

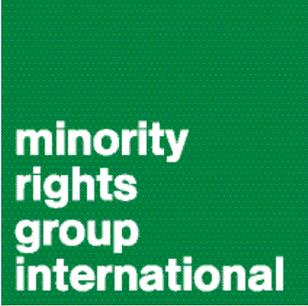
**UNIVERSAL PERIODIC REVIEW (UPR) STAKEHOLDER
SUBMISSIONS**

MINORITY RIGHTS GROUP INTERNATIONAL

Submission to the United Nations
Universal Periodic Review

Fifteenth Session of the Working Group on the UPR
Human Rights Council
21 January – 1 February 2013

Minority Rights Group International (MRG) is an international non-governmental organisation working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. MRG works with over 150 organisations in nearly 50 countries. MRG has consultative status with the United Nations Economic and Social Council, observer status with the African Commission on Human and Peoples' Rights, and is a civil society organisation registered with the Organization of American States.



**minority
rights
group
international**

54 Commercial Street,
London E1 6LT
United Kingdom
Tel: +44 (0)20 7422 4200
Fax: +44 (0)20 7422 4201
Web: www.minorityrights.org

I. Background and framework

A. Scope of international obligations

1. Botswana is a party to most major international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (from 20 February 1974; with no reservations), the International Covenant on Civil and Political Rights (from 8 September 2000),¹ the Convention for the Elimination of Discrimination against Women (from 13 August 1996; with no reservations).
2. Furthermore, it voted in favour of adopting the United Nations Declaration on the Rights of Indigenous Peoples. It has not ratified International Labour Organization (ILO) Convention No. 169 (1989) on Indigenous and Tribal Peoples, although the Government has expressed to the Special Rapporteur on the rights of indigenous peoples that it supports the general principles and objectives of the Convention.

B. Constitutional and legislative framework relating to tribal recognition and participation in public life

(i) Tribal Territories Act 1933

3. The Tribal Territories Act 1933 demarcates the country into territories belonging to the eight Tswana speaking tribes and four crown lands. It provides group rights to land only for the Tswana groups, while other tribes have only individual rights derived from the Land Act of 1970 (revised in 1993). Botswana is a multi-ethnic state in which there reside approximately 45 tribes, only eight of which are Tswana. Eighteen per cent of the population are estimated to claim Tswana heritage, with sixty per cent from non-Tswana tribes (the last census to solicit data on ethnicity was carried out in 1946).² As a result, the Tswana tribes have both group rights and individual rights to land whereas non-Tswana ethnic groups have no right to land in their group capacity.

(ii) The Constitution – Fundamental Rights

4. Chapter II of the Constitution concerns the “Protection of Fundamental Rights and Freedoms of the Individual”. Section 3 provides that every person in Botswana is entitled to the same fundamental rights and freedoms irrespective of their race, place of origin, political opinions, colour, creed or sex (the term “tribe” is omitted). Section 15 provides for the right of non-discrimination, including, under section 15(3), on the basis of tribal affiliation. However, the

¹ A reservation entered at the time of ratification is in the following terms:

“The Government of the Republic of Botswana considers itself bound by:

a) Article 7 of the Covenant to the extent that “torture, cruel, inhuman or degrading treatment” means torture inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana.

b) Article 12 paragraph 3 of the Covenant to the extent that the provisions are compatible with Section 14 of the Constitution of the Republic of Botswana relating to the imposition of restrictions reasonably required in certain exceptional instances.”

² RETENG: The Multicultural Coalition of Botswana, an organisation which has long advocated for a national census disaggregated on the basis of ethnicity conducted an estimate study using the 2001 Population data and estimated that the ethnic Tswana made 17.9% of the population while the non-Tswana made 60%.

Constitution allows exceptions to this right, in section 15(4)(d) and (9), for laws that pre-date independence (including the Tribal Territories Act), and contains internally contradictory provisions in respect of the House of Chiefs. Additionally, while the Constitution protects the individual from discrimination on the stated bases, it does not support or protect the rights and freedoms of the tribes as collective entities.

(iii) The Constitution – the House of Chiefs

5. The House of Chiefs, established under Chapter V, Part III as part of the Parliament, has no legislative or veto powers but acts as an advisory body to the elected National Assembly. Its permanent membership consists of eight chiefs drawn *only* from the eight major Tswana tribes. Its advice must be sought on all bills affecting (i) tribal organisation or tribal property, (ii) organisation, administration and powers of customary courts, and (iii) customary law.
6. The Constitutional Amendment Act No. 9 of 2005 maintained this stratified structure. The amendments increase the number of members but do not provide for each tribe to be represented by its own chief. Twenty members are selected by geographic region by other chiefs and headmen in the region. The President elects five more. Non-dominant indigenous groups do not enjoy a guarantee that their chiefs will be included in the House and membership, in any case, is divided into three unequal ethnic categories consisting of Tswana Chiefs, elected Sub-chiefs, and paid Headmen.

(iv) The Bogosi Act 2008

7. The Bogosi Act was brought in to replace the Chieftainship Act 1933 which provided for recognition of only the eight major Tswana tribes.³ To date, however, no tribes have been recognised and the Act perpetuates some elements of discrimination found under the pre-existing law.
8. Section 3 of the Act, as well as following sections, make clear that the primary decision-making structure for the purposes of the legislation is the *kgotla* (the customary meeting place of a tribe or tribal community for the discussion, in terms of customary law, of matters of tribal or communal concern), a system with origins in Tswana custom.
9. Section 21 of the Act empowers the relevant Minister to recognise a chief appointed by a tribal community. This can be criticised on two bases. First, the recognition is discretionary and the Act is silent on the factors that the Minister may take into account in exercising the discretion. Second, the Act remains silent on the rights and status of a chief recognised under section 21, leaving them to the absolute discretion of the relevant minister.

II. Promotion and protection of human rights on the ground

Implementation of international human rights obligations, taking into account applicable international humanitarian law

1. Equality and non-discrimination

³ The Chieftainship Act was found unconstitutional by the High Court in *Shikati Calvin Kamanakao I, Kamanakao Association and Motsami Keyecwe Mpho v Attorney General of Botswana and Kgosi Tswana Morem II (Misc no.377/99)*, 23 November 2001 (reported at 2001 (2) BLR 654)

10. Despite superficially positive moves, through amendment of the Constitution as well as the passage of primary legislation referred to in the preceding section, such changes maintain in place pre-existing racially discriminatory situations. The laws of Botswana continue to discriminate on the basis of tribal origin and have denied non-Tswana tribes the right to be ruled by their own chiefs, as well as equal and effective representation within the House of Chiefs.
11. While there is some facility for non-Tswana tribes to be represented within the House (e.g., through Presidential nomination), these posts are few in number and there are no criteria to guide the President's discretion, including that different tribes be equally represented. For example, the former President appointed the Wayeyi-designated chief, however the current President did not renew that appointment but instead appointed a member who is being imposed on the Wayeyi as their representative to this position.
12. The 2008 Bogosi Act introduced a new kind of inequality, in that chiefs of tribes that are already recognised (the Tswana tribes) need not (re)apply for recognition (under section 30) while all other chiefs (of the remaining non-Tswana tribes) must apply if they wish to be formally recognised. Moreover, the Act defines as the local tribal decision-making unit the *Kgotla*. This arrangement is alien to many of the non-Tswana tribes, such as the Wayeyi and Baswarwa, which rely on different cultural patterns and leadership structures, traditionally organised around a system of clans and elders.
13. Different tribes speak different languages. As an example, the Wayeyi speak a distinct language, Shiyeyi, and have their own culture. Shiyeyi is one of the 26 unrecognised languages in Botswana. Following independence in 1966, the Government declared that no languages other than Setswana (the language of the dominant Tswana tribes)⁴ and English could be used for teaching or any other public purpose. As a consequence, the language of one tribe is preferred over those of the others without objective or reasonable excuse.

2. Freedom of religion or belief, expression, association and peaceful assembly and right to participate in public and political life

14. As a result of the constitutional and statutory framework governing the composition of the House of Chiefs, the non-Tswana chiefs are not routinely represented. This has an impact upon their ability to discuss and influence tribal and customary law matters. For example, on 17 June 2011, in discussing the Local Government Bill, the *Kgosi* of the Batawana⁵ (supported by another Tswana chief from the Tonota region) suggested that Clause 16 of the Bill should be restricted to Senior Chief Representatives, a category made up of the Tswana chiefs that occupy the highest rank. The Clause provided for members of the House of Chiefs to be ex-officio members of District Councils. By confining it to Senior Chief Representatives, they limited the opportunity for a Headman to be an ex-officio member. The majority of non-Tswana tribal representatives in the House are Headmen and this measure effectively blocked their ability to sit as members of District Councils.

⁴ Setswana is spoken by approximately 79% of the population due to the assimilation of the non-Tswana tribes.

⁵ Who rules over the Wayeyi in Ngamiland

15. Membership of the House of Chiefs ensures involvement in proposed legislative changes to tribal organisation/property and participation in the development of the customary law of the group. Lack of representation in the House signals exclusion from the development of such customary law. For example, the Wayeyi, some Basarwa groups, and Herero are matrilineal, but the imposition of Tswana patriarchal customary law has undercut their own laws of inheritance, marriage and succession.
16. Additionally, while the Bogosi Act, in theory, allows the relevant Minister to recognise non-Tswana tribes and chiefs, this power has to date not been exercised. For example, the Wayeyi requested tribal recognition under section 3 of the Act on 20 June 2008; some four years later, such recognition is still awaited. Even if new *Kgosi* are recognised under section 21, the status and powers of those chiefs remain at the absolute discretion of the relevant Minister and, since there is no direct link between the Bogosi Act and the constitutional provisions regarding the House of Chiefs, any non-Tswana *Kgosi* so recognised would have no guarantee of representing their tribe in the House.
17. The Government funded Non-State Actor programme provided funding to civil society in 2010 and 2011. This programme has now come to an end and has not been replaced thereby negatively impacting on the ability of many civil society organisations to continue engaging in their work in the public sphere. For example, RETENG: The Multicultural Coalition of Botswana which, since 2002, has worked to promote and preserve the linguistic and cultural diversity of Botswana's heritage is likely to have to close its offices.

3. Right to education and to participate in the cultural life of the community

18. At the time of the last UPR in 2008, most primary schools in non-Tswana rural areas had high dropout rates, high numbers of untrained teachers and were poorly resourced.⁶ In 2008, in the poorest rural areas, only 22.4% of children of school-going age were in school, compared to 60% in the richer areas.⁷ The majority of children in these poorer schools in non-Tswana rural areas obtained grade D (fail) in the Primary School Leaving Examinations. The situation has not noticeably changed.
19. These grades are unsurprising in locations where languages other than Setswana are spoken in the home. The 2001 census indicated that in Ghanzi only 19% of respondents used Setswana in the home, 47% in Kgalagadi and 53% in Ngamiland. A 2009 study comparing six primary schools, three of which were in Tswana speaking areas and the other three in non-Tswana speaking areas, concluded that mother-tongue education is necessary to improve standards.⁸ It is difficult to achieve quality in education when children learn in languages that they do not understand.

⁶ Malete, L. (2003). School Attendance and dropout rates by age, gender and region: 2001 Census data. Paper presented at the 2001 Population and Housing Census Dissemination Seminar, 8–11 September. Gaborone: Central Statistics Office; Masalila, T. (2008). *Towards a systematic framework for examining the congruence among reading objectives, tasks and competencies in Botswana Primary schools*. Masters Thesis. International Institute for Educational Planning, Paris

⁷ UNICEF (2008). Division of Policy and Practice, Statistical Monitoring Section.

⁸ Monaka, K. (2009). 'Mother tongue education: Prospects for Bakgalagari learners'. In G. Kamwendo, D. Jankie & A. Chebanne (eds), *Multilingualism in education and communities in Southern Africa*. Gaborone. UBTromso Collaborative Programme for the San Research Capacity Building

20. Following the last UPR, the Government of Botswana accepted Denmark's recommendation to introduce mother-tongue schooling, in addition to schooling in English and Setswana. The Ministry of Education called a meeting of NGOs on 20 October 2011, which concluded that the Ministry would organise a conference in 2012 to map out a way forward. Since then, nothing more has happened. While the Ministry has approved a policy on inclusive education, dealing with issues of disability and other forms of marginalisation, it is not explicit on language learning. Further, the Minister for Local Government has since gone on the radio to announce that the Government plans to introduce English to children who speak San languages, on the basis that they need English and not their own languages.
21. The structure of tribe and tribal leader recognition in Botswana fails to acknowledge the diversity of different cultural practices. For example, the Wayeyi have a particular customary law of appointing their chief from the three genealogies of Matsharatshara, Hankudze and Qunku which constitute the tribe. This custom requires that when the Wayeyi need to replace a chief, they must search for a suitable candidate from the three genealogies. The selected person must have demonstrated loyalty to the struggle of the Wayeyi and have a passion for the preservation of their language and culture. This can be contrasted with the practice among the Tswana tribes whose chiefs are hereditary. Under Botswanan law, the Wayeyi chief is not recognised as such and neither are the Wayeyi recognised as a distinct tribal entity.

4. Minorities and indigenous peoples

22. The Tribal Territories Act denies to non-Tswana tribes group rights to their traditional, ancestral or community lands, providing group rights to land only for the Tswana groups.
23. Despite the replacement of the openly discriminatory Chieftainship Act with the apparently neutral Bogosi Act (2008), it remains the case that non-Tswana tribes continue to be denied official recognition.
24. Non-Tswana tribes are denied the right to educate their children in their community's language and, instead, they must be taught in Setswana or English.

III. Recommendations

25. MRG recommends, based on the preceding observations, the following:
 - (1) That the Government of Botswana ratify the ILO Convention No. 169 on Indigenous and Tribal Peoples.
 - (2) That the Government begin to collect data in respect of political and public participation, education at primary, secondary and tertiary levels, and all other relevant areas disaggregated by ethnic and tribal identity.
 - (3) That the Government recognise the 26 (at present) unrecognised minority languages.
 - (4) That the Government take positive steps to provide for the primary education of the children of distinct tribes and indigenous groups in their mother tongue.⁹

⁹ A recommendation from Denmark in similar terms was previously accepted by Botswana (UN Doc A/HRC/10/69/Add.1), but there is no tangible evidence of an improvement in the situation.

- (5) That the Government take immediate measures to equalise access to, tenure and status (including pay) in the House of Chiefs for the chiefs of all Botswana's tribes.
- (6) That the Government recognise all currently unrecognised tribal groups¹⁰ or, alternatively, put in place concrete and verifiable criteria – paying particular regard to concepts of direct and indirect discrimination – against which applications for recognition will be objectively assessed.
- (7) That the Government recognise all currently unrecognised tribal chiefs appointed in accordance with individual tribal custom. Alternatively, that the Government put in place concrete and verifiable criteria for such recognition, formulated in order to reflect the customary tribal practices of the distinct tribal groups.
- (8) That the Government undertake to deal with all applications for tribe and chief recognition with all due expedition.
- (9) That the Government take active steps to ensure that tribal chiefs, and tribal groupings, are afforded rights over their communal land. Their communal land shall include any such land that those communities have traditionally used or occupied or that is regarded by the community as their ancestral lands. In particular, MRG recommends that the Government repeal and replace the Tribal Territories Act 1933 in order to bring its law into line with its international obligations.
- (10) That the Government adopt positive measures to ensure that the non-Tswana tribes are able to effectively and freely participate in decisions that affect them and their lands.
- (11) That the Government maintain funding to civil society non-state organisations concerned in human and minority rights, including RETENG: the Multicultural Coalition of Botswana, an organisation that has previously benefited from the now-ended Non-State Actor Programme.

¹⁰ No tribes other than the Wayeyi have yet applied for recognition.