGR), which I consider in this paper, state-sponsored removals from areas where people lived for generations were justified on the grounds of nature conservation and equal access to the services of the state, accompanied by efforts to incorporate marginalized citizens into settlements (Sapignoli 2012). Against the background of these removals, the government emphasised its goals of compliance with basic human rights, and of furthering development in ways that took into consideration the dignity of the human person. At the same time, however, in response to the absence of government services inside the Reserve, the San and Bakgalagadi people of the Central Kalahari pointed

to the threats to their way of life and to the constant pressures to leave the Reserve that accompanied their daily lives, framing these conditions as violations of their human rights.

The CKGR case generated more concern among activists and sympathizers than other cases of forced resettlement in Botswana because it happened more recently, in the era of indigenous peoples' rights. This is the period in which humanity's law (Teitel 2012) has been connected to indigenous peoples' rights and claims of recognition. The removal of people from the Reserve thus exemplifies a wider struggle over the place of distinct peoples, above all indigenous peoples, in new and emerging standards of human rights and new approaches to collective rights being taken in institutions of global governance. This concern with collective forms of belonging in international law includes a particular understanding of humanity. As Comaroff and Comaroff (2009, 34) suggest, 'We have entered an age in which humanity knows itself by virtue of its rights'. They are referring to an age that has faith in the law, evident in the proliferation of human rights advocacy and law-oriented non-government organizations.

This is also true for the San people and other minorities in Botswana and the various non-government organizations working with them. Over the last twenty years human rights advocacy in connection with indigenous rights discourses has expanded significantly in Botswana, and nowadays there are numerous organizations and minority groups that claim indigenous rights in line with the international and regional understanding of indigeneity (African Commission on Human and Peoples Rights [ACHPR] 2005, 2006; Anaya 2009). Comprising some forty to fifty minority groups in Botswana, the San have received a substantial amount of attention from researchers, NGOs, and the general public (Barnard 2007). The San were able to bring their claims to global attention by attending international meetings, lobbying national and international NGOs, and using social media (Saugestad 2011; Sapignoli 2012). Much of this attention derives from the fact that the San have been a receptacle of western imaginaries of anti-modernity and otherness, as peoples who, in the words of Mathias Guenther (1980), made a transition 'From Brutal Savages to Harmless Peoples'. Their popular appeal has also followed from their status as collective rights claimants. The structural position of marginalization and discrimination that the San have experienced through time, combined with a history of land dispossession, removal and other threats to a hunting and gathering way of life, are some of the reasons why they are recognized by regional and international institutions under the juridical category of 'indigenous peoples' (ACHPR 2008; Anaya 2010).

This article assesses how the struggle for recognition of land rights and the cultural identity of indigenous peoples focused in the Central Kalahari region reflects notions of equal citizenship and speaks to the emergence of the concept of humanity. It considers how in Botswana official rules, state ideas, and discourses promising welfare, sustainability, progress, the rule of law, justice, and equality have played out in practice in the case of minority groups. In particular, I consider San and Bakgalagadi efforts to return to their ancestral lands in *Tc'amnqoo*, the Central Kalahari Game Reserve region, of Botswana, after they won a court case against the government of Botswana in 2006 (CCJ 2006) and again in 2011 (CAJ 2011) (Ng'on'gola 2007; Solway 2009; Saugestad 2011; Sapignoli 2012). These cases become a focal point of conflict over different understandings of human worth, dignity, and equality. I show that what occurred in the case of the Central Kalahari Game Reserve was the juridicalisation (Comaroff 2006) of peoples' struggles, opening further questions on

the San's humanity, including their relationship with human rights, citizenship, and indigeneity.

Botswana and its Humanities

The San in Botswana have been often characterized by the dominant Tswana people as part of the 'bush', in other words, part of nature; the 'inhuman others' that provide a counterpoint in the understanding of Tswana humanity. Schapera (1970, 83) notes that when they moved into what is now the Kalahari and adjacent areas, the various Tswana groups took possession of and portioned out parts of the tribal territories and their aboriginal inhabitants. The aboriginal groups were designated as *balata* (serfs) or *batlhanka* and were required to provide labour and goods in the form of tribute, *lekgetho* (tax) to the Tswana *modisa walefatshe* (overseers or keepers of the land). The San, as *balata* (serfs), were excluded from land allotments; they did not have wards under their own headmen, they did not have representation in the *kgotla* (the tribal council place), and they effectively had no political voice or any rights because they were not recognized as member of a *morafe* (Tswana tribe) (Miers and Crowder 1988, 195; Datta and Murray, 1989, 59-60). The lack of recognition of San humanity was well expressed in the 1920s in the words of Simon Ratshosa, an influential Mongwato member of the Ngwato tribe, the largest in Botswana, who stated:

[[‘The Masarwa are slaves. They can be killed. It is no crime, they are like cattle. They have no liberty. If they run away their masters can bring them back and do what they like in the way of punishment. They are never paid. If the Masarwa live in the veld, and I want any to work for me, I go out and take any I want.’]] (Simon Ratshosa, quoted in Miers and Crowder 1988, 172).

Ratshosa's comments were disseminated widely in the South African and British press. At a trial that took place in 1926, Ratshosa said that slavery was rampant in the Ngwato Reserve and that *malata* were treated very poorly. The British government, concerned about its reputation given the passage of the Slavery Convention, called for an investigation of hereditary service in the Protectorate (Miers and Crowder 1988, 182-183). The High Commissioner, then the Lord of Athlone, came to Serowe, the Ngwato capital, and read a declaration which stated that ‘The Government will not allow any tribe to demand compulsory service from another’ (Hermans 1977, 63). Subsequently, in 1927, the Imperial Secretary stated that ‘government realizes that the Masarwa are not slaves, but are a backward people who service more advanced Bechuana tribes in return for food and shelter they receive’ (Botswana National Archives [BNA] files S.47/3 and S.6/1).

Toward the end of the 19th century small-scale reforms were made in this system by Tswana chiefs, in some cases with the pressure of missionaries (Parsons 1973). By and large, however, both the Tswana and the British turned a blind eye to the issue of the inhumane treatment of the San and other minorities (Miers and Crowder 1988; Murray and Datta 1989). At the same time, San, Bakgalagadi, and other rural minorities and poor people were dispossessed as a result of colonial and post-colonial government policies involving the

establishment of Crown Land (land set aside for the British Crown in 1885), freehold land for individuals and companies, the setting aside of land for protected areas, and the reform of the basis of land tenure in the tribal areas in the 1975-1985 period (Hitchcock 1978; Peters 1994; Gulbrandsen 2012).

At the end of the British Protectorate period (1895-1966) and the time of its independence on September 30th, 1966, the Republic of Botswana was concerned with overcoming the abuses of the colonial past through enhancing rural development and promoting economic opportunities for its citizens. The newly independent state presented itself as ethnically neutral in order to claim its legitimacy (Wily 1979; Saugestad 2001; George Silberbauer, personal communication, 2011). Taylor (2003, 270) underlined a deliberate blurring of the distinction between being a citizen of Botswana (Motswana) and being ethnically a member of the dominant Tswana tribes (also labelled Motswana). Hence, dominant discourses tend to conflate these two meanings of the root *tswana*, so that if you are a Motswana (citizen) you should embody Tswana values, engage in pastoralism, and speak the Setswana language.

Throughout the post-independence period, the San continued to occupy the margins of social, political and economic borders within Botswana society, not quite within the state and its standards of civilization, but not entirely excluded from it either. Settlement programmes were initiated that were aimed at promoting sedentarisation, agriculture and pastoralism among minority populations (Hitchcock 1978; Silberbauer 1981, 1-16).

The Botswana government adopted the terms ‘Masarwa’ and ‘Basarwa’ to refer to the people with whom Setswana speaking groups came in contact when they occupied the interior of southern Africa. As Mogwe (1992, 2) notes these people ‘have been variously known as Bushmen, San, Remote Area Dwellers or RADs, *Batho ba tengyanateng*, and Basarwa’. Mogwe (1992, 3) goes on to point out that there has been strong opposition to the term *ba tengyanateng* since its English translation is ‘those-who-are-deep-inside-deep’. People in the remote areas of Botswana frequently express their distaste for most of these terms, and say that they want to be called by their own group names.

Today there are no state institutions in Botswana dealing directly with the San or other minority groups (Sapignoli and Hitchcock 2013a,b). The government instead has programmes aimed at broader category of *Remote Area Dwellers* (RADs), recently renamed Remote Area Communities (RACs) (Ministry of Local Government, 2009). The Remote Area Development Programme (RADP) was set up originally as a Bushmen Development Programme, but in 1978 the government opted to make it ‘ethnically neutral’ (Saugestad 2001). The Remote Area Development Programme shifted its priorities away from an approach emphasizing participation and poverty reduction toward a more decidedly settlement and assimilationist approach. The aims of this national project were self-sufficiency (self-reliance- *Boipelego*) and poverty alleviation through sedentarisation, villagisation, modernisation and assimilation of the remote communities (mainly San) in the ‘mainstream of the Tswana society’. Little effort was made to set aside large tracts of land to meet their needs (Wily 1979; Sapignoli and Hitchcock 2013a). Development, in this sense, was seen as a modernisation strategy geared toward the ‘Tswanisation’ of the San, doing

away with hunting and gathering, which was seen as ‘backward and primitive’ and having people live settled lives, keep livestock, and raise crops, ‘like any other Batswana’.

The period from 1978 through the early 1990s saw the establishment of over sixty Remote Area Dweller Settlements, with social and physical infrastructure including boreholes, schools, health posts, meeting places (*kgotla*), and housing for government workers such as teachers, nurses, and tribal police. Donors provided support for these settlements, especially the Norwegian Agency for International Development (NORAD) (Saugestad 2001).

From the outset, there were a number of problems with these settlements, including lack of sufficient land to allow for hunting and gathering to occur, relatively few employment and income generating opportunities, and the presence of dominant outsiders, many of them non-San people, who took over the water, grazing, and arable land of the settlements. In some cases, people living in the settlements were supplied with food and other goods, especially if they were considered destitute, or people without visible means of support (Hitchcock 2002; BIDPA 2003; Seleka *et al* 2007). The government’s programmes had the result of encouraging dependency on the state, and the tendency to withhold support if communities were not following governmental dictates.

To accomplish mass relocations and sedentarisation, the government used a carrot and stick approach, attracting people to settlements but then failing to provide the full array of services and support systems that were promised (Hitchcock, Sapignoli, and Babchuk 2011). From the perspective of people in the Remote Area Settlements, according to program evaluations of the RADP (BIDPA 2003) and researchers working in these areas, the variable kinds of support provided and the lack of consistency in government policy left people feeling as though they were not being treated like other citizens of the country (Kann, Hitchcock, and Mbere 1990; Nthomang 2004).

In the last twenty years San representatives and NGOs have openly criticized the Botswana government’s approach to development and welfare towards minorities in different venues, and they have called on the government to adopt an indigenous-rights-based approach to development that takes into consideration indigenous peoples’ rights and needs. For its part, the government of Botswana continues to maintain that *all* citizens of the country are indigenous (Saugestad 2001, Republic of Botswana 2014a) and that ‘special rights’ should not be granted to any groups.

The Relocation

The government’s management of the Central Kalahari Game Reserve shows how the principle of *botho* (humanitarianism) that guides Botswana policies and approaches to development, equality, and citizenship is contradictory and often suspended when it applies

inside the Reserve. At least since 2002, people have consistently been denied access to social services, extension assistance, and the commodities and medicines that are provided to people in other places in the country under the government's social, health, and livelihood support programmes. This situation reinforces the concerns of people in the Central Kalahari that they are not being treated in the same way as other people in the country, or even simply as human beings. It therefore raises serious issues surrounding the ways in which indigenous peoples in Botswana experience citizenship and what it means to be a person.

One of the original motives behind the creation of the Central Kalahari Game Reserve was the remediation of a situation of inequality, resulting from the fact that most of the San land at the time was occupied by farmers (Silberbauer 2012). The CKGR was proclaimed in 1961 under the *Fauna Conservation Proclamation* (1961) on the recommendation of an anthropologist, George Silberbauer, a colonial officer for what was then the government of the Bechuanaland Protectorate (1885-1966) (Silberbauer 1981:1-31). The reserve was established as a means of: (1) Securing and protecting the livelihoods and lifestyles of the San and other peoples (Bakgalagadi) who lived in it, and (2) As a way to conserve the fauna, flora, and habitats of the region.

The Reserve (see Figure 1), as a protected area under Botswana land policy is registered as State Land, so in the opinion of the government, none of the people living there had ownership rights.

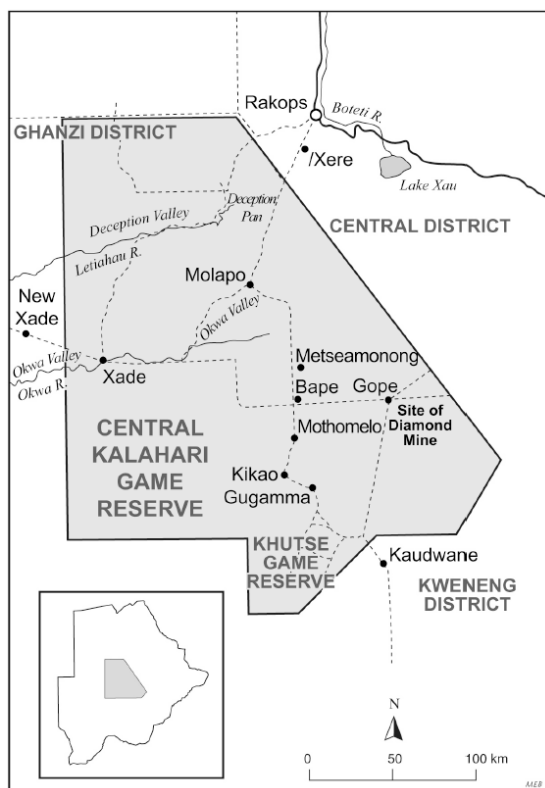


Figure 1: Central Kalahari Game Reserve (CKGR)

From the 1970s through the 1980s Botswana, as an aspiring ‘welfare state’, introduced in the Reserve its national policy on development, the Remote Area Development Programme (Hitchcock 2002; Saugestad 2001). Several types of infrastructure were built in the area of Xade (in the western part of the Reserve) that made visible the presence of the state: a borehole was drilled, government buildings were erected, such as a school, a clinic, houses for government workers, and a *kgotla* for public discussion. A headman position was created, either elected by the communities or sometimes appointed by the Ministry of Local Government, with the aim of representing the people in the Reserve before the state, to address people with public announcements, and handle disputes.

During these years the presence of government officers increased. These officers consisted primarily of scouts, social workers, community development personnel, and agricultural officers from the District Councils, who sometimes visited the people in the Reserve to provide services such as food rations, health care, water, transportation to school for children, and training. The officers were acting in the name of *botho*, of a ‘benevolent’ state that takes care of its citizens and brings social justice. It is important to underline that these services were not constantly provided, and that in practice, this developmental approach increased the dependency of the San and Bakgalagadi on government handouts, and accelerated their sedentarisation around Xade, the largest community in the Reserve.

In the 1970s and 1980s these officials were the only continuous state presence in the Reserve, yet they were quite autonomous from the central government, which did not have particular interests in the area, leaving room for manoeuvre in officials’ daily practices and applications of law. This situation lasted for about ten years, until the central government began putting pressure on the Department of Wildlife to be more proactive in arresting people for illegal hunting.

In the early 1980s the emphasis in government discourses regarding the Central Kalahari moved from people to nature. In government talks and papers, nature was represented as a separate world, independent from and other to the world of ‘culture’ and ‘civilization’. For many indigenous groups, though, nature is itself ‘socialised’; indeed, it is a fundamental part of their identity and society (Descola and Palsson 1996). In 1986 the Government of Botswana, under the Office of the President, opted to make the CKGR a ‘people-free zone’. This meant that people would not be able to live there, and that flora and fauna should be conserved, in part to promote tourism (Ministry of Commerce and Industry 1986). Some ecologists working in the Kalahari had suggested that the San and Bakgalagadi were no longer ‘traditional’, since they ‘lived in stationary villages, kept domestic stock, and hunted with the aid of guns, horses, donkeys, and dogs’, thereby having a negative impact on the wildlife in the Reserve (Owens and Owens 1981, 28-31). Conservationists and the government identified the residents of the Reserve as the sources of environmental degradation, and as threats to the future of humanity and to the future of the nation (interviews of government officials, 2006, 2011, 2012). The state’s ideas about modernisation and environmental conservation meant that the inhabitants of the Reserve were trapped in impossible situations in which their fate depended upon them being either too human or not human enough. They had lost their ‘authenticity’ by adopting a so-called ‘modern’ livelihood and lifestyle, and appeared too human to be in the Reserve.

Through time the Office of the President maintained that the rationale behind the relocation was to administer the inhabitants in a way consistent with the rest of the nation. It was noted that if local people were relocated to other areas, it would be easier to deal with them administratively (High Court, Botswana, 2006 personal notes). For the government the relocation was necessary for the creation of the citizen/human, whilst for the San and Bakgalagadi the relocation was a process of dehumanization and the extinguishment of their citizenship and basic human rights.

In the period from 1986 to 1997, efforts were made by government ministers and district councils to convince people to leave their places inside the Reserve. *Kgotla* meetings were held in the CKGR; the first occurred in May 1988 when two Botswana government ministers met with residents of Xade (Hitchcock 2002). These *kgotla* meetings were mainly used to present the decision of the government that people should relocate, something that most people did not agree to do. Various kinds of pressures were brought to bear on people to encourage them to move out of the Central Kalahari. Eventually, the government decided to remove the people of the large settlement at Xade and relocate them at a new resettlement site known as New Xade outside of the western boundaries of the Reserve.

It is important to stress that the Botswana state is not a coherent and monolithic entity and that there were different positions on the relocation and the treatment of the San and Bakgalagadi in the country. In particular, opinions differed between people at the central government offices in Gaborone and people working at the district levels in places such as Ghanzi. In the run-up to the removals of people from the Central Kalahari, both the Ghanzi District Council and the Kweneng District Council, as well as the regional offices of the Department of Wildlife and National Parks, attempted to support the people in the Central Kalahari and tried to resist the top-down initiatives to remove people from the Reserve and establish new settlements. Their efforts were to no avail. In 2002 the government decided to stop all the services that had been provided to the communities until then. Social workers entered the CKGR in several large trucks; they shut down the only functioning borehole at Mothomelo (eastern CKGR), destroyed water tanks in the communities, and began moving the remaining people and their possessions out of the Reserve (Workman 2009, 1-2) to three established settlements, Xere (on the eastern border), Kaudwane (on the southern border) and New Xade. With the destruction of wells and boreholes, raising domestic livestock (goats, sheep, donkeys, and horses) was impossible, adding to the pressures on residents to relocate. More direct means were also used to force relocation: domestic livestock were loaded on trucks or ended up scattering into the bush, and people's homes were burned. One displaced individual recalled,

[[‘During the relocation people were just thrown in the trucks, the one used to transport cattle, we were mixed up with goats, animals and poles of woods. We were treated not as people’]] (interview translated from G//ana 2011).

The people of the Reserve experienced the relocation in different ways (Kiema 2010), and did not express that experience with a perfectly unified voice. However, the vast majority of

the relocatees' experience contrasted with the government's presentation of the removal. The Minister of Local Government stated:

[[‘May I add here once more that the Government has the interests of Basarwa at heart ... We as governments simply believe that it is totally unfair to leave a portion of our citizen undeveloped under the pretext that we are allowing them to practice their culture. I would therefore urge you, in communicating with the rest of the Negotiating Team, to appreciate the fact that all we want *to do is treat Basarwa as human not game*, and enable them to partake of the development cake of the country’]] (My emphasis. CCJ 2006, Bundle 1A 104 (Exp32)- Letter from Minister Margaret Nasha to Ditshwanelo, dated 7th January 2002).

The reasons given by the government of Botswana for moving the San and Bakgalagadi people out of the Reserve are various and have changed through time, but they cluster around two main goals: first, to develop the people of the CKGR along the lines of other citizens of the country; and second, to promote conservation of the environment and wildlife and the development of tourism, which were in the national interest (Republic of Botswana 2004). The government's positions on the relocation have been challenged by some NGOs, including London-based Survival International, and the San organization, First People of the Kalahari, as well as some academics (see Good 2009a; Solway 2009). They have argued that the CKGR residents were relocated primarily because the government wanted to exploit diamonds in the reserve. The government explicitly argued that mining was not the reason for the relocations; but it is important to note that in the Reserve today there is a diamond mine at Gope (Ghagoo) in the southeast of the reserve, a planned copper-silver mine in the northwest close to the Tsau Entrance Gate, and several mining prospects pending elsewhere. In 2013, controversy arose over whether or not the Botswana government had in fact granted licenses to companies seeking gas reserves to engage in hydraulic fracturing (fracking) in the CKGR and other protected areas in the country. The government claimed that there were no licenses issued for the Central Kalahari, but in 2014 had to retract its statements, saying that fracking was indeed on going in the Central Kalahari. In November of the same year the UN Special Rapporteur for Cultural Rights, Farida Shaheed, in her preliminary report after her visit to Botswana, stated: ‘insisting that people relocate outside the Reserve for wildlife conservation purposes is at odds with allowing the continuation of mining and tourism activities’¹.

In the course of these controversies over mining, government officials, acting in the name of the state, continued to present the removal of the San and Bakgalagadi in line with the idea of the ‘care-giver state’: people should leave the wild space of the Reserve to become fully human/citizens; and at the same time the Reserve should be preserved in the interest of the nation, its citizen, and of the entire humanity. The new resettlement villages were presented to visiting delegates from the EU, Britain, and the USA as a model of development for a progressive nation and a benevolent state.

Juridicalisation of the Struggle

The CKGR people expressed their concern about being relocated in public forums at the district, national, and international levels (Hitchcock 2002, Sapignoli 2012). They mapped their territories using GPS and GIS, and they developed their own Community Based Natural Resources Management Program in an effort to obtain the rights to resources in their areas.

Some of the relocated people went back into the Reserve even when not allowed to do so, carried out demonstrations (as occurred, for example, in September, 2005), tried to negotiate with the government (largely unsuccessfully), and sought support of local and international NGOs. In 2002, when all attempts to seek a negotiated solution failed, some of the removed inhabitants of the Reserve decided to file a legal case (originally 243 applicants) in the High Court of the country (CC 2006), which lasted from July 2004 to December 2006 (Solway 2009, 2011; Sapignoli 2012).² Not everybody who was relocated was part of the applicant group that went to court; hence this juridification of the struggle created a community of applicants with rights distinct from those who did not participate in the legal cases.

In the courtroom there were two main narratives. The first was the government's paternalistic narrative of equality, citizenship, and development, that was already present through the year of the removal activities, and that expressed the intention to integrate the San and Bakgalagadi into 'the rest of the modern nation'. The government's justification to suspend the services was their 'astronomic cost', and its position was that the services were not terminated; 'they were just moved' (High Court Botswana 2006, personal notes). This narrative was based on the position that human settlements cannot exist in a game reserve—the place for wildlife—and relocation was presented as an act of government responsibility towards its citizen, a necessity for the inhabitant's integration in the human world. The respondent's lawyer, Sidley Pilane in his final submission to the court argued:

[[‘The Applicants ask the Court if human settlements are “incompatible with the objects of a game Reserve? Then what?” The answer is simple: the whole system collapses. Not only in the sense of the CKGR system but in the sense of the system which supports the running of the nation ... If everyone can have everything they want, wherever they want, whenever they want, under whatever circumstances prevail- there will not be enough for anyone. If Government can ignore policy, laws and land use for one community then it must for all communities. Then what was once structure and function in governance, becomes chaos and deprivation for a nation’]] (CC 2006, 296 in paragraph 355)

The respondents' lawyers invoked the issue of distinct rights versus the equal rights of citizens, claiming that was the duty of the government to protect the CKGR for the present and future generations, claiming that if the right to live in the Reserve was extended to other people in the nation the flora and fauna of the Kalahari would be completely destroyed. There were attempts to discredit the applicants' claims of their different identity from the country's other inhabitants using the position that the Bushmen were 'no longer authentic' because they were not hunting and gathering full-time, as they had in the past, and were involved in agriculture, livestock production, and migrant labour. The applicants were represented as the 'poor part' of the Botswana society and not indigenous peoples with 'special rights' from the rest of the nation (High Court of Botswana 2006, personal notes). This was a humanity characterized by poverty and the absence of civilization.

One of the questions that arose in court was whether or not the removals of people from the central Kalahari were constitutional. The CKGR is the only place referred to specifically in the Botswana Constitution (art, 14,c) where the 'Bushman' are mentioned as having certain rights, and this was an element of debate because the act of the government was not just

against international public opinion and law, but also against its own Constitution (Ng'ong'ola 2004, 63, 2007). This led to the debate about who were the 'Bushmen' and whether both the San and Bakgalagadi could be included in this category (Sapignoli 2009, 2012).

The second narrative, from the plaintiffs, addressed the question of their identity as indigenous peoples. They presented a story of cultural survival through time, similar to other indigenous peoples in the Commonwealth. It was a story based on the right of people to choose their own way of life based primarily on hunting and gathering, and of land ownership based on continuity and aboriginality to the area. Gordon Bennett, the plaintiffs' lawyer, started the final pleading in September 2006, emphasizing, as a fundamental issue, the 'right to choose' one's way of life. Then his arguments revolved around the 'doctrine of continuity': the applicants' 'continuing connection' to place with their land, and in time, between their past and present way of life, and their choice and ability to maintain a different culture as indigenous peoples. Bennett argued that both the San and Bakgalagadi were indigenous to the CKGR, and that there was no need to make an ethnic distinction because both are 'Bushmen people'. In addition, he underlined that the suspension of services (particularly water and food rations) in 2002 and the suspension of delivery of Special Game Licenses (necessary for collecting food) were actions clearly intended to force the San and Bakgalagadi to leave the Reserve (High Court of Botswana 2006, personal notes). The plaintiffs had to produce evidence that, even if they have been forcibly disposed of their land, they were able to survive such dispossession, and that they still had links to that land and used it in a 'traditional way'. Bennett was talking about equality in diversity and about Bushman having native title over the land. This was a humanity characterized by cultural difference and human sustainability with nature.

On December 13th 2006 the verdict of three High Court judges decreed: a) the Reserve belonged to its former residents and they had the right of return; b) The government was not obliged to provide services (including water or other services that were available before the relocation) to the applicants (because in the Constitution these rights are not recognized), and finally c) The Government should restore the Special Game Licenses (SGLs) and provide people in the reserve with these licenses (CCJ 2006, 121-122).

The verdict touched upon two key issues that related to the status of the inhabitants of the Reserve as citizens and as humans. The first had to do with the scope of their distinct status as indigenous peoples. Two of the judges, Judge Unity Dow and Judge Mpamphi Phumaphi, recognized them as indigenous.³ Justice Dow wrote, 'I take the position that the fact the applicants belong to a class of peoples that have now come to be recognized as "indigenous peoples" is of relevance' (CCJ 2006, 201). Judge Phumaphi underlined the fact that neither the British nor the Botswana state had extinguished the applicants' rights as indigenous peoples of the land that became the CKGR: 'The Bushmen are indigenous to the CKGR which means that they were in the CKGR prior to it becoming Crown Land, thereafter a game Reserve and then state land upon Botswana attaining independence.' (CCJ 2006, 327-328). The CKGR decision did not give to residents of the game reserve legal (*de jure*) tenure rights over the land but rather the right to occupy the areas where their traditional territories were.

The second issue arising in the verdict relating to the status of the applicants as citizens and humans had to do with their subsistence and the government's responsibility to provide these

peoples with equal access to the services of the state. Two judges concluded that the termination of services in the Central Kalahari was not unlawful and that people had been consulted sufficiently prior to the termination of those services. Chief Justice Dibotelo justified his decision to deny the government's duty to provide services to the applicants, referring to witnesses who, during the hearing, had indicated their intention to live in the Reserve even without services. Striking a note of difference with this view, Judge Dow (CCJ 2006, 157-158) emphasised that the services that the government was providing before the relocation were now 'essential for the applicants livelihood', because their mobility and diet has changed over the years.

Despite the verdict representing a breach of the Tswana assimilationist policy and support for the San and Bakgalagadi groups' identification as 'indigenous people within the CKGR', the government has avoided implementing the High Court decisions. Furthermore, the right of the Bushmen to return to their 'ancestral land' became contingent on their retaking possession of a lifestyle that does not need 'modern' government services (such as water, medicine, schools, transport) but only the rights to practice hunting and gathering in a traditional manner. The applicants were thus trapped by an essentialised image of hunters and gatherers. The verdict did not recognize the state's duty to provide services to its citizens in the reserve, but only their right to subsistence hunting. In accordance with the 2006 judgment, the government decided not to restore the services that were provided before the relocation (water, health and educational services, pensions, destitute food rations, training); nor was the movement back to the Reserve facilitated by the government in any way. Even though the right to hunting permits (SGLs) was spelled out in the judgment, this requires official administration, with permits granted to individuals by the Minister of Environment, Wildlife and Tourism. Since 2006 the residents of the Reserve have submitted, without success, around 190 applications for Special Game Licences to the Department of Wildlife and National Park in the Ministry of Environment, Wildlife, and Tourism.

Soon after the verdict, in January 2007, some of the applicants in the case and their families started to go back to their places in the Reserve. Most had to walk back to what remained of their old villages. Some of them used horses and donkeys while a fortunate few travelled in four-wheel-drive vehicles. Since then, the residents have been facing many difficulties, ranging from lack of water and other services, hunting arrests, entry permits, and periodic problems with the Department of Wildlife and National Parks (DWNP) and the Botswana police, trouble that follows from the uncertainty over whether they could legally stay in the Reserve given the way that the negotiations over their return were going, and what they were being told by government ministers on visits to the Reserve (Sapignoli 2012).

Insecurities

Some of the biggest challenges facing some of the San and Bakgalagadi in the Central Kalahari and surrounding areas included questions about the duties of the government and the rights and responsibilities they have, including provision of water, medicines, and social infrastructure (Mphinyane 2002; Nthomang 2004).

Since 2002, there were no boreholes where residents or visitors (other than tourists, government officials, and mining company personnel) could get water. The only boreholes present were for wildlife. The government's attempts to stop people from bringing water into

the Reserve and the state's failure to support their efforts to establish boreholes led two residents from Mothomelo to file another legal case, in June 2010, in the High Court, Lobatse (CC 2010). In the founding affidavit the first applicant declared: 'I am advised that the refusal of access to the Borehole amounts to inhuman and degrading treatment in violation of section 7 of the Constitution' (CCFA 2007, paragraphs 44). In July 2010 the applicants lost their case (CCJ 2010). The case went to Appeal, and was eventually successful on January 2011 (CCAJ 2011; Sarkin and Cook 2010-2011). Five Court of Appeal judges argued that since the applicants were found in 'lawful occupation' of the CKGR and since they have the right of 'continuing occupation of the Reserve', as established in the 2006 verdict, they had the right to drill their boreholes for domestic purposes (CCAJ 2011). The government's refusal to allow the applicants to have a borehole was characterized as a 'degrading treatment of the appellants' (CCAJ 2011, 24). Notwithstanding this, water as a human right was not recognized *per se*; the government was not obliged to provide water to the people of the Central Kalahari. Rather, access to water has depended on the work of NGOs or individuals who raised money to establish water points. Today only one community, Mothomelo, has had a successful borehole drilled with the assistance of local and international non-government organizations, paid for by international funds, while the other communities remain without local water supplies.

After these court cases and with the new presidency of Lt. General Seretse Khama Ian Khama, the government has become increasingly intolerant of anything related to the Central Kalahari and the San in general, shifting its image from a developmental and welfare state to that of a 'liberal authoritarian' (Good 2009b) and hard-core conservationist state. Government representatives have pointedly rejected much of the criticism over their handling of the Central Kalahari situation voiced by some international organizations (see Solway 2009, Saugestad 2011), UN and ACHPR experts (e.g. Anaya 2010, ACHPR 2008).

Given this background, it should come as no surprise that the first High Court verdict has not been implemented. While the people of the Central Kalahari won the right to return to the Reserve, state agents at the gates have stopped people from entering without a special entrance permit. The uncertainty over entrance permits has been an on-going issue with the people of the Central Kalahari, many of whom felt that they were not free to leave the Reserve if they so choose, for fear of not being allowed to return and that their horses, goats, and donkeys could be confiscated once they are at the gates. This set of issues are huge impediments to the viability of the CKGR communities and they (mainly access rights and small livestock keeping) became the basis for a third CKGR legal case, filed in early 2013, which a High Court judge dismissed in September 2013.

It should be stressed that the relationships with family and community members who live in the relocation settlements outside the Reserve, where people engage in exchanges and social networking, are crucial to maintain social relationships and to fortify people's 'safety nets' system. The residents in the Reserve share and exchange meat, skins, and wild fruits, with some sugar, tea, cooking oil, and maize meal -- goods that are part of the destitute food that some residents receive in the settlements of New Xade, Kaudwane or Xere. People also move between places outside and inside the Reserve to collect pensions, destitute food rations, and to go to clinics. Members of the families who remained in the resettlement villages take often

care of the fields and animals, some of which were part of the resettlement compensation (Hitchcock, Sapignoli, and Babchuk 2011).

Since 2002 there have been no government or District Council officers operating inside of Reserve delivering services or assistance, with the exception of school-age children being picked up and driven to school outside the Reserve. The only state officers coming in the Reserve on a regular basis have been game scouts and members of a specialized military police group (the Special Support Group, the SSG). The SSG, described by some analysts (e.g. Mwakikagile 2010, 12) as ‘notorious’ for their actions, patrols the villages in the CKGR in search of ‘poachers’, camping outside the gates of the Reserve where they constantly stop its residents in search of ‘illegal’ meat, weapons, or ostrich eggshells.

The situation got worse when in January 2014 a country-wide Botswana hunting ban went into effect (Republic of Botswana 2014b). In practice this ban applies to all categories of hunters, citizens and non-citizens, SGL hunters (subsistence hunters) included. A woman in Metseamonong, commenting on the arrest of her relatives while hunting, once asked me ‘Have you ever seen somebody living without eating? Why is it that we are not treated as human beings? How we can survive without food and water?’.

Many San and Bakgalagadi claim to live in a status of fear and uncertainty about the future: uncertainty whether they will be relocated again, beaten, or killed. A man in Molapo (east CKGR), speaking about the SSG, said:

[[‘Why, do they see us as enemy? ... Why the military has to be here? We are scared, we live in a status of fear. Our children and wives are very worried that something can happen. They are worried to go out for collecting food. And we are worried too. This is our land.]] (translated from G//ana, November 2012).

With the restrictions on resource use and mobility, food security in the Reserve has become a constant problem. Despite the non-implementation of the 2006 ruling the people of the CKGR are persisting in their use of the court. In August 2014 five residents filed another case in the High Court over their hunting rights. This case had not been decided by the High Court as of 2 January 2015.

According to Cernea (2005, 48) resource access restrictions, and in this case also living in a condition of fear, could ‘end up being virtually the same as if they were physically forcibly displaced’. Even though it repeatedly lost in court and despite strong international attention on cases of government-sponsored forced resettlement, the government of Botswana has not stopped its practice of moving or relocating peoples from the places where they live. Between 2010 and 2013, at least sixteen different communities, most of them with majority San populations, were told that they have to resettle. The government has said in some cases that these lands will be granted to private investors (interviews with government civil servants October, 2012).

In the Central Kalahari today there is a general distrust toward the state, toward any non-San NGOs involved, and toward the fairness of any negotiation process. The situation became worse after two Ministers visited the Reserve in February 2011 and talked about a possible ‘third relocation’, citing the area’s status of ‘game Reserve’. The position of the government

continues to be that no permanent structures or any kind of development should be present in the CKGR because it is a natural park. However, it is interesting to note that, in spite of these restrictions, there are permanent infrastructures that embody state interests, such as roads, camping sites for tourists and wildlife scouts; elegant tourist lodges, boreholes for wildlife, a working diamond mine, and some camps for police and game scouts. At the same time, the government considers the continual refusal of the San and Bakgalagadi to relocate and use what is offered in the new established settlements to be irresponsible and undignified.

Conclusion

In his inauguration speech given on the 1st of April 2008, the fourth president of Botswana, Lt General Seretse Khama Ian Khama, stressed the importance of dignity, emphasizing *botho* as a central value for the state and the people. As President Khama noted:

[[‘No one should need to live an undignified life as a result of poor shelter or health and abuse in a domestic environment... Living in dignity must go hand in hand with being treated with dignity. In this regard I call upon all of us, politicians, the public service, and the private sector, to ensure that our interaction with the public must at all times be underpinned by dignity. *Botho* is an integral part of our culture’.⁴]]

Despite such proclamations, the borders of the Central Kalahari Game Reserve today divide those who have certain rights and those who lack them. Government officials often treat the San and the Bakgalagadi who live inside the Reserve as part of nature, as less than human; Botswana’s politics of ‘inclusion’ and ‘equality’ has in fact resulted in the exclusion and dispossession of minority groups. The Botswana government’s decisions not to allow central Kalahari residents rights to natural resources such as water and wildlife – in spite of High Court decisions – and also rights to services and development according with the guiding principle of *botho*—as other citizens have—are linked to the government’s understanding of humanity and rights. The concept of humanity carries different political connotations (Feldman and Ticktin 2010). In Botswana, the ways that the government conceptualized CKGR inhabitants’ humanity was in terms of those qualities seen to be lacking in them, above all their need of development. In the path towards citizenship and humanity, the residents of ‘remote communities’ were to be guided to modernization.

For a country that stresses proudly the equal treatment of all its citizens and touts its social welfare and health programmes aimed at reaching the poorest of its citizens, the condition of the Central Kalahari inhabitants epitomizes the contradiction between the rhetoric of state policies and their actual impacts. Governance through a discourse of development and care creates new techniques of domination, supported by the justification of protecting and empowering that part of its citizenry that is the most vulnerable. Through time the government of Botswana has always maintained the position that ‘all Batswana are indigenous’ to the country, with a strong emphasis on the state’s anti-tribal and nonracist politicizes, in which indigeneity is related to common citizenship—including the citizenship of all white citizens. This rejection of tribalism is aimed at underscoring the view that all

people are being treated in the same way. The question that follows is this: sameness to what and to whom? As we have seen, this sameness or equality based on a common humanity paradoxically privileges Tswana values and practices in a liberal state.

The government's principles of the equal rights of all citizens and a development programme that avoids differences based on ethnic distinctions clashes with the minorities' perception of being treated as second-class citizens or, in the case of the CKGR, not as citizens at all. In the case of the San and Bakgalagadi, the goals of citizenship were expressed in attachment to their territories and ways of life within the CKGR, goals that ran squarely against the government's plans for the Reserve—to preserve nature for the benefit of the national community—and its corresponding delimitation of citizenship. The Reserve was quite literally a no-man's land in which support for human collective life was largely precluded as an obligation of the government.

The CKGR case, in which the judiciary ruled twice in an independent way from the executive, revealed some limitations of the legal strategy pursued by the applicants (Solway 2011, 229-30). These limitations are evident in the facts that the Attorney General interpreted the judgment in a very rigid manner, that the government has not implemented the 2006 verdict, and that as a consequence the CKGR's people depend economically on local and international NGOs and donors to access water in their villages. But there can be no doubt that these cases have important implications at various levels. Regionally and internationally they are precedent-setting cases that have implications for the rights of indigenous peoples not just in Africa but also throughout the world. Nationally these cases showed that the actions of the government towards the San and Bakgalagadi were wrong and unlawful. These cases brought more awareness of the rights of the people of the Central Kalahari and reinforced the impression that using a legal strategy can have positive outcomes. The Court's decision took into consideration Botswana as well as International and Common laws that positioned the applicants as part of a humanity that transcended citizenship and appealed to human and indigenous rights laws. At the same time it reinstated the applicants' 'right to have rights' (Arendt 1973, 293-94), as those who, as citizens, can bring their own government to court and refer to state laws to have their rights recognized.

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¹ See OHCHR website

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15345&LangID=E#sthash.C0ZzP4i1.dpuf> (accessed Dec. 2014)

² It should be noted that there were tensions among the various parties during the court case, in part because of decisions on the part of some Botswana NGOs to ally themselves with an international human rights advocacy organization, Survival International (SI). Some of the local NGOs pulled out of the negotiations because they felt that the approaches being employed by SI were counter-productive (see Solway 2009; Saugestad 2011). There were also disagreements among some of the San and Bakgalagadi over the organizations with which to ally themselves.

³ Even if the International Labour Organization 169 or the Covenant of Economic, Social and Cultural Rights had not been signed by Botswana, they were mentioned as 'customary international law', as was the Australian Mabo Case on land rights.

⁴ President Ian Khama's inauguration speech:

<http://www.diamonds.net/news/NewsItem.aspx?ArticleID=21136> (Accessed Feb. 2010).