UNIVERSITY OF GLASGOW

The Impact of the Modern Development Agenda on the Indigenous Peoples' Rights in Botswana: The Case of the San.

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Abstract

This thesis critically probes into the impact of the Modern Development Agenda (MDA) on the rights of the San in Botswana. For purposes of this thesis, the MDA is an international law construct that presents itself as a globalised project that seek to standardise the development of different societies. The thesis asserts that the MDA is geared towards uniformising the social, economic, political, and legal aspects of the said societies. The MDA is inherently imposing and does not take cognisance of the subjects' prevailing values, beliefs, aspirations, and institutions. Building on the Third World Approaches to International Law (TWAIL) and using socio-legal and desktop approaches, the thesis argues that there exists ample evidence that international law has deployed the MDA as a space of hope to which nation states must aspire to attain at whatever cost. The thesis is particularly interested in how the MDA presents itself as a space for advancement, social improvement, inclusion, consultation, success yet in fact subjects of developmental policies like Indigenous Peoples attest only to its destructive nature. The San's experiences are used to demonstrate that the standardised nature of MDA is problematic for Indigenous Peoples. The MDA diminishes the indigenous identity, disintegrate communities while dismantling social safety nets, erase indigenous way of life, lifestyle and remove Indigenous Peoples from their ancestral land, replacing their livelihood amongst others. Thus, the adverse effects of the MDA on the rights of the San are more pronounced as illustrated by the interview findings. The irony however is that, in part, the answer in resolving the discrimination, dispossession and marginalisation occasioned by the MDA to the San lies within international law. Through the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), international law provides the cardinal principles on the development of Indigenous Peoples. These principles are intended to mitigate the pernicious effects of the MDA on Indigenous Peoples. Notable aspects of the UNDRIP protects Indigenous Peoples land, territories, resources, institutions, cultural practices, livelihood, and values amongst other things. Indigeneity is a criterion for benefiting from the rights provided for in the UNDRIP and it is contentious so much that the UNDRIP itself could not set the parameters of what indigeneity entails. Consequently, in practice, Indigenous Peoples are not able to tap into the emancipatory aspirations of the UNDRIP as its implementation is proving complex. The politics and contestations of indigeneity in the context of Botswana set an example of what other Indigenous Peoples of the world may be confronted with. The activism strategies employed by the San such as litigation are used to illustrate ways in which Indigenous Peoples can navigate the changing landscape of rights and MDA in a globalising world.

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List of Abbreviations

AU African Union

ACHPR African Charter on Human and Peoples Rights

CKGR Central Kalahari Game Reserve

CKGRP Central Kalahari Game Reserve Proclamation

CoA Court of Appeal

CRC Constitutional Review Committee

EMRIP Expert Mechanism on the Rights of Indigenous Peoples

FPIC Free Prior and Informed Consent

GoB Government of Botswana

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

IMF International Monetary Fund

IMP Indigenous Peoples Movement

IWGIA International Work Group for Indigenous Affairs

MDA Modern Development Agenda

OAU Organisation for African Unity

RAD Remote Area Dwellers

RADP Rural Area Development Programme

SDG Sustainable Development Goals

TWAIL Third World Approaches to International Law

UDHR Universal Declaration of Human Rights

UN United Nations

UNDRIP United Nations Declaration on the Rights of Indigenous Peoples

UNDRTD United Nations Declaration on the Rights to Development

UNPFII United Nations Permanent Forum on Indigenous Issues

UPR Universal Peer Review

WB World Bank

List of Statutes and Legal Instruments

African Charter on Human and Peoples Rights (1986).

Bogosi Act (2008).

Constitution of Botswana (1966).

Constitution of Kenya (2010).

International Covenant on Civil and Political Rights (1966).

International Covenant on Economic, Social and Cultural Rights (1966).

Wildlife Conservation and National Parks Act (1992).

Universal Declaration of Human Rights (1948).

United Nations Declaration on the Rights of Indigenous Peoples (2007).

United Nations Declaration on the Right to Development (1986).

UNESCO's Universal Declaration on Cultural Diversity (2001).

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Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, (Communication No. 276 / 2003).

Johnson v. McIntosh 21 U.S. (8 Wheat.) 543, 574 (1823).

John K.Keny and 7 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 4 others [2018] eKLR.

Joseph Letuya and Others v Attorney General and Others [2014] eKLR.

Kamanakao and Others v The Attorney General 2001 (2) BLR 54.

Lesiame Vice Pitseng V Attorney General and Kabelo Jacob Senyatso Case NO:UAHGB-000064-22.

Lesiame Vice Pitseng V Attorney General and Kabelo Jacob Senyatso Case NO: CACGB-086-22.

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1.

Matsipane Mosetlhanyane & Others V The Attorney General of Botswana, Court of Appeal, CALB-074-10.

Roy Sesana and Others v Attorney General [2006] 2 BLR 633.

Social and Economic Rights Action Center and The Center for Economic and Social Rights v. Nigeria (Communication No. 155/96).

Tapela and Another v Attorney General [2014] MAHGB -000057-14.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution. I declare that this thesis is approximately 100 000 words (including Bibliography).

Printed Name: Onthatile Olerile Moeti

Signature:

Date : 11th December 2023

Dedication

To my mother Kewabafe Mercy Moeti, my PhD partner who did not live to see this end. You gave me freedom to pursue my dreams, lessons to thrive in that pursuit, the most important being to grow through what I go through. In grief and heartache, I finished our assignment for you birthed and raised no quitter. Your love and life lessons transcend your demise.

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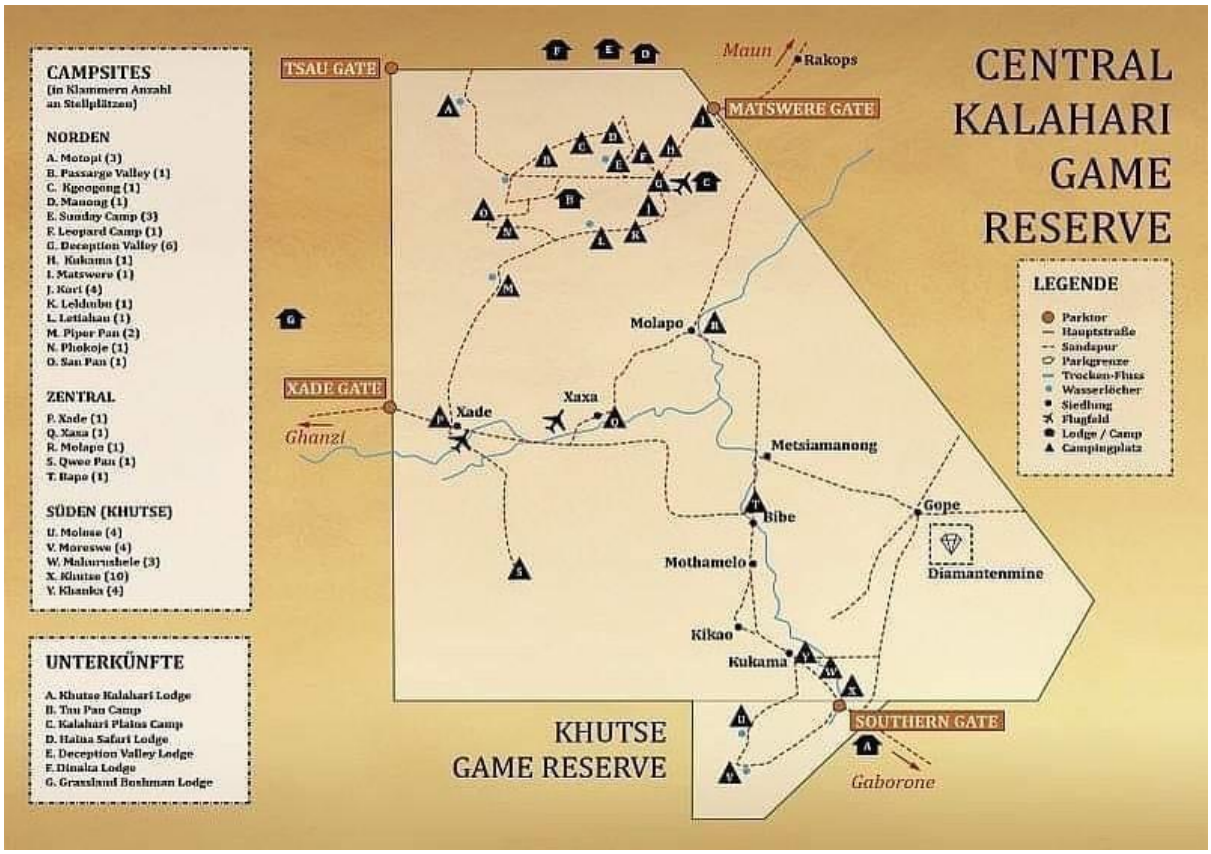
MAP OF BOTSWANA AND THE CKGR

FIGURE 1: This is the map of Botswana. The CKGR is in the central part of Botswana. It extends about 53 000 km2 of arid bushveld.

FIGURE 2: This is the map of the CKGR. I travelled in to the CKGR from the Xade gate to Molapo,Metsiamanong, Mothomelo, Kukama then exited at the Southern gate.



CHAPTER 1
INTRODUCTION

1.1 Background to the Study

Indigenous Peoples have been frequent victims of massacres, arbitrary resettlement, and various forms of servitude, slavery, or forced labour.[1] Historical acts of oppression are not just blemishes of the past for the world's Indigenous Peoples.[2] Acts of subjugation and subordination of Indigenous Peoples by various actors translates into current inequalities. Indigenous Peoples share a reality of deprivation of vast landholding, access to life sustaining resources and suffer from forces that actively suppress their political and cultural institutions.[3] Consequently, Indigenous Peoples have been vastly reduced in numbers and are usually concentrated in pockets of relative geographic isolation called reservations.[4]

The preceding observations apply to the San in Botswana whose experience forms the basis of this thesis. Of the 100 000 San living in Southern Africa today, approximately 60 000 are said to live in Botswana and have been there for over 20 000 years.[5] Genetics found that the San carry the genetic material which indicates that their ancestors are the ancestors of all living beings.[6] The Tswana, various groups enjoying first class citizens from the Colonial and Post-Colonial governments arrived in Southern Africa and eventually into Botswana 700-800 years ago.[7] They established Tswana Kingdoms which were ruled in hierarchical structures and began to dominate, enslave and dispossess the San.[8] The domination of Tswana Kingdoms was legalised by the colonial government through laws that elevated Tswana Kingdoms and tribal secured vast land ownership. The colonial government expropriated land owned by the San who were to remain in occupation of such land at the pleasure of the Crown.

In post-colonial Botswana, the status of the San testifies to the inadequacies of the constitutional and legal protection of minorities in Botswana. Furthermore, colonial influence on the economic, social, and political facets persists. The San exist in the margins of power

[1] Rodolfo Stavenhagen, *The Emergence of Indigenous Peoples* (Springer, 2013) and Florencia Roulet, *Human Rights and Indigenous Peoples: A Handbook on the UN System* (IWGIA 1999).
[2] James Anaya, 'Indian Givers: What Indigenous Peoples have Contributed to International Human Rights Law' (2006) 22 Wash. U. J.L. & Pol'y 107.
[3] Ibid.
[4] Ibid.
[5] Alan Barnard, *Hunters and Herders of Southern Africa* (CUP 1996).
[6] Ibid.
[7] Ibid.
[8] Anaya, Supra.

and constitute the invisible and inaudible citizenry, with majority of their concerns going unresolved by the Government of Botswana (GoB). The San occupy the lowest strata in the economy spectrum and live in abject poverty. The San communities have lost their social cohesion, their cultural practices are only revered as touristic expeditions while their natural resources are in full control of capitalist greed. The San's indigeneity is a subject of ambiguous policy, recognised only for touristic purposes. The San's plight for ancestral land ownership and occupation, preservation of lifestyle, identity, religion, culture, and participation in the political, economic and social platforms on equal footing with other Batswana permeates contemporary Botswana.[9]

A recurring concern for the San today remains their access to land, resources, and territories in their ancestral land, the Central Kalahari Game Reserve (CKGR). The San's plight for land has been exacerbated by the Modern Development Agenda (MDA). Consequent to the MDA the GoB embarked on, the San were relocated from the CKGR and resettled in the modernised villages namely Kaudwane, New Xade and Xere outside the CKGR. The MDA, a globalised project that has standardised development and is carried out by modernising the way of life of different societies to ensure that their lives are reflective of the standardised values has been used elsewhere to relocate Indigenous Peoples for; their land to be given to capitalist monopolies for what is termed productive use, for conservation purposes, and for them to be integrated into mainstream dominant lifestyles. From the San in Southern Africa, Maasai, Ogiek, and Sengwer in Kenya, Mapuche people of Chile, the Adivasis in India, the Seminole Peoples of Florida and the Tiwi People in Australia, Indigenous Peoples have experienced some relocations of sorts for any of the three articulated reasons.[10] With the intensification of the MDA, Indigenous Peoples are losing their land and the benefits associated with occupation and ownership of such land. The dispossession of Indigenous Peoples off their land has been viewed by some scholars as genocide on Indigenous Peoples, invasion of land and

[9] Interviews were conducted in Xere, Kaudwane, New Xade and Central Kalahari Game Reserve between May 2022 and August 2022 amongst the San at grassroot level, civil servants and politicians; and virtual Virtual interviews were conducted between June 2021 and June 2022 amongst San activists, activists, academics, civil servants, lawyers, and politicians.

[10] Jane Newbold, 'Balancing Economic Considerations the Rights of Indigenous People. The Mapuche People of Chile' (2004) 12 (3) 175; Lucy Claridge and Daniel Kobei, 'Protected Areas, Indigenous Rights and Land Restitution: The Ogiek Judgment of the African Court of Human and Peoples' Rights and Community Land Protection in Kenya' (2023) 57 Oryx 313; Robin Maria DeLugan, 'Commemorating from the Margins of the Nation: El Salvador 1932, Indigeneity, and Transnational Belonging' (2013) 86 Anthropological Quarterly 965; Sidel Saugestad, *The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance, and the First People of the Kalahari* (The Nordic Africa Institute,2001).

appropriation of resources.[11] It is as much abhorred by Indigenous Peoples who are often clear about their desire to maintain their culture whilst inhabiting their ancestral land.[12]

The San like other Indigenous Peoples have openly condemned and resisted the MDA policies for numerous reasons including the GoB's encroachment on their land and related rights, alteration of culture, lifestyle, and interference with livelihoods amongst others. Modes of resistance include advocacy for their participation and actual representation in historically exclusive platforms such as political structures, inclusion in decision making structures, protests, and litigation amongst others.[13] By way of example, in an endeavour to assert their territorial rights over the CKGR, the San instituted legal proceedings against the GoB. In the landmark case of *Roy Sesana, Keiwa Setlhobogwa & Others v Attorney General*[14] (*Sesana case*), the San successfully challenged the decision of the GoB to forcefully remove them from the CKGR. The *Sesana case* is used in this thesis to demonstrate the status of the San in the contemporary Botswana, the contestations, and politics of indigeneity in Botswana and the contentious nature of Indigenous Peoples advocacy and resistance against dominant development patterns in liberal democracies.

In this thesis, I seek to locate the MDA adopted by the GoB within the dominant developmental patterns. I argue that as it is consequent colonialism and globalisation, the MDA is riddled with Eurocentric values. MDA like international law is one of the many 'othering projects' and falls perfectly within Mutua's Savage, Victims and Savior metaphor.[15] The experiences of the San in their encounter with the MDA attest to the vicious, aggressive, disproportionate, exploitative, and unfair nature of the policies. The San as belonging to neither the colonial government nor the dominant Tswana groups have borne the brunt of the MDA as the inherent and natural consequences of the said policies are to alter life as they know it in many ways than one. Rajagopal attributes the foregoing experiences to the Eurocentric nature of international law which defends a world of deep injustice.[16] In the said world, Indigenous Peoples would suffer from a double burden in international law, as they are neither Europeans nor dominant

[11] Carlos Gigoux & Colin Samson, 'Globalisation and Indigenous Peoples: New Old Patterns' in Bryan S. Turnier (ed) Handbook of Globalisation Studies (Routledge 2010).
[12] Interviews, Supra.
[13] Thomas D. Hall and James V. Fenelon, *Indigenous Peoples and Globalisation: Resistance and Revitalisation* (Routledge, 2009); Ruth Hall, Marc Edelman, Saturnino M. Borras, Ian Scoones, Ben White, Wendy Wolford, *Global Land Grabbing and Political Reactions 'from Below'* (2017, Routledge).
[14] *Roy Sesana and Others v Attorney General [2006] 2 BLR 633*.
[15] Makau Mutua, 'Savage Victim and Saviours: The metaphor of human rights' (2001) 42 Harv'Int'L J 201.
[16] Balakrishnan Rajagopal, 'International Law and Its Discontents: Rethinking the Global South' (2012) 106 American Society of International Law 176.

political actors within the states whose borders now contain and divide their traditional territories.[17]

Even though the MDA is a creation of the GoB it is consistent with development that TWAIL scholars perceive as a tool that propagates Eurocentric ideologies.[18] This is evident in the use of specific European vocabulary such as 'civilisation', 'progress' and 'modernity'.[19] Eslava and Pahuja argue that the Eurocentric driven characterisation still permeates international law in its contemporary form with the adoption of words such as 'secular', 'religious', 'private' and 'public' which are rooted in the history of Europe.[20] The argument can be sustained as regards the MDA because similar characteristics are imposed as manifestations of MDA. It is these depictions of international law that forms the genesis of the discrimination, dispossession, and marginalisation of the San through the MDA.

By way of example, at independence in 1966 the GoB created a secular state, but only the state is not secular because the imported religion dominates the state such that the President of the country can reference the bible in an official address. Further, only Christian significant events are observed as holidays and characterised in the English terminology, Easter holidays not Pesach or Eid al Fitr. On dispossession, the private and communal concept of property ownership is a differentiation that was imported in Botswana, which invariably dismantled the long-standing traditional communal model of property ownership amongst the San, the effect of which is still felt today and is the bedrock of dispossession under the MDA.

Based on the interviews conducted with different stakeholders in Botswana, I argue firstly that that the MDA as implemented amongst the San in Botswana has more adverse effects than gains for the communities. To implement the MDA policies, the GoB forcefully removed the San from the CKGR. The failure of the GoB to consult with the San and allow their representation in making the relocation decision and the use of military apparatus during the relocations itself attest to the forceful nature of the relocations. Moreover, while the forced relocations were camouflaged as development, the San's lives have been in a perilous state since and they are in a far worse position in the resettlement villages than they are in the CKGR. Similarly, the consequent marginalisation of the San communities in Botswana has been

[17] Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) Oregon Review of International Law 131.
[18] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post) Colonial: TWAIL and the Everyday of International law' (2012) 45 Law & Politics in Africa, Asia & Latin America 195.
[19] Ibid.
[20] Ibid.

through different MDA informed domestic policies and legislative frameworks which reflect to a greater extent international development and international law mandates that operate within the realm of domestic level and remain contested by subjects at grassroot level who constantly challenge and redefine the legitimacy of both international law and development.

The deteriorated state of the San's lives post the implementation of MDA policies demonstrate the core argument advanced by TWAIL scholars as it relates to the evidence of development showing its harmful effect than its benefits.[21] Various factors including lifestyle diseases, inadaptability to the money economy, unemployment and lack of livelihoods demonstrate the San's difficulties in the resettlement villages. Given the mining and tourism entities set up in the CKGR, apparently post the San's relocations, the GoB used the forced relocations to pave way for capitalist entities to make profit off the San's resources. Lastly, the forced relocations have resulted in loss of land for the San which means loss of livelihood, culture, identity, lifestyle as all these are anchored on the ancestral land. In advancing the above arguments the thesis engages in existing debates about the legal and social status of the San from historical to contemporary Botswana, the politics and contestation of indigeneity in Botswana and beyond, and the role of international law in advancing the San's rights and use findings of interviews to demonstrate the impact of the MDA on the rights of the San.

1.2 Research Questions

The overarching question of the research is how does the Modern Developmental Agenda impact the San's rights? In order to answer the foregoing question, the thesis addresses the following supplementary questions namely;

a) What is the Modern Development Agenda?

b) What is the social, economic, political, and legal status of the San in Botswana?

c) What is indigeneity and how does it affect the promotion and protection of the San's rights in Botswana?

d) How do the laws relating to Indigenous Peoples law influence the promotion and protection of the San's rights in Botswana?

[21] Sundhya Pahuja, *Decolonising International Law, Development, Economic Growth and the Politics of Universality* (CUP 2011).

e) In what ways can the Botswana legislative and constitutional mechanisms be revised to balance competing interests between MDA and Indigenous Peoples' rights to facilitate optimal promotion and protection of the San's Rights in Botswana?

1.3 Objectives and Main Arguments

The thesis aims at exploring Indigenous Peoples' rights against the backdrop of the resurgence of the MDA through colonialism and globalisation. The thesis focuses on the impact of the MDA on the rights of the San in Botswana. The central argument made is that MDA policies adopted by the GoB exacerbate the marginalisation, discrimination, and abuse of the San in Botswana. Furthermore, thesis argues that the recurring effect of the said policies has been to maintain the disadvantaged position of the San in both colonial and post-colonial Botswana. Thus, while the GoB claims to deploy MDA policies as an empowerment tool, the said policies inordinately affect the San's rights.

1.4 Significance of the Study

This thesis contributes valuable and original insights into the existing knowledge on the San. In the existing literature, lawyers, legal practitioners, academics, and scholars on the San have often confined their studies of the San and on the San to desk top inquiries. This thesis departs from that norm and introduces socio-legal approaches as an advanced methodology of engaging and understanding how development and international law is operationalised in Botswana amongst the San. This is methodological contribution.

There is no research on the San that has used TWAIL as a theoretical approach. This thesis becomes the first to do so and that is theoretical advancement. From this thesis, other scholars may realise the importance of employing TWAIL as an approach in understanding other aspects of international law as it relates to the San. In fact, the use of TWAIL as an approach in this thesis and establishing from the field work that majority of the aspects of the UNDRIP resonate with the San is in itself a testament to one of the core arguments advanced by TWAIL that international law need to take cognisance of the developing world as 'epistemic site of

production and not merely a site of reception for international legal knowledge'.[22] Thus this thesis advances the TWAIL arguments by providing a case study to reference.

Related to the TWAIL ideologies, the thesis demonstrates that the San as Indigenous Peoples in the developing world are more than recipients of international law but legitimate producers of international law and what can legitimately constitute international legal knowledge. This is a departure from the prevailing Scholarly depiction of the San as regular people who constantly receive and accept international law as presented to them. The representation the San made in United Nations (UN) fora attest to their importance in the creation of an Indigenous Peoples inclusive UN and most importantly the awareness than now exists on the status of Indigenous Peoples in Southern Africa.

The thesis contributes to an ongoing dialogue on the implications of developmental policies in Botswana from an Indigenous Peoples rights perspective. This thesis is the first to demonstrate the interconnectedness of the existing research on the MDA policies on the San from sociological, legal, and public policy perspectives. The thesis brings together the sociological, legal and policy perspectives and adds the international law dimension to the MDA and San research. Through assessment of UNDRIP, the thesis further pushes the discussion on the San beyond the traditional land research confined to Botswana laws that generally exists in the scholarship relating to the San in Botswana.[23]

The thesis equally contributes to the conceptual framing of indigeneity within the TWAIL theoretical framework and uses the socio-legal approach as a methodology. TWAIL advocates for international law from below, and the thesis presents the San's understanding of their rights as communities as representative of Indigenous Peoples rights from below. The thesis makes an argument that the UNDRIP, having been negotiated with the participation of some Indigenous Peoples, gives credence to the centrality of dictating international law from below as propositioned by TWAIL. The San are used to demonstrate that although they did not participate in the making of the UNDRIP what they consider crucial to their survival as communities found legal expression through the participation of other Indigenous Peoples

[22] James Thuo Gathii, 'The Promise of International Law: A Third World View' (2021)36 (3)American University International Law Review Available at: https://digitalcommons.wcl.american.edu/auilr/vol36/iss3/1 accessed on 17 June 2022.
[23] Kuela Kiema, *Tears for my Land* (Bay Publishing, 2010) 23.
[23] Amelia Cook and Jeremy Sarkin Who Is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana Tulane J. of Int'L & Com. Law 2009 (18) 93; Robert Hitchcock, Maria Sapignoli & WA Babchuk, 'What about our Rights? Settlements, Subsistence and Livelihood Security among Central Kalahari San & Bakgalagadi' (2011) 15 Int'Journal of Human Rights 67; Mogomotsi and Mogomotsi, Supra.

elsewhere. The participation of other Indigenous Peoples of the world gave the general population of Indigenous Peoples like the San a voice in the UNDRIP.

Although the San can relate with the content of the UNDRIP, there is still some reflections that ought to be done to ensure that modern instruments like UNDRIP do not reinforce patterns of exclusion of key participants that is inherent in classic international law. Thus the exclusion of the San in the drafting of the UNDRIP is used as an expansion to the TWAIL main argument, and demonstrate that the exclusion of the San in the making of the UNDRIP attest to the stratification of the Indigenous Peoples movement, a problematic development that is likely to see Indigenous Peoples of the developing world excluded in important decisions, in some instances in a similar manner as in their states.

This research is unique because it provides an explanation on the interface between the MDA, International Law, and Indigenous Peoples' rights from the perspective of Botswana. Whilst the San have generated a lot of interest and have been the subject of scholarship, no scholarship addressed the underlying drivers of the San's treatment by the GoB as a manifestation of both colonialism and globalisation. Notably, the majority of scholars references colonialism as the singular basis of MDA policies.[24] Previous scholarships on the San and their rights mirror on specific individual issues, mostly on the San's land rights and in other instances address narrow recent developments.[25] Specifically, scholars who wrote on the Indigenous Peoples rights conducted desk top based research.[26] This thesis provides first-hand account from experiences as shared by the different stakeholders on how the MDA impact the San's rights. The thesis engages with different aspects of the San's rights beyond the land such as participation, resources, and consent amongst others and opens a TWAIL lens of interrogating the everyday life of international law in the context of Botswana.

[24] Kenaope Nthomang, 'Relentless colonialism: the case of the Remote Area Development Programme (RADP) and the Basarwa in Botswana' (2004) 42 Journal of Modern African Studies 415; Tom Bower, 'Reframing Kurtz's Painting: Colonial Legacies and Minority Rights in Ethically Divided Societies' (2016) 27 Duke Journal of Comparative and International Law 35; Lone Ketsitlile, 'An Integrative Review on the San of Botswana's Indigenous Literacy and Formal Schooling Education' (2012) 41 The Australian Journal of International Education 218.

[25] Goemeone E.J Mogomotsi, and Patricia K. Mogomotsi, 'Recognition of The Indigeneity of the Basarwa In Botswana: Panacea Against Their Marginalisation and Realisation of Land Rights?' (2020) 28 African Journal of International and Comparative Law 555; Bonolo Ramadi Dinokopila, 'The right to water in Botswana: A review of the Matsipane Mosetlhanyane case' [2011] African Human Rights Law Journal 282; and Clement Ng'ong'ola, 'Land Rights for Marginalised Ethnic Groups in Botswana, with Special Reference to the Basarwa' (1997) 41 Journal of African Law 1.

[26] Ibid.

This thesis is the first of its kind to use the TWAIL in contextualising the operation of international law in Botswana. Thus, this thesis expands the TWAIL core argument that the MDA is a creation of both colonialism and globalisation and expands on it by demonstrating this argument from the perspective of the San in Botswana. The interference with the San's way of life and the dispossession of their land is predicated on the understanding that the San are backward and should be modernised to meet the dictates of the MDA. The thesis thus argues that the modernisation quest is the golden thread that binds colonialism and globalisation. Furthermore, no scholarship exists that weaves a thread between Indigenous Peoples rights in Botswana, MDA, and international law.

TWAIL elucidates the argument which forms the contribution of this thesis, which is in their treatment of Indigenous Peoples, states are propelled by external forces founded in the global village. Such forces include the World Bank, Multi-National Corporations and Wealthy states within the Global North. Eslava argues that local jurisdictions are deliberately constructed as carriers of international aspirations.[27] This argument is contextualised to Botswana. It becomes difficult to conceive a GoB that is free from international pressure particularly when dealing with Indigenous Peoples who often occupy unpolluted and prime land, attractive to Global North based investors. National governments are pegged against Indigenous Peoples by the dictates of global order.

The use of the socio-legal approaches in establishing the impact of the MDA on the San presented me with an opportunity to see international law in the Botswana context thus adding a new and African dimension to the TWAIL dialogue on how international law operates from below. The operation of international law in context is an important aspect in the understanding of how the law impacts everyday lives and require scholarly attention. The thesis thus allowed me to see international law not only at the level of treaties or courts but in terms of how it operates on the ground and most importantly how it is perceived by the intended subjects of the specific framework, the UNDRIP. Other TWAIL scholars have written about the everyday operations of international law in different contexts, but no such scholarship exists on the San. Therefore, the thesis broadens the applicability of TWAIL to promotion and protection of Indigenous Peoples' rights in Africa generally and Botswana specifically.

[27] Luis Eslava, *Local Space, Global life: The Everyday Operation of International Law and Development* (CUP 2015).

The *Sesana Case* has not been critically considered from the perspective of the compromises the San are willing to make in the development frontier. This thesis becomes the first to argue and demonstrate that the San in Botswana are not the extreme non-interventionists as are some Indigenous Peoples in the world. The thesis develops a theory of the San in Botswana as 'intervention minimalists'. This effectively means that the San are amenable to gradual collaborations with the GoB as demonstrated by their acceptance of what they argued as essential services from the GoB. The San's position as captured in the Court record and in the fieldwork conducted for purposes of this thesis is that they are open to development for as long as it is done in their ancestral land and with their full participation.[28] The acknowledgement of the San as architectures of their developmental trajectory is a springboard for the promotion and protection of their rights as Indigenous Peoples and conflict resolution. This is consistent with the UNDRIP which mandates states to seek and obtain Free, Prior and Informed Consent (FPIC) from Indigenous Peoples before making any decisions affecting them. Chapter 4 deals with FPIC amongst other rights.

The thesis asserts that the promotion and protection of Indigenous Peoples' rights and the MDA can coexist. This is because UNDRIP provides cardinal principles on the development of Indigenous Peoples thus allowing for MDA subjects to comply with the international law dictates. The thesis focuses on the potentials and constraints presented by the MDA to the advancement of Indigenous Peoples' rights. The thesis equally presents best policy recommendations on the promotion and protection of the Indigenous Peoples rights which remains contentious amidst charting developmental trajectory of Indigenous Peoples.

1.5 Theoretical Framework and Research Methodology

The research uses two theoretical approaches namely TWAIL and the Rights Centred Approach. The two approaches are useful in understanding the major themes of this research namely MDA, colonialism, globalisation, indigeneity, and Indigenous Peoples rights. Furthermore, the theoretical approaches provide an understanding of the MDA as a discourse at the heart of this research. From the TWAIL perspective, MDA is understood in its historical context and is rooted in colonialism as a grand project that redeems the backward, aberrant, violent, oppressed, underdeveloped people of the non-European world by incorporating them

[28] Interviews, Supra.

into the universal civilisation of Europe.[29] In the post-colonial world, Globalisation then standardised the MDA and publicised it as a compelling agenda. Whilst from the rights centred approach, the MDA may be understood as a component of the right to development.[30]

Eslava and Pahuja describe TWAIL as a 'response to both the colonial and postcolonial ethos of international law' and 'one of the most explicitly articulated juridical and political spaces in which to think about an international law beyond its (post)coloniality.'[31] TWAIL challenges the foundation and legitimacy of international law. It is opined that:

> The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination.[32]

The objectives of TWAIL include understanding international law and its uses, establishing a possible alternative to international law and directing policy formulation to eliminate underdevelopment in the Third World.[33] The end goal of TWAIL is to promote a more just and equitable approach for the developing world.[34]

The research uses TWAIL theoretical framework as it relates with colonial legacies. TWAIL is chosen as a theoretical framework for this research because it is a broad approach that allows the analysing of international law and institutions.[35] TWAIL theoretical framework enables an exploration of the interaction of colonialism, globalisation, and Indigenous Peoples in Botswana. TWAIL aids to frame the argument that the ongoing impact of the MDA on the San in Botswana is a creation of both colonialism and globalisation. This is demonstrated by the *Sesana Case.* It was also through colonial land allocation that the San lost title to own land. Post-colonial GoB adopted modernisation as standardised in the continually globalising world.

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[29] Antony Anghie, *Imperialism, Sovereignity and the Making of international Law* (CUP 2005).
[30] Arne Vandenbogaerde 'The Right to Development in International Human Rights Law: A Call for it Dissolution' (2013) Netherlands Quarterly of Human Rights 187; Declaration on the Right to Development (1986).
[31] Eslava and Pahuja, Supra.
[32] Makau Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law 31.
[33] Supra.
[34] David Fidler, 'Revolt Against or From Within the West?: TWAIL, The Developing World and the Future Direction of International Law' (2003) Articles by Maurer Faculty 29 https://www.repository.law.indiana.edu/facpub/2126 accessed on 14 January 2023.
[35] Obiara Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both? (2008) 10 International Community Law Review 317.

These globalised MDA policies seek to perpetuate the assimilation of the 'different' into mainstream and the result has been further interference with the San's rights, the primary being land dispossession. The 'remnant' of Colonialism makes globalisation thrive in this regard. Equally important, TWAIL allows for the analysis of the relationship between international law and MDA and supports the central argument made in this thesis that, international law and MDA have a transcendent relationship with the MDA taking a superior position because it is a financially beneficial enterprise by comparison with international law.

The rights-centred approach focuses on rights as the main object of analysis. This approach is justified on the basis that the research is interested in the promotion and protection of Indigenous Peoples' rights in Botswana. Furthermore, the theoretical approach is justifiable and suitable as the MDA itself may be understood within the right to development. Within the premise of regional and international law, Indigenous Peoples have the right to decide their development priorities. For example, *Article 22* of the African Union Charter on Human and Peoples Rights (African Charter) confers the right to development on Indigenous Peoples in Africa. The African Commission on Human and Peoples Rights has established that dispossession of Indigenous communities of their traditional lands violates their right to development.[36] The rights centred approach thus presents me with an opportunity to analyse the other rights as they interact with the MDA as a component of the right to development and independent from the right to development.

On the research methodology, I used the Doctrinal Legal approach at the inception of the research. This is because the Doctrinal Legal approach as an established traditional genre of research in the legal field serves as knowledge- building research.[37] The Doctrinal Legal approach laid the necessary foundations through the critical scrutiny of existing international, regional, and national regimes on Indigenous Peoples and provided the preliminary understanding of the subject of the thesis. I used the Doctrinal Legal approach to analyse preliminary data for purposes of establishing the proposition of this thesis namely that the MDA has an impact on the rights of the San in Botswana. I used primary sources such as

[36]Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya, Communication 276/2003 http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html accessed on 12 October 2023.

[37] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary methods in Reforming the Law' (2015) 8 Erasmus L. Rev 130.

international treaties and commentaries, and secondary sources such as background papers, working papers, academic journal articles and textbooks.

I acknowledge that the Doctrinal Legal approach has limitations. The methods employed in this methodology investigates and ascertains the law as is and does not go beyond the black letter law to establish how the law affects the subjects. To address this shortcoming, I used the Socio-Legal approach to link the law with the subjects of the law, assess how the law applies in context. The Socio-Legal approach allows me to interrogate how the law affects subjects in their day-to-day life, as individuals and as a collective. Socio-legal approach present a more complex understanding of 'how legal rules, doctrines, legal decisions, institutionalised cultural and legal practices work together to create the reality of law in action'.[38]

The aim of a socio-legal approach is to establish the part that law and the legal system and structure play in the creation, maintenance and change of social situations.[39] This approach to the dynamics of law is sometimes termed " law in action " research.[40] The use of socio-legal approaches has gained traction amongst TWAIL scholars who are interested in establishing the practice of international law in local contexts. For example, Eslava use ethnography to establish how international, national, and local normative frameworks, in close relationship with development ideas, are deployed to construct local space and subjects that are attuned with global expectations.[41]Rajagopal employ socio-legal studies in assessing the interface between international law from below, development, social movements and Third World resistance with a view to establish the changing phases of international norms and institutions as they interact with the influence of the Third World and vice versa.[42] Thomas argues that socio-legal approaches are justified because empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways and can therefore only be properly understood if studied in that context.[43] Roux also finds justification of the socio-legal approach and opines that doctrinal understanding may not provide sufficient material for understanding the law fully.[44]

[38] R Banakar, 'Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden' in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 13.
[39] Ibid.
[40] Ibid.
[41] Eslava, Supra.
[42] Rajagopal, Supra.
[43] Phillip Thomas, 'Curriculum Development in Legal Studies' (1986) 20 Law Teacher 112.
[44] Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 Legal Education Review 173, 176-7.

The use of the socio-legal approach in this thesis underlines the importance of contextualising law. It is of great importance to the rights discourse worldwide to study the interaction between the Indigenous Peoples' rights regulatory and institutional framework and specific Indigenous Peoples groups like the San. The socio-legal approach allowed me to find out how laws relating to MDA affect the San in Botswana. Socio-legal approach represents a definite way to give subjects of law and relevant actors at grassroot level a voice in a conversation that generally exclude them such as the making and development of international law and the politics of developmental policies. Socio legal approach is a both a way of measuring the actual impact of the MDA policies through observations of the status quo of the subjects of the MDA policies a consultative platform to gain insights into what the San consider development for their purposes. Moreover through Socio-legal approach I managed to contextualise both national and legal regimes and their role in attaining the San's developmental aspirations. As a result of the actors informed findings, the recommendations made to the GoB on balancing competing interests of modernisation and preservation of Indigenous Peoples' ways are anchored on community consensus thus will likely have legitimacy. The use of Socio-legal approach gave me a platform to engage with the San as individuals, as a People and through their social movements. Through such engagements I established how as a matter of fact the law impacts on the San's rights. Further, having established the impact of the law on the San, I am now able to provide policy recommendations in line with what the San perceive as potentially useful to them as a people. The use of socio-legal approach allows policy recommendations that are bottom up in nature as I am now guided by the voices and views of the San. The need to have a policy framework that reflects the values, views and aspirations of the San cannot be emphasised as the root cause of the present conflict between the San and GoB is the top-down approach found in international, regional and nations laws.

In the socio-legal approach, the research employed a qualitative method. The qualitative research technique allowed for a deeper exploration of the research question and the subsidiary questions. I conducted interviews with the San leaders, San Representatives and San advocacy groups based in Botswana to establish the impact of the MDA. I also interviewed academics, activists, lawyers, civil servants, policy makers and politicians. I interviewed a representative respondent pool based on gender, educational background, social status, and age therefore the outcome is deemed representative of the diverse San population and other stakeholders. The respondents also included the litigants in the *Sesana case* which is the central case as it generated interest in the relationship between the San and the GoB with particular emphasis on

how the competing interests of the two parties could be harmonised. This method is useful in answering all the research questions.

There were some limitations experienced during the research. The COVID 19 necessitated travel restrictions delayed my travel to Botswana for field research amongst the San at grassroot. The process of obtaining a research permit in Botswana was protracted and marred with bureaucratic red tapes. Upon obtaining a research permit to conduct research amongst the San from the Ministry of Local Government, I was required to seek and obtain a permit from the Ministry of Wildlife to enter the CKGR. When armed with research permits from the two ministries and at the CKGR gate after travelling the whole day, the Officers at the gate refused us entry. No further explanation was given to us.

I failed to obtain interviews with Senior officials who were responsible for making the decision to relocate the San and those who oversee MDA programmes tailor-made for the San. As regard the relocations, most of the key decision makers have moved offices, some have retired but were mostly not willing to engage on what they term San controversies. The official records relating to the relocations were not availed to me. The Court record on the *Sesana case* provided some key information on the relocations and some key retired personnel volunteered to participate in the interviews. Some officers who attend to the day-to-day implementation of the MDA programmes tailor made for the San volunteered to participate in the interviews.

1.6 Definition of Terms

The following segment of the chapter considers the definition of terms key to the thesis.

1.6.1 Modern Development Agenda

For purposes of this research, MDA means the globalised project that has standardised development and is carried out by modernising the way of life of different societies to ensure that their lives are reflective of the standardised values as propelled and advocated for by International Organisations such as International Monetary Fund (IMF) and the World Bank (WB). Whilst other TWAIL scholars refer to this project as development, the thesis settled for MDA as it is a contextualised term for development in Botswan loosely translated from either

dithabologo tsa sesha or *dilo tsa sesha*. For the San in Botswana, the MDA manifests itself in the adoption of public policy that significantly alters their traditional way of life which commenced with their forced relocation from the CKGR to the resettlement villages. Primarily, where Indigenous Peoples are the subject of the MDA policies, cardinal principles of international law on the development of Indigenous Peoples should be the cornerstone of the policy formulation and implementation. In the context of Botswana, the fragility and vulnerability of the San must be a paramount consideration such that the intended MDA must not leave the San in a far worse position. This working definition considered interviews conducted with academics, activists, lawyers, developmental officers, policy makers, politicians, and the San.[45]

From the interview findings, Matienda defines MDA as policies adopted by the nation state in consultation with various stakeholders with the intention of improving the overall lives of the target group.[46] For Matilda, another Development Officer amongst the San, MDA should be a subject specific project that is characterised by some positive transformation for it to be a successful enterprise.[47] Matilda observes that the San relocations from CKGR to resettlement villages failed the transformation test as post resettlement, the San fragility and vulnerability were exacerbated and their community fragmented by the GoB's one size fits all approach.[48]

Young, an activist and an academic with vast experience working on the San's rights observes that MDA is a consensus between nation states to better the lives of citizens and that in the execution of the international obligation to better citizens lives, governments must take cognisance of the peculiar state of their societies.[49] Young faults the MDA for putting too much trust on governments to do what would be right for Indigenous Peoples given their fragility occasioned by recurring persecution at the hands of state machineries.[50] For Young, there is too much tainted history between the San and the GoB to expect policies favourable to the San.[51] This has seen the implementation of MDA through the forced relocation from the CKGR to resettlement villages with no continuity plan in the San's new homes.[52] Young deems the San's relocation as the 'hottest red flag' of MDA in motion.[53] For Satau, a San who is also an

[45] Interviews, Supra. The respondent uses a pseudo name.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid.

activist, MDA is often a missed opportunity for governments in engaging with Indigenous Peoples in the making of developmental policies that will harness the participation of Indigenous Peoples in the economic, social, and legal activities of the modern state.[54] Satau argues that MDA may as well be classified as a *carte blanch* to governments to do as they please with Indigenous Peoples and the case of the San in Botswana demonstrates that.[55]

Maria Knowles Tsebe, a lawyer with extensive experience on Indigenous Peoples litigation in Botswana and Africa observes that the MDA is difficult to define but one can set its key characteristics.[56] For Tsebe, the MDA is characterised by governmental obligations to improve the lives of the citizens through targeted policies that take account of the subjects of the policies' peculiar circumstances.[57] In the case of Botswana, the MDA must take into consideration the San's fragile state as a community, the unique lifestyle that they are interested in preserving and their general vulnerability.[58] The MDA characteristic that is key to the San is meaningful participation in the policy promulgation and implementation.[59] The meaningful participation equally means opportunity for the San to give feedback that is incorporated in the revision of existing policies.[60] Anything else falls short of the Modern Development Agenda and renders it *Modern Development Abuse*.[61]

There is a golden thread in the construction of MDA amongst the respondents who identify as San. These respondents use the Tswana speaking tribes 'lifestyle as illustrative of MDA. The respondents indicate that the GoB relocated them to expose them to development in the form of the Tswana speaking tribes' lifestyle, economy, and general practices. The respondents highlight that MDA requires their integration into the Tswana lifestyle, economy, and general practices. For the pro MDA San respondents, the integration into the Tswana lifestyle is opportune for growth, elevation and harnessing the promises of MDA of improved lifestyle, access to health care, safe and drinking water, and schools amongst others. For the anti MDA San respondents, MDA is tantamount to imposition of other tribes' ways of life on the San causing the San to lose their identity, way of life, traditional livelihood, economic activities and loose ties with their invaluable possession, the land, and its resources. To the extent that

[54] Interviews, Supra. The respondent uses their real name with consent.
[55] Ibid.
[56] Ibid. Respondent used a pseudo name.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.

MDA cannot take place without transition of some sort on the part of the San, MDA is not intended for the benefit of the San. The anti MDA San respondents opine that MDA was an extension of colonialism.

When engaging on the meaning of MDA, majority of the respondents who identify as San began their answer with '*thabologo ya ga mang gone'* which loosely translates to '*whose development anyway*?'. Only a handful of these respondents believe that whilst the MDA is foreign, the end goal may improve the lives of the San.[62] Xukuri a San at grassroot level articulates the MDA in the following ways:

> Whose development? When we were told that we will be relocated outside the land of our fathers, we knew that would spell doom for we only know how to thrive in our land. Why can't they develop us in our land. If we must follow development elsewhere, that development is not ours. So, whose development? It certainly isn't mine and certainly isn't one for my people.[63]

Moripe a San at grassroot level perceives the MDA as a façade camouflaged as a promise for a better life which requires the San to first shed off their whole being before they can enjoy the 'MDA Dividend', and states that:

> The MDA is not for us. We are better off right here. We know how to survive right here. Whilst outside the CKGR, I failed to settle, find my purpose, or survive the challenges presented by life. You are asked to lose yourself, adopt someone else's way of life, which is quite alien to you and complicated, survival of the fittest model. You need money to live. The government was offended by my cry for help. It became clear to me that; the government was after my land and its abundance, and it did not care for me and my people. I was bound to perish whilst the government and its goons lived in opulence from my land. The land they stole from me dangling the 'MDA Promise of Prosperity'. We were just plain gullible to believe the stories sold to us, that development exists. Does the MDA even exist?[64]

Mothudi Sesana perceives the MDA as the implementation of various policies that have a positive impact on the lives and welfare of the targeted group. The relocations have 'integrated' the San into a modern society, something which was long overdue.[65] Mothudi Sesana notes the GoB's concerted effort in alleviating poverty and severe deprivation amongst the San such as economic activities intended to harness the San's independence in 'the new world'.[66] Mothudi Sesana highlights entrepreneurial initiatives like operating bakeries, welding factories, sewing

[62] For example, Mothudi Sesana, the young brother to the activist, Roy Sesana hailed the MDA.
[63] Interviews, Supra. Respondent uses pseudo name.
[64] Ibid.
[65] Interviews, Supra. Respondent used his real names.
[66] Ibid.

factories as a cornerstone of the MDA.[67] In consensus with Mothudi Sesana, Selina Mo observes that MDA was not just a promise for a better life, but that promise had been actualised by the GoB through numerous initiatives like domestic animals donations to the San.[68] Mothudi Sesana and Mo's observations were deemed censored and indicative of their restricted freedom of expression because they are public servants. Extra perceives the MDA as a promise for a better life that was not kept thus rendering it a tool used to dispossess the San of the CKGR and give way to capitalist entities that conduct mining and tourism businesses.[69]

Chapter 5 considers the impact of the MDA on the rights of the San and expands some of the above views in relation to how the MDA impact the San's rights.

1.6.2 A Note on Ethnic Terminology

Botswana is the name of the country. Batswana is the plural for more than one citizen. Motswana is a single citizen. Setswana is the language spoken by the majority of the Tswana tribes which has since become the national and official language together with the English language. The Tswana is a collective name adopted by this thesis to refer to the dominant tribes found in Botswana with distinctively similar dialects in their languages and whose economic, political, social, and legal organisation is relatively similar.

The history of how the Tswana became dominant in Botswana is succinctly captured as follows:

> In 1885, the then-Bechuanaland became a British protectorate and in 1933, the British authorities recognized eight tribes in the Chieftainship Act as follows: the Barolong, Bakwena, Bangwaketse, Balete, Bakgatla, Batlokwa, Bangwato and Batawana. These eight tribes speak dialects which are mutually intelligible and collectively known as the Setswana language. They share similar cultures and histories. They collectively make up about 18 per cent of the population. Six out of the eight tribes reside in the Southern part of the country near the capital city, Gaborone. Two others (the Bangwato and Batawana) reside in the Central and Northwest (Ngamiland) districts respectively and are numerically inferior to the tribes they rule over. Professor Neil Parsons, a British historian at the University of Botswana, observed that it was upon Tswanadom that the British founded the colonial state of Bechuanaland, which was in turn and in many ways the foundation for the sovereign state of Botswana. He maintains that the concept of 'Tswanadom that is both philosophical and territorial has led many

[67] Interviews, Supra. Respondent uses their real name.
[68] Interviews, Supra. Respondent uses a pseudo name.
[69] Ibid.

> observers to assume that Botswana is a mono-ethnic state… but only in so far as the Tswana minority have successfully imposed its culture on the majority population of the extreme diverse origins.' The recognition was a colonial error that has rendered the majority of the country's peoples not only invisible but also insignificant.[70]

In addition to the dominant Tswana groups, there are other tribes that are not marginalised to the extent of the San but did not enjoy the colonial government's preferential treatment, such as Bakhurutshe, a tribe I belong to. Chapter 2 deals more issues on ethnicity issues in Botswana.

1.6.3 Indigeneity

For purposes of this thesis, indigeneity means an ethnic identity claimed by a tribe. Indigenous Peoples is a group of tribal people constituted in a single community or various communities who assume indigeneity as their identity. Indigeneity and Indigenous Peoples are highly contested concepts.[71] The politics and contestations of indigeneity are fully explored in Chapter 3 of the thesis. Both indigeneity and Indigenous Peoples have taken different meanings depending on various factors including period in history, who wants to know the meaning, why is one interested in the question of what indigeneity is or who is an Indigenous Peoples for example.

In pre colonialism, indigeneity and by extension a classification as Indigenous Peoples existed as a mere classification but post colonialism, it exists as an active political force.[72] Essentially, in the precolonial period, there were 'penalties' attached to assuming indigeneity as an identity or being identified as Indigenous Peoples. Indigeneity was used to justify actions from colonisers such as dispossession, decultarisation, and violent attacks amongst others on people marked as Indigenous Peoples. Whilst in the post colonialism period, indigeneity is a 'badge of honour', a legally, socially, and politically constructed shield through which Indigenous

[70] Lydia Nyati-Ramahobo, 'Minority Tribes in Botswana: the Politics of Recognition' (2008) 1 Minority Rights Group available at https://www.refworld.org/pdfid/496dc0c82.pdf accessed on 17th August 2021.
[71] Eva Gerharz, Nasir Uddin and Pradeep Chakkarath (eds), *Indigeneity on the Move: Varying Manifestations of a Contested Concept* (Berghahn Books 2018).
[72] Jonathan Friedman, 'Indigeneity: Anthropological Notes on a Historical Variable' in Henry Minde (ed) *Indigenous Peoples Self-determination Knowledge Indigeneity* (2007 EA Publishers) 145 available at Indigeneity: Anthropological notes on a historical variable — Lund University accessed on 27 March 2022.

Peoples with common experiences and interests converge to seek recognition, redress, inclusion and protection against states, state machineries and neoliberal forces.

1.6.4 Indigenous Peoples Rights

According to Gray, indigenous rights are claims and entitlements by oppressed Indigenous Peoples to challenge existing institutions, practices, or norms, to ensure that they are treated with dignity by the state.[73] In the current global world, the idea of Indigenous Peoples' rights is a source of controversy, yet it presents transnational unity amongst different stakeholders. The promotion and protection of Indigenous Peoples rights is even more contentious as the very existence of such rights remain contended in some parts of the world like in Africa.[74]

The following discussion demonstrates how the term Indigenous Peoples rights is understood and contextualised by the various respondents. The San's views on what Indigenous Peoples rights and how they interact with rights provides insights into understanding Chapter 2 which focuses on the social, economic, and legal status of the San in Botswana, Chapter 3 on indigeneity, Chapter 4 which scrutinises regional and international Indigenous Peoples institutional and regulatory frameworks and Chapter 5 on the impact of the MDA on the rights of the San.

Academics, lawyers, and activists generally tend to reference formal documentation like the UNDRIP and the Botswana Constitution as a source of Indigenous Peoples rights.[75] On the other hand, respondents who identify as San except for San who are activists did not use the rights terminology as applicable to the San.[76] However, there was consensus amongst these respondents that the San have an inherent entitlement to be in the CKGR and enjoy the natural resources therein without any interference.[77]

The respondents who identified as San throughout the resettlement villages and in the CKGR were asked specific questions on the Indigenous Peoples rights to establish their understanding of the rights regime.[78] Majority of these respondents often began their answer with '*Mosarwa*

[73] Andrew Gray, *Indigenous Rights and Development: Self-determination in an Amazonian Community* (Berghahn 1997).
[74] Willem van Genugten, **'**Protecting of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010)104 The American Journal of International Law 29.
[75] Interviews, Supra.
[76] Ibid.
[77] Ibid.
[78] Ibid.

ha a na tshwanelo, kana rona gare batho ba sepe, ke ka ha mang le mang are tsayang ka teng akere?'[79] which loosely translates to '*A San does not have any rights, we are an insignificant lot, that's how everyone else treats us isn't it*?'. For Goonamo human rights and Indigenous Peoples rights has no meaning for him because it does not translate to any value for him and his people.[80] Goonamo observed thus:

> We know nothing about rights. I think the rights you are asking about is related to the MDA, is it not? If we had any rights, we would have been consulted before we were relocated from the CKGR. If we had rights, we would be living a better life promised to us in these resettlement villages. A Tswana man's dog has a better life than us. We have no functional facilities like a robust clinic where our women can give birth safely, no roads, no water to drink or water the cattle and goats. We were forced to join in the agriculture economy. At my age, I have no capability to herd cattle. But nobody cares because I am just an insignificant person in the scheme of things. If you relocate me from a land that I can survive in with my eyes closed, put me in your land and abandon me yet you know I need you to keep breathing, you have effectively killed me. I take it you realise that there are no rights for me and my people.[81]

Some respondents demonstrate that there is a complex understanding of Indigenous Peoples rights. For Xikuri, there is a limited understanding of Indigenous Peoples rights amongst the San, but he understands that the extent to which one can enjoy Indigenous Peoples rights is commensurate with their privilege in the society.[82] Thus, it being common cause that the San are not people of privilege it goes without saying that they enjoy no rights whatsoever.[83] Xikuru observes that:

> To claim rights, one should assess their standing in a society and gauge how that society treat them. In my case, I know I am a nobody and I have accepted my status. We know our disadvantage by comparison with the Tswana. I have lived a life of servitude, paid with dog food and shelter. I believe if rights existed, someone would have confronted my master as my conditions of living were unacceptable if I have rights. After escaping servitude, I am a regular with the police because my former boss is a powerful man. Can rights protect us against the powerful? Look at how the GOB bulldozed us out of the CKGR, where were those rights? Only a handful of us returned to the CKGR and we live in fear because we have no rights. All we have is our land in which our ancestors will protect us. Rights to enjoy our land and the good it provides will happen the day the CKGR experiences snow of proportions of Queen Elizabeth's homeland. [84]

[79] Interviews, Supra.
[80] Interviews, Supra, Respondent uses a pseudo name.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.

In Sister's view a San at grassroot level resident in CKGR, it is one thing to claim rights and it is something else to claim rights and obtain such.[85] Sister notes that:

> I was forcefully relocated from Molapo and returned years later. In between my relocation and return to this land, many things happened. When the GoB spoke to us about relocation, we were being told of a decision that was taken for us. We were not asked what our thoughts were and how we felt about leaving our land, our identity, our ancestors, and our whole being, for the CKGR means that much to us. When we were still adjusting to the decision for it was unilaterally taken, the GoB abruptly and forcefully relocated us, no warning given for us to prepare ourselves for the looming loss. We arrived at the 'promised land' and that was chaos. The destination was nothing close to what the GoB said it would be. Life was far worse than it can ever be in the CKGR. No water, medicine, food, road, money to buy what is needed to survive and no one to help us navigate that life. We did not even have the land as they brought us to the land of their gods. All these things made me realise that there is nothing like rights for us. People with rights are given respect.[86]

Ankele, a San at grassroot level narrates an incident to highlight that rights do not accrue to the San in the following way:

> My nephew disappeared in 2019 during a trip with civil servants during a stretch break within the CKGR. The alleged point of disappearance is a hub for all sorts of deadly wild animals. Whenever I seek investigations updates on his disappearance, I am met with threats. I recall one officer saying, it is just one San who disappeared, it is one less problem. Another officer told me he would give me my nephew's bones in time. We have been met with the most heart wrenching insensitivity whilst we mourn the loss of our son. If we had any rights, the police would have investigated my nephew's disappearance, given us an official report, and provided counselling for us. These rights you are talking about do not happen for people like us, children of a lesser god.[87]

Whilst the San respondents do not use Indigenous Peoples rights terminology, they have a general strong conviction that they must be allowed the space to enjoy the occupation and use of the CKGR as their ancestral land. In claiming the occupation and use of the CKGR, the San respondents assert their spiritual endowment and are inclined to the spiritual connection they have with the land of their forefathers and foremothers. The San thus argue that the enjoyment of their occupation and use of the CKGR is divine and should not be interfered with even by the GoB. Interestingly, the San respondents use the terminology ancestral land to refer to the CKGR whilst they refer to the resettlement villages as 'the land belonging to others' or 'the

[85] Interviews, Supra. Respondent uses their real names with consent.
[86] Ibid.
[87] Ibid.

land of our abusers' or 'foreign land' or 'exile land' and 'temporary shelter where we await returning home'.

The departing view on the enjoyment of Indigenous Peoples rights was presented by respondents who identify as San and are Indigenous Peoples rights activists hereinafter referred to as San activists. Roy Sesana seem to have a more nuanced understanding of rights, the Constitutions, Indigenous Peoples' rights in Botswana and elsewhere.[88] Whilst Roy Sesana is adamant that the San are clothed with the enjoyment of Indigenous Peoples rights by virtue of being the First Peoples in Botswana and being a tribe on the verge of extinction, he is not optimistic about the GoB's willingness to discharge its obligations in the promotion and protection of the San's rights.[89] Roy Sesana is of the view that, a basic example of how the GoB is not willing to promote and protect the San's rights can be deduced from the GoB's nonchalant attitude in empowering the San.[90]Roy Sesana notes that the majority of his people are not even aware that they are rights bearers, a position that rendered them vulnerable and susceptible to abuse by the GoB and other stakeholders.[91]

1.7 Ethical Considerations

Ethics in research related to Indigenous peoples has, over recent decades, been increasingly discussed in a global context.[92] Ethics in research conducted amongst Indigenous Peoples is critical as the subjects constitute one of the most vulnerable groups. In fact, researchers on methodologies to be employed when doing research on Indigenous Peoples often warn of the sensitivity of the research exercise that is often caused by Indigenous Peoples' scepticism to research.[93]

To ensure adherence with acceptable standards of ethics in this research, I complied with the Ethics Policies of the University of Glasgow, University of Botswana, and the Republic of Botswana where the field research took place. Upon obtaining all necessary permits, I conducted a familiarisation trip in Kaudwane, New Xade and Xere before the actual field work to build trust and openness. This exercise was done in the company of the research interpreter

[88] Interviews, Supra. Respondent uses their real name with consent.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Anna-Lill Drugge (ed), *Ethics in Indigenous Research: Past Experiences -Future Challenges* (Urea University 2016).
[93] Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Zed Books 2012).

who introduced me to the villagers. During the interviews, I ensured that all ethics guidelines were strictly adhered to. I introduced the respondents to the research, obtained consent from all the respondents before the interviews commenced, advised the respondents that the interviews were voluntary with the right to withdraw at any point, and that they had the right to disclose their names or be anonymised.

The study investigated one of the most sensitive issues in the current politics of Botswana. Tensions between the GoB and the San is heightened as a result both parties are sceptical about any research on these issues. Whilst the familiarisation visits to the research villages served to mitigate the mistrust between me and the San, there was nothing I could do to encourage the GoB to take part in the research. Some civil servants, development officers and policy officers volunteered to participate in the interviews provided their identities were protected and specifically required that none of their interviews be shared with anyone and that the publication output of the interviews refer to all of them as development officers no matter their designation.

The San at grassroot level neither speak English or Setswana which are the two languages I speak. I enlisted the services of a translator, that ensured that the respondents fully understood the questions and the responses they gave were properly captured. Prior to the field work, I enrolled the interpreter in a research and academic translation short course to capacitate him for the field work.

1.8 Structure of Arguments

The thesis consists of an introduction, four chapters, and a conclusion. Chapter 1 frames the MDA in terms of its distinctive characteristics and suggests that these characteristics offer clues for reframing development as it relates to Indigenous Peoples. In addition to considering the experiences of Indigenous Peoples as they interact with developmental policies, Chapter 1 focuses on the politics of development, particularly within colonial, settler colonial and post-colonial contexts. Chapter 2 focuses on the status of the San in Botswana. Revisiting the simultaneous development of legislative and policy framework from pre-colonial Botswana, colonial and post-colonial Botswana, the chapter considers how the politics of ethnicity, culture, and identity permeate the policy making and dominate the legislative outcome thus resulting in the marginalisation and discrimination of the San in colonial and post-colonial

Botswana. Chapter 3 examines the politics and contestations of indigeneity and argues that indigeneity is increasingly theorised as it relates to colonial structuring of society and less of how it finds meaning in present social context. In deploying indigeneity in its colonial context, governments find a justification for assimilating Indigenous Peoples like the San. The thesis adopts the post-colonial meaning of indigeneity. This chapter suggests that indigeneity is a factor that ought to be established *defacto* and *dejure*. People or individuals in social context determine their indigeneity and then present themselves before the law to benefit the 'rewards of indigeneity'. The meaning and implications of indigeneity are not void of controversy. The case of the San in Botswana is used to demonstrate indigeneity in context and highlight the politics and contestations inherent in any indigeneity related issue. The GoB's controversial policies on indigeneity are used to demonstrate how indigeneity in an African context have peculiarities distinct from other contexts and how the colonial meaning of indigeneity which extended indigeneity to all native tribes in Africa has been used to distort indigeneity in the post-colonial context.

Chapters 4 deals with regional and international law regulatory and institutional frameworks on the promotion and protection of Indigenous Peoples rights. The chapter revisits the Indigenous Peoples rights trajectory in the regional and international framework and argues that Indigenous Peoples play a pivotal role in the making and shaping of Indigenous Peoples specific rights and frameworks. The chapter focuses on the UNDRIP and considers the controversies on its making and how the controversies from the drafting present hurdles in the implementation process. The chapter argues that the present difficulties in the implementation of the UNDRIP have little to do with the content of the legislative framework but are attributable to the systemic hurdles inherent in international law generally. Even if Indigenous Peoples were granted full discretion to craft the UNDRIP as they deem best, implementation would still be a struggle if the existing euro centric, state centric international law ordering persisted. Chapter 4 focuses on specific rights in the UNDRIP such as Indigenous Peoples' right to self-determination, the right to give free, prior, and informed consent, the right to own and occupy ancestral land and the right Indigenous Peoples have over their territories, waters, and natural resources. Chapter 4 demonstrates that the UNDRIP is a crucial international instrument in the protection of Indigenous Peoples against dominant development patterns and the specific rights discussed are the necessary yardstick to be adhered to by states prior to any development on Indigenous Peoples. The San in Botswana posit the UNDRIP as a 'saving

grace' and find it relatable to them. In fact, though the San at grassroot do not use international law terminology, what they consider important in the communities has found legal and international law expression through the UNDRIP.

Chapter 5 focuses on the impact of the MDA on the promotion and protection of the San's rights in Botswana. The San's representation of how the MDA impact their rights is not only related to but also predicated on the GoB's attitudes towards assigning indigeneity. Moreover, the experience of the San reveals a profoundly colonial dimension of MDA policies in contemporary Botswana. Chapter 6 explores the key arguments and findings of the thesis and highlights their meaning for Indigenous Peoples of the world. Furthermore, the chapter provides recommendations to the GoB, the San, and other key stakeholders on building sustainable and functional relationships, adopting right policies, and understanding the precarious status the San are in, with a view to establish a conducive environment for the promotion and protection of the San's rights.

CHAPTER 2
THE HISTORICAL AND CONTEMPORARY STATUS OF THE SAN IN BOTSWANA

2.1 Introduction

This chapter gives a historical and contemporary account of the San's social, economic, and political status in Botswana. The chapter further maps the legal landscape and assesses how the laws impact the promotion and protection of the San's rights. This chapter is indispensable in the thesis as it contextualises the evolution of the Modern Development Agenda (MDA) in Botswana. The social, economic, and political evolution of the San is crucial in understanding what influences the MDA policies in contemporary Botswana. Moreover, this chapter sets perspective for Chapter 3 on indigeneity as the politics and contestations of indigeneity are directly linked to the evolution of the MDA. The chapter considers both secondary sources and findings from interviews conducted with various stakeholders including the San at grassroot level, San activists, academics, activists, lawyers, developmental officers, policy makers, retired civil servants and politicians.[1]

With quite an impressive and celebrated legacy of economic growth, respect for human rights and upholding sound democratic ethos, Botswana is often dubbed the 'African Miracle'.[2] This accolade is premised on the fact that Botswana is situated in a continent synonymous with bad governance, violation of human rights, violence and many other incidents that offend the democratic ideals. Post-colonial Africa has been characterised by intra state conflicts, violent crises, political instability, and state failure.[3] Almost every country in Africa has had a fair share of conflicts and crises.[4] Botswana is one of the few exceptions. A popular testimonial for

[1] Interviews were conducted in Xere, Kaudwane, New Xade and Central Kalahari Game Reserve between May 2022 and August 2022 amongst the San at grassroot level, civil servants and politicians; and virtual Virtual interviews were conducted between June 2021 and June 2022 amongst San activists, activists, academics, civil servants, lawyers, and politicians.

[2] Stephen Marr, 'A Town New and Modern in Conception: Non-racial Dreams and Racial Realities in the Making of Gaborone, Botswana' (2019) 25 Social Identity 41; Jeremy Sarkin & Amelia Cook, 'The Human Rights of the San (Bushmen) of Botswana-The Clash of the Rights of Indigenous Communities and their Access to Water with the Right of the State to Environmental Conservation and Mineral Resource Exploitation' (2010) 20 J Transnat'I L Pol'y 1.

[3] Catherine Scott, *State Failure in Sub-Saharan Africa: The Crisis of Post-Colonial Order* (BPC 2020).

[4] Matthias Basedau and Johanna Schaefer-Kehnert, 'Religious Discrimination and Religious Armed Conflict in Sub-Saharan Africa: An Obvious Relationship?' (2019) 47 Religion, State and Society 30.

Botswana's success pertains to the drastic change from one of the world's poorest countries at independence, to one of the world's development successes.[5]

Botswana (then called Bechuanaland) was a Britain Protectorate effective 1885 and throughout the colonial period maintained the status of a labour reserve for South Africa.[6] As a protectorate, the country was ruled indirectly from South Africa as Britain was intent on minimising administration to save costs.[7]At independence in 1966, Botswana was among the world's poorest nations.[8] British rule that spanned over 80 years had not developed Botswana. There was no infrastructure except a '7 km of tarred road, a capital that amounted to little more than a railway station' and very few nationals had high levels of education or public service experience.[9] Less than a year after independence, diamonds were found in Orapa and that changed Botswana's developmental trajectory.[10] Within two decades of attaining independence, Botswana changed from one of the 25 poorest countries in the world into a middle-income country with one of the fastest growing economies.[11] This exceptional record is said to have been matched and sustained by competent and efficient management.[12]

With a more robust, critical and independent scrutiny of Botswana's performance, some major shortcomings come to the fore.[13] Botswana's exemplary record is superficial as events inside Botswana contradict perceptions about the country's unblemished record.[14] Inequalities of wealth and income are high and the disparities between the rich and the poor are established, structured, and growing.[15] There is growing mismanagement of resources, bad governance is shielded by the hierarchies and inequalities that permeate the society and general public's deference to authority easily stifles public questioning.[16]

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[5] Sarkin & Cook, Supra.
[6] Monageng Mogalakwe and Francis Nyamnjoh, 'Botswana at 50: Democratic Deficit, Elite Corruption and poverty in the Midst of Plenty' (2016) 35 Journal of Contemporary African Studies 1.
[7] Ibid
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Charles Manga Fombad, 'The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995' (2001) Journal of SAS 57.
[12] Ibid.
[13] Bugalo Maripe, 'Freezing the Press: Freedom of Expression and Statutory Limitations in Botswana' (2003) AFR. HUM.RTS. L.J. 52; Mogalakwe & Nyamnjoh, Supra, Kenneth Good, 'At the Ends of the Ladder: Radical Inequlaities in Botswana' (1993) The Journal of Modern African Studies 203; Kenneth Good Diamonds, Dispossession and Democracy
[14] Mogalakwe & Nyamnjoh, Ibid; Oyvind Mikalsen, 'Development Communication and the Paradox of Choice: Imposition and Dictatorship in Comparing Sami and San Bushmen Experiences of Cultural Autonomy' (2008) 22 Critical Arts A Journal of South-North Studies 295.
[15] Good, Supra.
[16] Ibid.

Some of the international concerns on Botswana's human rights performance relate to the country 'staunch position on the death penalty, gender inequality and prevalence of gender-based violence, rape and other sexual related violations, high youth unemployment, inequality between the urban and rural arears, and refusal to sign and domesticate most critical treaties relating to the most vulnerable groups.[17] Moreover, in Botswana, human rights especially of minority groups have regrettably evolved slowly.[18] In summing up the human rights status of Botswana in 2022, Freedom House report states that:

> While it is considered one of the most stable democracies in Africa, Botswana has been dominated by a single party since independence. Media freedom remains under threat. The indigenous San people, as well as migrants, refugees, and LGBT+ people, face discrimination.[19]

The interview findings confirmed the above assertions as they relate to the San as much as they highlighted other notable shortcomings on Botswana's credentials.[20] Botswana grapples with the promotion and protection of Indigenous Peoples 'rights. It is against this background that this chapter analyses the social, political, and economic status of the San in Botswana. The chapter makes the following key arguments.

Although there is a paucity of literature on the San's way of life prior to their interaction with the Tswana and the colonial government, the San were a nomad tribe that was socially, economically, and politically organised.[21] The limited writings and documentation of the San's independent lifestyle demonstrates the continued assault on their identity and the persisting cultural genocide from scholars that perceives Indigenous Peoples as a group identified only through the lens of the dominant groups.[22] The failure in acknowledging the San's way of life before their interaction with Tswana groups and the colonial power is used by the GoB to justify the forced assimilation.

The San's interaction with external forces drastically changed their social, political, and economic organisation. As discussed in Chapter 1, Tswana groups subjugated, dominated, dispossessed, and displaced the San from their land from the 19th century.[23] The 19th Century

[17] Good, Supra; Mogalakwe, Supra and Maripe, Supra.
[18] Sarkin & Cook Supra.
[19] Available at https://freedomhouse.org/country/botswana/freedom-world/2022 accessed on 14 April 2023.
[20] Interviews, Supra.
[21] Interviews, Supra.
[22] In this instance, the dominant groups may mean the Tswana tribes or the Colonial government. Dominant is used to define a group perceived to have more power than the San who are themselves perceived as vulnerable defenceless and weak.
[23] Good, Supra.

also marked the economic transition from hunting and trading game products as the economic activity to cattle rearing.[24] This was because the 'powerful' Tswana imposed their economic activities through the land dispossession and the displacement of the San. As a system almost structured as the Tswana kingdom, colonial rule further disadvantaged the San as it hierarchised tribes with the Tswana occupying the top barren amongst tribes, an arrangement that outlived colonialism. The Tswana were deemed legitimate by the colonial government and consulted on key issues like land distribution.[25]

In contemporary Botswana, the San remain the most socially, politically, and economically excluded tribe.[26] The San are disintegrated, their sense of belonging, identity and lifestyle has been destroyed following their relocations from the Central Kalahari Game Reserve (CKGR).[27] The San have largely been denied the fruits of Botswana's rapid economic growth, suffering from chronic unemployment and poverty, holding little to no land and few assets, and frequently depending on government beneficence for survival.[28] Politically, the San have no representation in crucial decision-making structures.[29] The San traditional structures have been replaced by modernised decision-making and Tswana traditional structures and institutions.[30]

The discrimination, exclusion, marginalisation, and vulnerability of the San is both socially and legally constructed. The Tswana perception of the San culminated into laws and policies. The laws that were promulgated since colonial period exacerbated the San's frail and feeble position in the societal strata.[31] The colonial land allocation and the GoB relocation policies dispossessed the San of their land. The colonial Constitution and the Chieftainship Act curtail the San's representation. The Wildlife Conservation and National Parks Act (Wildlife Act) restricts hunting and gathering, and inherently interferes with the San's way of life in various ways. All these are essential for the recreation of a San community that is compliant to the MDA imperatives as envisioned by the GoB.

[24] Good, Supra.
[25] Ibid.
[26] Interviews, Supra.
[27] Ibid.
[28] Nicholas Olmsted, 'Indigenous Rights in Botswana: Development, Democracy and Dispossession' (2004) 3 Wash U Global Stud L Rev 799.
[29]Interviews, Supra.
[30] Ibid.
[31] Ibid.

This chapter considers the San's social, political, and economic organisation from the historical to the contemporary Botswana. The chapter further explores the legislative framework and analyses how it impacts the promotion and protection of the San's rights.

2.2 Situating the San: Historical to Contemporary Botswana

Botswana is made up of diverse ethnic groups. Botswana literally means the country of the Tswana tribe, underlying the domination of the Tswana.[32] The name Botswana is said to originate from the three Tswana chiefs who sought protection from the Queen of England and was so named in 1885.[33] Prior to that, the country had two names, Bangwato called it 'Khama's country' whilst everyone else called it Kgalagadi.[34] In addition to the Tswana ethnic groups discussed in Chapter 1, there is the San also known as Bushmen or Basarwa.[35] The San are sub-divided in Botswana into many named groups, most of whom speak their own mother-tongue. Some of these groups include the Ju/'hoansi, Bugakhwe, //Anikhwe, Tsexakhwe, !Xoo, Naro,G/wi, G//ana, Kua, Tshwa,Deti, ǂKhomani, ǂHoa, //'Xauǂesi, Balala, Shua, Danisi, /Xaisa.[36]

An account on the prominent role played by the Tswana chiefs in the colonisation of Botswana is more critical as it put the Tswana in an advantaged position by comparison with other tribes. It seems to be the case that the Tswana Chiefs' hailed actions of seeking protection from the Queen set a tone for recognition and respect of the Tswana tribes by the colonial government. The Tswana have enjoyed privileges like no other tribe, have occupied leadership positions and spearheaded policy making platforms that peddle Tswana centric agendas. For example, the MDA policies adopted on the San seek to 'Tswanalise' the San as they are biassed towards Tswana economic, social, and political output.[37]

[32] Interviews, Supra.
[33] Monageng Mogalakwe, 'How Britain Underdeveloped Bechuanaland Protectorate: A Brief Critique of the Political Economy of Colonial Botswana' (2006)1 Africa Development 66.
[34] Ibid.
[35] Nyati-Ramahobo, Supra.
[36] Interviews, Supra; Kuela Kiema, Tears for my Land (Bay Publishing, 2010).
[37] By way of example, the Official language in Botswana are English and Setswana. These two languages are also compulsory for students from Primary right through to Senior School to the exclusion of all other languages.

2.2.1 A Historical Account of the First Inhabitants of Southern Africa

The history of the San prior to their encounter with the Tswana groups in Botswana is scant. This is also true of the evolution of the San's social, political, and economic life. Many scholars write about the San from a historical perspective with no account of any change. In his anthropological account of the San Kiema observes that;

> We are not perceived as having evolved and developed since that ancient time. Our entire history is linked to the past; a past that is never linked to the present or the future. The latest date given by Tlou and Campbell about our history is that 3, 000 years ago and possibly less, both the Khoe and San living in Southern Africa were gatherers and hunters…Any events relating to us since then are not described. Why are Tlou and Campbell not interested in giving an up-to-date history of us? In other history books, events concerning Bantu tribes are described with time frames-dates-months, and years-but not us.[38]

Kiema underscores the persisting assault on the San's historical account as persisted generally by dominant stakeholders such as scholars and national government.[39] The account on the San as a tribe that had no gradual evolution is intended to distort the experiences of the San, subsume them under the dominant tribes and reduce their rich history to nothingness. In fact, a closer look at the writings on the San and their history is dominated by Tswana scholars, therefore the omissions are to be expected to reinforce domination of Tswana tribes. In other accounts by less biased scholars, the San are recorded as the original inhabitants of Southern Africa where they lived for millennia as independent hunters and gatherers.[40] The rich heritage of rock art in Southern Africa is attributed to ancestral San who had lived there since ancient times.[41] The oldest unequivocal remains of Homo sapiens sapiens dated to 125,000 B.C.E. have been excavated at Klassies River Mouth east of Cape Town.[42] For thousands of generations the San lived, hunting and gathering, as the sole occupants of Southern Africa.[43] Archaeological evidence records that they lived in small mobile groups with a complex microlithic stone tool technology.[44]

Some scholars tend to be very dismissive of the San's political, social, and economic organisation. The basis seems to be the use of other tribes that subsequently inhabited Botswana

[38] Kiema, Supra p.74.
[39] Ibid.
[40] Richard Lee, Robert Hitchcock & Megan Biesele 'Foragers to First People: The Kalahari San Today' (2002) Cultural Survival Quarterly Magazine 1.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Lee, Hitchcock and Biesele, Supra.

as a litmus test in establishing historical evolution of tribes.[45] Such a historical evolution follows a specific trajectory that is peculiar to Tswana groups. Nevertheless, Kiema provides an account that demonstrates that the San were organised socially, politically and economically even way ahead of their interaction with any other tribe.[46] Owing to their hunting and gathering activities, the San were organised in small communities or "bands" which exploited resources within a defined territory.[47] A band was depicted as the principal unit of the social structure with the family making up the core unit.[48] Band membership was acquired by birth or marriage or through other admission processes, for example interchange of members as a resolution of conflicts.[49] Band members had the right to exploit the resources of a given band territory.[50] The band territory itself was inherited and the ownership passed from one generation to another. Although hunters and gatherers, the San lived in different places within their tribal boundaries, hunted and gathered the wild fruits within their tribal territories.[51] The San had marked territories and one band required permission from the other to gather or hunt in their territory.[52] Migration was common amongst the San, but it was within a defined territory owned by one's own band. Some of the notable tribal territories recalled by some San include the Dxanakhoe, Tshila, Dcuikhoe amongst many others.[53]

Socially, the San had tribal taboos, laws and regulations which were laid down from one generation to the next orally. These rules governed social relations between diverse San groups.[54] Within bands, some leaders would naturally emerge to provide guidance to members of a designated band, however, there was no permanent centralised leadership.[55] The leaders had the capacity to give permission to non-members wishing to benefit from the territory the band occupied.[56] Leadership was also important as the San faced attacks from the Bantu intruders from time to time.[57]

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[45] Clement Ng'ong'ola, 'Land Rights for Marginalised Ethnic Groups in Botswana, with Special Reference to the Basarwa' (1997) 41 Journal of African Law 1.
[46] Kiema, Supra.
[47] Ibid; Ng'ong'ola, Supra; Steven Robinson, 'Land Struggles and Ethics of Representing 'Bushman' History and Identity' (2000) KRONOS 56; Olivia Jane Winters, 'The Botswana Bushmen's Fight for Water and Land Rights in the CKGR' (2019) 21 Consilence 172.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid
[55] Kiema, Supra; Ng'ong'ola, Supra; Robinson, Supra.
[56] Interviews, Supra; Kiema, Supra; Ng'ong'ola, Supra; Robinson, Supra.
[57] Ibid.

2.2.2 The San's Encounter with the Tswana

Contact between the San and the Tswana has been traced to the 19th century.[58] The Tswana groups migrated from other parts of Southern Africa following defeat from inter-tribal wars that beset the region and settled in present day Botswana where they found the San. The interaction between the two groups is characterised by turmoil as the Tswana forcibly removed the San from the land they held for many years. The San are depicted as having put in a good fight to defend their land from some of the Bantu groups such as the Amandebele.[59] Of the Tswana groups, the interaction is recorded between the San and the Bakwena who occupied the southeastern parts of TC'amnqoo, one of the territories owned by the San.[60] The San reportedly accepted the Bakwena as neighbours, however with the passage of time conflicts ensued between the San and the Bakwena with the San losing.[61] In no time, the land previously belonging to the San was now termed Kweneng which translates to land owned by the Bakwena. Some San were kept on Bakwena cattle posts and were handed down by the Bakwena as serfs from one generation to the next.

Pre-colonial, the Tswana enjoyed an elaborate political system with the tribal chief (kgosi) vested with virtually absolute power.[62] These powers were limited in practice by the constant threat of revolt or assassination.[63] External pressures from Non-Tswana groups strengthened the chief's position as supreme military commander and on arrival of the Christian missionaries, chiefs used their association to increase their political powers.[64] The Tswana developed local states with a political structure that was able to integrate people of other ethnic groups.[65] Tribes owned a given piece of land under the control and custodian of the Chief.[66] The chief allocated land to members of his tribe for ploughing or residential purposes. The villages were divided into several wards, each headed by a headman. The chief settled disputes, pronounced on tribal customs and traditions, and ruled on matters concerning the tribe in

[58] John H Robertson & Rebecca Bradley, 'A New Paradigm: The African Early Iron Age Without Bantu Migrations' (2000) History in Africa 287.
[59] Kiema, Supra.
[60] Ibid.
[61] Ibid.
[62] Simon Gillett, 'The Survival of Chieftaincy in Botswana' (1975) Botswana Notes & Records 103.
[63] Ibid.
[64] Gillet, Supra; Ikanyeng Malila, 'The Role of Punishment in the Political Subordination of the Dikgosi in Colonial Botswana' (2012) Botswana Notes & Records 13.
[65] James A. Robinson & Neil Parsons, 'State Formation and Governance in Botswana' (2006) Journal of African Economies 100.
[66] Keshav C Sharma, 'Traditional Leadership and Institution of Chieftainship during the Pre-Colonial and Colonial Period' in Donald I Ray & PS Reddy (eds) *Grassroot Chiefs in Africa and the Afro Caribbean Governance?* (University of Calgary Press 2003).

consultation with its members.[67] The Tswana society was highly gendered with women assuming the bottom position in the hierarchy of leadership. Consequently, the chief consulted elderly men.

There were notable differences between the San and the Tswana. Whilst the San were nomadic hunters and gatherers, the Tswana reared cattle and grew crops. The San were socially constituted in smaller groups called bands whilst the Tswana groups were constituted in more larger groups that would settle and form a permanent ward. As a result of their elaborate political organisation and their numbers, the Tswana began the process of assimilation of the San.[68] Genetic evidence indicates that assimilation rather than annihilation was the rule, and historic and ethnographic data from Botswana argue that this assimilation occurred more through a process of mutual consent rather than under implied threat of force.[69] Given the status of the San in present day Botswana, it is highly improbable that the San's assimilation into dominant Tswana groups was voluntary. The San's staunch position in maintaining their traditional lifestyle coupled with the violent dispossession displayed by the Tswana towards the San, equally dispel the voluntary assimilation argument. In reference to how and why the San were assimilated by Bantu groups in South Africa, Yellen observes that hunting and gathering did not prove competitive and the process of assimilation of the San populations proceeded at a relatively rapid pace in present day South Africa.[70] This may provide insights into the experiences of the San in Botswana, who may have not been able to continue hunting and gathering because of dispossession by the Tswana.

2.2.3 The Founding of Colonial Bechuanaland and the Marginalisation of the San

When Botswana was declared a Protectorate in 1885, five of the Tswana chiefdoms were considered important by the colonial authorities due to their size and the power wielded by their leaders.[71] These chiefdoms were the Bakwena, Bakgatla, Bangwaketse, Batawana and

[67] Sharma, Supra.
[68] John Yellen, 'The Process of Basarwa Assimilation in Botswana' (1985) 17 Botswana Notes and Records 15.
[69] Ibid.
[70] Yellen, Supra.
[71] Gillet, Supra; Malila, Supra.

Bangwato.[72] These chiefdoms were amongst the eight major tribes by the 1966 Constitution and were privileged to have a permanent seat in the House of Chiefs.[73] Notably excluded from these tribes is the San.

Essentially, the Chiefs of these major tribes ruled much as before whilst the Protectorate Administration largely confined itself to supervising and restricting European activities in the territory.[74] The chiefs were allowed maximum independence in their tribal rule and in maintaining law and order.[75] The San's political organisation did not provide for a Chief in the manner the Tswana system did. As a result, the San did not have a political leader who was recognised by the colonial government, nor was the colonial government interested in the San. The British provided very minimal support to the Protectorate, the Administration would step in and almost always support Tswana chiefs where there was serious trouble.[76] Under the Protectorate the Tswana Chiefs enjoyed almost unchallenged power. In theory they could be called to account either by the British Administration or by their own people, in practice that was hardly the case. Consequently, the only way in which the British could prevent the Chiefs from abusing their position was to transfer at least part of their powers to some other constitutional authority also acceptable to the tribes.[77]

The colonial powers' arrival in Bechuanaland was intended to as much as possible 'sophisticate' the Africans who were perceived to be backward. The understanding that Africans were backward was founded in their way of life being different from that of Britain. colonialism in Bechuanaland Protectorate as did everywhere else was aimed at erasing differences. In what Home dubs the contradictory and self-serving nature of British colonialism in Africa, the British explained their role in Africa thus:

> The British role here is to bring to the country the gains of civilisation by applied science (whether in the development of material resources, or the eradication of disease, etc).[78]

Colonialism with the sole purpose of eliminating the African way of doing things and introducing the British way thrived in Botswana particularly against the San as the Tswana had already begun the process of assimilation of the San. The process of assimilation of the San by

[72] Gillet, Supra; Malila, Supra.
[73] Robinson and Parsons, Supra; Sharma, Supra; Louis W Truschel, 'Political Survival in Colonial Botswana: The Preservation of Khama's State and Growth of Ngwato Monarchy' (1974) 4 TRANSAFRICAN 71.
[74] Ibid.
[75] Ibid.
[76] Gillet, Supra.
[77] Ibid.
[78] Robert Home, *Towards a Pro-Poor Land Law in Sub Saharan Africa* (PULP 2011) 25.

the Tswana groups was founded on similar ideology as colonialism in that they both aimed at imposing certain values and ways of doing things on a people deemed backward. The Tswana thought the San were inferior and backward, and the irony was, the British thought the Tswana and the San were inferior and backward, requiring the 'British touch'.

The encounter between the San and the colonial government was very limited. During the colonial period, there were concerns that the San were enslaved by the Tswana, investigations were carried out, and a report given to the colonial government.[79] However, the colonial government did not take any action to protect the San.[80] In fact, the colonial government became a key player in the discrimination, abuse, marginalisation and exacerbated the San's vulnerability through its policies.

After the San had been disposed of by the Tswana, the colonial government reaffirmed the prevailing position that the San should not own tribal land. The Concessions Court was established in 1893 and was mandated to investigate and validate Europeans settlers' land claims.[81] The European settlers successfully claimed five pieces of land ranging from 1, 000 to 6,000 morgens.[82] The Europeans acquired 'freehold' titles, something that was unknown to Bechuanaland. The land taken up for the farms cut into the traditional territories of the San, but the colonial authorities and other actors involved in the recognition of settler claims and the creation of freehold land were not prepared to acknowledge the political or territorial sovereignty of the San.[83]

The disregard of Indigenous Peoples' land ownership was the bedrock of colonialism. Gathii observes that:

> The law on title to territory is subtly laced with an implicit evolutionary or hierarchical sub-text that characterizes non-European relations to land as primitive and as such not capable of creating a legal title. Non-European land relations are therefore lower in the evolutionary hierarchy of civilizations, while European land relations are hierarchically superior, and settled as opposed to migratory. Unlike non-European land relations, European land relations are un-problematically characterized as being accompanied by legal title to the land…The fact that Masubian roaming was so much part of their way of life that even colonial authorities took no note of it! Unlike settled and ordered 'civilization,' such

[79] J.E. Spence, 'British Policy Towards the High Commission Territories' (1964) 2 The Journal of Modern African Studies 221; Robert Hitchcock, 'Socioeconomic Change among the Basarwa in Botswana: An Ethnohistorical Analysis' (1987) 34 Ethnohistory 219; Sidel Saugestad, *The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance, and the First People of the Kalahari* (The Nordic Africa Institute,2001).
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid.

> migratory practices, according to the Court, are inconsistent with the only universal viable model of political organization for all peoples. This universal model is embodied in European statehood and its attendant artifacts of bounded territory: fixed populations and effective governance.[84]

Gathii illustrates the experiences of the San as they encountered colonial powers in Botswana. The use and occupation of land by Indigenous Peoples was disregarded by the colonial powers and subsequently by the post-colonial government such that even the existing jurisprudence in Africa illustrates that the occupation and use of land by Indigenous Peoples was treated as non-existent.[85] This is consistent with the McIntosh principle or doctrine of discovery as espoused in the case of *Johnson v. McIntosh*.[86] The principle of discovery effectively means that whilst Indigenous Peoples may be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, they do not have any more rights beyond just mere occupation. Colonial powers' discovery gave exclusive title to those who made it and that such discovery necessarily diminished the power of Indigenous Peoples to dispose of the soil at their own will, to whomsoever they pleased.[87] Miller et al articulate the doctrine of discovery thus:

> According to the doctrine of discovery, sovereignty could be acquired over unoccupied territory by discovery. If the territory in question was occupied, then conquest or cession was necessary to transfer sovereign power from its inhabitants to an imperial power. However, European imperial practice was to deem territory occupied by Indigenous Peoples to be unoccupied, or terra nullius, for the purpose of acquiring sovereign power. Legally deeming Indigenous territory vacant meant that settler governments did not require conquest or cession of themselves in order to grant themselves sovereign power to rule Indigenous Peoples and territories. International law deemed Indigenous territory to be terra nullius because European powers viewed Indigenous People to be insufficiently Christian or civilised to merit recognizing them as sovereign powers.

This principle applied to the San in that with the establishment of the CKGR in 1961, the colonial government allowed the San to continue their occupation and possession of their ancestral land, without necessarily conferring any title of ownership. This was the case even though at the time of declaring the land a game reserve it belonged to the San.

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[84]James Thuo Gathii 'Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)' (2002) 15 Leiden Journal of International Law 581 at 584-585.
[85] Ibid.
[86] *21 U.S. (8 Wheat.) 543, 574 (1823)*
[87] Blake A. Watson, 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand' (2011) 34 Seattle University Law Review 507.

During the colonial period, three types of land ownership developed. Firstly, Tswana tribes kept the land they had previously controlled through Tribal Reserves, but Tribal Councils administered such land in terms of their customs and traditions.[88] Through the Native or Tribal Reserves designation, the colonial government gave Tswana chiefs an opportunity to identify their tribal territories.[89] The demarcation would render the land exclusive tribal reserves whilst the land not so claimed by the Tswana tribes and any other vacant land outside the Tribal reserves would be appropriated by the Crown.

The Colonial government adopted a unique policy in Bechuanaland in that it recreated and preserved traditional territories and tenurial practices of the dominant Tswana.[90] Pursuant to the policies, Tswana traditional land and control administrative processes were acknowledged and legitimised. Through the recognition of only the eight major Tswana tribes and designating eight out of the nine reserves for them, the San were denied the protection and autonomy which the reserves policy sought to assure.[91] It is important to note that when the colonial government deemed the land vacant some of that land was in fact occupied by the San. The land was declared vacant in accordance with the colonial rule of discovery which was used widely by colonial powers the world over to dispossess natives of their land.[92]

A second type of land was created when tribal representatives surrendered huge areas of farmland to white settlers.[93] At the estates of these settlers, titles to private property were also recognised. The remaining land was classified as public crown land (which later became state land at Independence).[94] The San were further excluded from land holding rights when the colonial government refused to acknowledge and recognise the San's political and sovereignty over certain land in the Native/Tribal Reserves and Crown lands. The San were left landless as legal title to their land passed to the Crown under the 1910 Order in Proclamation which redefined Crown lands as including land belonging to the San but specifically excluded land held by the Tswana chiefs in trust for their tribes.[95]

[88] Ng'ong'ola, Supra; Clement Ng'ong'ola, 'Land Tenure Reform in Botswana: Post-colonial Developments and Future Prospects' (1996)11 SAPR 1; Manuela Zips-Mairitsch, *Lost Lands?: (land) Rights of the San in Botswana and the Legal Concept of Indigeneity in Africa* (IWGA 2013).
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92]Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.

It is argued that the order rendered the San as occupiers of vast land tenants at the will of the Crown with no legal protection obtained in the Tribal reserves.[96] Essentially, if the land was required by the Crown, the colonial government did not consider itself bound to consult with the San nor compensate them for any loss. The precarious position the San were in became more pronounced with the evolution and implementation of the fauna and conservation laws.[97] San leaders were not consulted about framing and implementation of hunting regulations whereas the Tswana chiefs were consulted.[98] When protected areas, game reserves and national parks were proclaimed over Crown land, traditional hunting and gathering rights could not be fully guaranteed.[99] It became clear that the colonial government policy was that no one had an inherent right to hunt or gather in the Crown lands.[100] This effectively meant that the San had no rights whatsoever over any land even though they were allowed to exist in some land, historically their ancestral land turned into crown land.

In the context of the three categories of land, the San did not get any tribal land and there was no room for a separate legal status of land use by the San. A separate legal land use by the San was desirable since their social arrangement and economic activities differed fundamentally from that of the Tswana for whom designated tribal land worked effectively. The San were expected to either live on Tswana tribal reserves or they were tolerated on Crown land.[101] Although the formal classification of San territories as Crown land did not directly change the system of land use, big game hunting became increasingly important and trophy hunters doubled the pressure by limiting the remaining freedom of the San.[102] The classification of the San's land as Crown Land whilst other tribes were allocated tribal land underscores the serious injustice perpetrated against the San by the colonial government. The San were rendered squatters as they had no title over their ancestral land, the land they merely occupied at the pleasure of the crown, a situation that still prevails today.

The colonial government had an opportunity to confer ownership title to the San through the 1961 Central Kalahari Game Reserve Proclamation (CKGRP).[103] The CKGR was conceptualised as a sanctuary for thousands of San to carry on with their traditional mode of

[96] Ng'ong'ola, Supra.
[97] Ibid.
[98]Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.

existence, in their environment, without encroachment or interference from other people.[104] The San remained consistent in their quest to maintain their traditional lifestyle in their ancestral land and giving the San title over that land would have secured their ancestral land. However, the colonial government declared the land a game reserve to appease the Tswana who were benefiting from free labour provided by San who were displaced and dispossessed.[105] The CKGRP struck out provisions designed to secure land and land use rights of the San with the right to enter the reserve without first obtaining permission from the District Commissioner for Ghanzi remaining.[106] Essentially the CKGRP only secured hunting, gathering and occupational rights thus falling short of the communal ownership privileges the colonial government had bestowed on the Tswana.[107] Post-colonial period, statistics placed freehold land at 5 per cent, State (formerly Crown) land at 25 per cent and tribal land at 70 per cent.[108] If the San had been granted a title over the CKGR, they would have a portion of the 70 per cent currently in tribal ownership. The deliberate dispossession of the San by the Tswana and the colonial government remains the root cause of the discrimination and marginalisation of the San in modern day Botswana.

In this instance of orchestrating dispossession, denouncing existing laws in the colonies, and altering lives altogether, colonialism shares some international law traits, namely the legitimisation of the global processes that are characterised by marginalisation of the developing countries and the domination by the developed countries.[109] Pahuja argues that the said domination is multifaceted.[110] Where it is legal, it has allowed the infusion of Eurocentric values into legal systems in the Third World and where it is economic it has allowed the Global North to continue assuming a position of privilege allowing them to define the economic direction for the rest of the world.[111]

Eurocentric values are a greater part of the Botswana legal system and dominate the San's historical and contemporary land possession and ownership, economic organisation and political systems. It is these traits of colonialism and international law that have now given way to globalisation to do the developed world's bidding in the twenty first century. For

[104] Ng'ong'ola, Supra.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid; Kwame Frimpong, 'Post Independence Land Legislation and the Process of Land Tenure Reform in Botswana' (1993) 26 385.
[109] Pahuja, Supra.
[110] Ibid.
[111] Ibid.

example, the forced relocations consequent to the MDA policies the GoB adopted are said to be necessitated by the corporate activities like mining and tourism which were taking place at the time of the field work. The San respondents assert that their relocations were intended to pave way for the corporate entities because it is too coincidental that as soon as the relocations began, some global mining and tourism giants began their business in the CKGR.[112]

2.2.4 The San in Contemporary Botswana

The San, deemed susceptible to displacements, indigent, inconvenient, and invisible in scholarship, social circles and governmental policies are Botswana's Indigenous Peoples.[113] The declaration of their indigeneity was made by the court in the celebrated case of *Roy Sesana and others v Attorney General*.[114] In the understanding of the San, the declaration of their indigeneity by the High Court meant that the GoB ought to recognise their First Peoples status and allow them to 'live happily ever after in their ancestral land.'[115] However, the reality as demonstrated by the findings of the interviews conducted with the key stakeholders show that the San in contemporary Botswana are dealing with the aftermath of colonialism compounded by globalisation.[116]

Different respondents underscore vulnerability, deprivation, marginalisation, socially constructed hurdles in accessing resources, identity elimination, and decultarisation, as characterising the San's lives in contemporary Botswana.[117] The San at grassroot level were interviewed in the villages within the CKGR namely Molapo, Metsiamanong, Mothomelo and Gugamma. These respondents were made up of the San who relocated out of the CKGR and returned following their victory challenging the forced relocations and those who refused to relocate. The San were also interviewed in Kaudwane, New Xade and Xere, which are resettlement villages. Roy Sesana, an activist and traditional San leader sums up their status in contemporary Botswana thus:

> We are the only tribe in Botswana that is landless, we experience severe inequality, and are marginalised. We have no livelihood. We depend on the GoB to provide, that is a serious dent on our esteem as a people who have always provided for ourselves in our ancestral land. Our lives are made difficult, both in the

[112] Interviews, Supra.
[113] Mogomotsi, and Mogomotsi, Supra; Saugestad, Supra.
[114] *[2006] 2 BLR 633*.
[115] Interviews, Supra.
[116] Ibid.
[117] Ibid.

> CKGR and outside. Inside, we cannot hunt, gather, or roam our ancestral land. If we do, we face the wrath of the law. In the resettlement villages, we have been forced into the lifestyle of other people who are making us uncomfortable in more ways than one. They expect us to work for them, labour intensive but for free. The GoB literally abandoned us in the resettlement villages, and we are perishing there, in the name of development.[118]

The above assertions were corroborated by other respondents as follows; Goonamo observes that the San were relegated to a position of non-existence in economic policy formulation.[119] Extra a San at grassroot residing in New Xade notes that the forced relocation from the CKGR was a GoB strategy to disintegrate the San communities who are failing to thrive in foreign land.[120] Oneone states that the San had a valid reason to mistrust the GoB because it presided over the destruction of the San's lives through economic, social, and political marginalisation.[121] Stobadiphuduhudu highlights the severe deprivation her people found themselves in.[122] Satau points out that the San did not have access to redress like other Batswana because of officers' perception and that the GoB position on the San exacerbated the extent to which service providers discriminated against the San.[123] Development Officers attested to the community disintegration, poor infrastructures, abject poverty, high HIV prevalence, alcoholism, inaccessible platforms for representation and absence of sources of livelihood.[124]

The struggles of the San in the colonial and post-colonial Botswana are identical because at independence the GoB adopted the colonial economy, its structures, bureaucracy, values and practices, all of which have perpetuated colonial forms of development practice such as expropriation of the San's land, promulgating legislations that criminalises the San's way of life such as hunting.[125] The deeper problems are rooted in an administrative structure that is inappropriate and reflects its origins and embodiment in the colonial structures.[126] The San as a minority group is not included in the promotion of appropriate policies geared towards improving their quality of life post-independence.[127] On the contrary, almost all post-colonial

[118] Interviews, Supra.
[119] Interviews, Supra. Respondent uses a pseudo name.
[120] Interviews, Supra. Respondent uses their real name with consent.
[121] Ibid.
[122] Ibid. The respondent uses a pseudo name.
[123] Ibid. The respondent uses his real name with consent.
[124] Interviews, Supra.
[125] Kenaope Nthomang, 'Relentless colonialism: the case of the Remote Area Development Programme (RADP) and the Basarwa in Botswana', (2004) 42 Journal of Modern African Studies 415.
[126] Ibid.
[127] Ibid.

programmes aimed at addressing the San appear to have primarily functioned as vehicles for their continued colonisation.[128] This argument is further validated by the relocation policies which are in themselves an extension of colonialism, a manifestation of globalisation and are inherently modernisation centric as discussed in Chapter 5.

While the MDA policy in Botswana operates with the colonial structures and mindset, the GOB endeavours to meet its international obligations on the development of the citizenry in line with the globalised MDA ideologies. In post-colonial Botswana, the MDA is sold as a beneficial enterprise that is necessary for the betterment of the subjects. The justification of the relocations in Botswana further underscores the role of globalisation as it uses globalised parlance such as 'relocation to facilitate access to services; relocation to give way to conservation; relocation to give way to productive use of the land, territories and resources'. The domestication of development is not peculiar to Botswana only. Eslava provides insights into the contextualisation of development in Bogota, Colombia. For Eslava, the emergence of Global North centred international law which is the basis for internationalised development projects is traced to Truman's inaugural address.[129]

Truman observed that the Third World was in need of redemption from the Global North and reiterated the United States 'commitment to multilateralism and self-determination of nations, principles which were later adopted in the international framework.[130] Unlike colonialism, development was to be democratic, fair and measured with modern scientific and technical knowledge, promising equitable economic growth and international emancipation.[131] In terms of modernisation, industrialisation and trade participation, development was presented as a way of solving the problems of the underdeveloped world.[132] However, the MDA as it relates to the San fails the litmus test presented by Truman, for example the process of making the policies was not democratic, it was dictatorial in that the GoB excludes the San in the making of the policies in question; the GoB has not been able to provide the equitable economic growth amongst the San in the resettlement villages; the San's economic, political and social struggles are said to be more pronounced consequent to the MDA forced relocations.

[128] Nthomang, Supra.
[129] Eslava, Supra.
[130] Ibid.
[131] Ibid.
[132] Ibid.

Another dynamic to the globalised MDA public policy in Botswana is the decentralisation of implementation of the MDA project. This dynamic has been observed by Eslava in his account of the development of Bogota.[133] Eslava introduces decentralisation as a major deliberate driver of development and argues that through decentralisation key players in the developmental agenda reimagined local jurisdictions as new key sites of global ordering.[134] Decentralisation seeks to connect local jurisdictions with international economic systems and international development standards, effectively reintroducing the colonial indirect rule adopted by some colonial masters into the contemporary international order.[135] In the context of Botswana, the GoB spearheads the MDA in Botswana, in line with the international development ordering. As it regards Indigenous Peoples, the most common expectation of the international development agenda is that extraction of resources would take precedence over Indigenous Peoples' quest to occupy, use and own their land, territories, and resources. States have become fluent in using MDA to dispossess Indigenous Peoples, and when doing so attempts are made to present the MDA as a glorious enterprise.

2.3 The Protection of Indigenous Peoples Rights in Botswana

The GoB's decision to forcefully relocate the San from the CKGR ignited a debate on the adequacy of the legal protective mechanisms on Indigenous Peoples in Botswana. Particularly, the outcome of the *Sesana case* illuminated the inadequacy of the legislative mechanisms in protecting the San. In fact, the consideration of the historical factors that created the marginalisation and discrimination of the San underscore the use of law as both a protective tool as well as a discriminatory tool. Various laws were used to dispossess and abuse the San whilst other laws may be used to emancipate them. For example, legislation such as Bogosi Act and Wildlife Act have been used to marginalise the San, whilst the Constitution has played a dual role of discrimination and emancipation.

The Botswana legislative framework does not make specific provision for the promotion and protection of Indigenous Peoples. Given the perception that Botswana is an exemplary democracy to African countries, the expectation is that the GoB should have pioneered a leading framework on the promotion and protection of Indigenous Peoples rights, however that has not been the case. There has not been any attempt by the GoB to promulgate legislation

[133] Eslava, Supra.
[134] Ibid.
[135] Ibid.

geared towards the protection and promotion of Indigenous Peoples' rights. In fact, if the 2021-2022 Constitutional Review exercise is anything to go by, any Indigenous Peoples specific legislation and rights regime would be dominated by political elites with little to no participation by Indigenous Peoples.[136] In a country where issues relating to identity are of grave concern, the 2021-2022 Constitutional Review exercise did not address any Indigenous Peoples issues, nor did the committee visit Kaudwane, Xere and CKGR, three of the four 'hot spots' on Indigenous Peoples issues. In addition to the foregoing, the Constitutional Review Committee (CRC) had one San in its membership but was not drawn from the CKGR and adjacent villages and was included in his personal capacity. A representative from the CKGR was of utmost importance as that is the only national park in the country with indigenous residents. Whilst the CRC visited New Xade, the San at grassroot level cited that there were numerous factors that rendered the exercise irrelevant for them. Firstly, there was no public education on the processes, expectations, and importance of the constitutional review exercise; secondly, the San at grassroot level were not aware of their role in the process if any and thirdly, the CRC visit to New Xade was not adequately publicised so much that some respondents only learnt about it after the fact.[137] Some female respondents observe that the CRC meeting was dominated by men and the women had no say and that the choice of a kgotla in holding the CRC meeting had an adverse effect of curtailing participation as the San generally defer to the kgotla authority.[138]

The nonchalant attitude in ensuring adequate representation of Indigenous Peoples in an exercise of such national importance emanates from the GOB's position regarding Indigenous Peoples in Botswana. The reluctance in making Indigenous Peoples rights specific mechanism is attributed to the GOB's position that all Batswana are indigenous to Botswana and the promulgation of discriminatory policies would be morally reprehensible and would not be any different to what transpired in apartheid South Africa.[139] Whilst this is a self-defeating argument in that the GOB has in many instances made numerous discriminatory policy decision supposedly to demonstrate that the San are different from other tribes and to mitigate the San's marginalisation, it is still popular, has been so for over five decades and is the bedrock of MDA

[136] Daniel Chida, In Botswana, President Appoints Constitutional Review Commission (2022) available at https://constitutionnet.org/news/botswana-president-appoints-constitutional-review-commission accessed on 13 June 2022.
[137] Interviews, Supra.
[138] Ibid.
[139] Mogomotsi and Mogomotsi, Supra.

policies in Botswana. Absent the Indigenous Peoples rights framework, the San could use the existing human rights framework, although this framework falls short of providing the San with comprehensive protection against tyrant use of power by the GOB and other actors.

This thesis uses The Indigenous Peoples' Rights in Constitution Assessment Tool (Assessment Tool) to analyse the extent to which the legislations and the Botswana Constitution protect the San's rights. The Assessment Tool is relatively objective and should be used like a checklist to guide users through a process of analysing how well Indigenous Peoples' rights are represented in a constitution.[140] It encourages evidence-based scrutiny and advocacy to improve the state's legal and institutional framework from the perspective of Indigenous Peoples and their rights.[141] The Assessment Tool consists of 34 questions, which are divided into 8 sections based on the issues addressed in most contemporary constitutions.[142]These draw on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the ILO Convention 169 and other core human rights treaties.[143] The eight sections are recognition and citizenship, right to equality and anti-discrimination, foundations for indigenous peoples' rights, autonomy: agreement-making and self-government, consultation, political participation and representation, land, territories and natural resources rights, right to culture, and social and economic development and protecting and promoting Indigenous Peoples' rights.[144] This tool encourages the scrutiny of other legislations beyond the Constitution to establish the extent to which governments promote and protect Indigenous Peoples rights.

2.3.1 The Constitution and Other Legislation

The Botswana Constitution was adopted in 1966 and has gone through very limited amendments over the last decades.[145] There is a possible amendment following the 2021 CRC referred to above. However, as it stands, the colonial Constitution does not protect Indigenous Peoples rights as the Bill of Rights confer only first-generation rights. When scrutinising the Botswana constitution against the Assessment Tool, it becomes clear that the Constitution falls short of protecting and promoting the San's rights. The absence of socio-economic rights

[140] Amanda Cats Baril 'Indigenous Peoples' Rights in Constitutions Assessment Tool' 2020 International IDEA 1.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Bojosi Otlhogile, Tshekedi Khama and Another vs High Commissioner: The Making of the Court (1993) 25 Botswana Notes and Records 29.

generally and Indigenous Peoples rights specifically limits the extent to which the San may vindicate their rights. This is because most of the violations of the San's rights relate to second generation and third generation rights. For example, for many years, the San have been at loggerheads with the GoB over their land holding rights as a community. The San's traditional and ways of landholding does not recognise individual land holding whilst the constitutional land holding is individualistic. The communal ownership and possession of ancestral land is central to the overall enjoyment of the San's rights. This is because ancestral land is the cornerstone of every aspect of the San's lives.

The Assessment Tool considers the specific provision on Indigenous Peoples rights as crucial in a protective Constitution, something which the Botswana constitution does not have. The omission of Indigenous Peoples specific rights is an extension of the GoB's non recognition of any tribe as Indigenous Peoples in Botswana. The non recognition of indigeneity as a policy position effectively means that the San do not receive targeted anti-discrimination and equality laws and policies. Furthermore, there is no provision to ensure San's political participation and representation in existing structures. The San's traditional structures have been dismantled and replaced with modern or Tswana governance structures. There is no legislation in place that compels the GoB to make legislation and policies targeted at ensuring equitable distribution of land with secure title for the San. Even in the face of a court order in the *Sesana case* pronouncing on the San's ownership rights over the CKGR, the GoB has blatantly refused to formalise such ownership. All these highlight omissions that exist in the Botswana constitution which effectively render the said constitution inadequate to promote and protect the San's rights.

Although the Bill of Rights in the Constitution of Botswana is limited to first generation rights, it has been interpreted liberally and, in the process, amplified by the Courts on various occasions to give effect to some rights not expressly provided.[146] In such instances, the Courts have interpreted some of the rights to include socio-economic rights.[147] Despite the willingness of the Courts to adopt liberal interpretation in the construction of the constitution the absence of specific Indigenous Peoples' rights in the Constitution is a serious blow to the advancement

[146] Ng'ong'ola, Supra; Rekar Kumar, 'Constitutional Rights and Judicial Activism: Bridging the Gaps in Botswana' in Quansah, E and Binchy, W (eds) *The Judicial Protection of Human Rights in Botswana* (2009, Clarus Press) 119.

[147] For example, in Tapela and Another v Attorney General [2014] MAHGB -000057-14 the court found that denying HIV positive inmates ARV unjustifiably limited their right to life, equality, and freedom from inhuman and degrading treatment and ordered the GoB to enroll all foreign inmates who meet the treatment criteria on ARV treatment.

of the San's rights in Botswana. Constitutional provisions that protect indigenous peoples' rights have the potential to shape the content of legislation and executive policies and increase the likelihood of court decisions that are favourable to indigenous peoples' rights.[148] Constitutions declare important legal principles that can be enforced and positively interpreted by courts and the judiciary, as well as by legislatures.[149] The 2010 Kenyan Constitution may be used to demonstrate the practicalities of the above argument. The said Constitution recognises minorities and marginalised groups ownership of land, provided that disputes over land ownership be resolved using communities' structures and regulations if they are consistent with the Constitution.[150] The Ogiek community used the progressive Constitutional provisions to assert their rights over their ancestral land against the Government of Kenya on numerous occasions.[151]

The Constitution of Botswana has some provisions that have the potential to harness the San representation in political structures. Section 88 of the Constitution provides for the House of Chiefs as part of the National Assembly. The National Assembly must consult the House of Chiefs before passing any bill with respect to tribal organisation or tribal property, the organisation, administration and powers of customary courts and customary law.[152] However Section 2 of the Chieftainship Act defined "tribe" with reference to the eight principal tribes only which were Tswana groups with a history of domination over the San. The effect of this provision was that the Minister could only recognise the chiefs of tribes mentioned in the act. This section in the Chieftainship Act was pursuant to the constitutional provision that gave exclusive membership to the House of Chiefs to what it termed eight principal tribe chiefs. The San were excluded as they did not form part of the eight major tribes. The provisions of the Chieftainship Act, the Tribal Territories Act and the Constitution were challenged before the High Court by Chief Shikati Calvin Kamanakao of the Wayeyi tribe in the case of *Kamanakao and Others v The Attorney General*.[153] It was alleged that section 2 of the Chieftainship Act, as well as the Tribal Territories Act, were discriminatory and therefore unlawful. It was further argued that sections 77 to 79 of the Constitution were also discriminatory in that they provided for only eight tribes as ex-officio members of the House

[148] Baril, Supra.
[149] Ibid.
[150] See Sections 56, 60 (g) and 63.
[151] *John K.Keny & 7 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 4 others [2018] eKLR* available at Kenya Law: Home Page accessed on 14 April 2022.
[152] Section 88
[153] *2001 (2) BLR 54.*

of Chiefs. The applicants argued that the Wayeyi had their own distinct lifestyle and culture, notwithstanding the fact that they might live in the Batawana tribal territory.

The court found that provisions of *section 2* of the Chieftainship Act were discriminatory based on one's tribe and therefore ultra vires the Constitution.[154] The court then held that for it to strike out one provision of the Constitution as offending against another would be tantamount to it rewriting the Constitution. Furthermore, it held that the High Court was not the proper organ of state to do so, but that this should fall to the legislature. The Court further found that the exclusion of other tribes as ex officio members of the House of Chiefs amounts to unfairness and discrimination, which, if not justified, is intolerable. The eight principal tribes had a privilege or advantage which is not accorded to the other tribes.[155] The legislature amended Section 2 of the bill of rights and redefined the word "tribe" to give it a wider and all-embracing meaning to include all tribes.[156] However, there are still residual discriminatory practices against the San amongst other tribes as in some instances their representation into the House of Chiefs is effected as a direct political appointment without adequate consultation envisaged by the Bogosi Act.[157]

Although with great potential to do so, the Chieftainship Act does not promote and protect the San's rights. The Act contradicts the cardinal principles that are deemed by the Assessment Tool as central to the promotion and protection of the San's rights. The Assessment Tool prioritises recognition, equality, autonomy, representation as key to a protective legislation and all these factors are absent from the Chieftainship Act. The Act would have been poised to facilitate the San's participation in the democratisation processes, however it has been used to discriminate against the San. Even with the amendments alluded to above, the San are still excluded in tribal representation. There are allegations of arbitrary appointments of San individuals as members of the House of Chiefs representing the San without consultation with the San.[158]

[154] Kamanakao case, Supra.
[155] Ibid, p. 660.
[156] Ibid.
[157] Majority of the San respondents highlighted that they were never consulted at any point in the process of the appointment of their representative in the House of Chiefs and they were not aware of anyone in their communities who were consulted before such appointments were made.
[158] Interviews, Supra.

The last piece of legislation under consideration is the Wildlife Act. The CKGR as discussed in this chapter was home to the San when it was a declared a game reserve. The implications of declaring CKGR a reserve in 1961 was that it would fall within the ambit of the Wildlife Act. This is different from other the land owned by other tribes which fall within the Tribal Land Act and it is this development that has complicated the San's land rights and title over the CKGR. According to the Wildlife Act:

> "owner", in relation to any land, means — (a) In the case of private land, the person in whose name such land is registered in the Deeds Registry; (b) In the case of land vested in a city or town council or a township authority, the said council or authority; (c) In the case of State Land, the President; (d) in the case of a tribal area, the land board established in respect of that tribal area.[159]

The implication of the foregoing provision is that the San territorial rights are treated as secondary to Wildlife conservation, with the wildlife given some protection over the San. Thus, the Wildlife Act exacerbates the discrimination and marginalisation against the San as it does not recognise the San's ways and practices of land ownership which is communal. Given that the Wildlife Act excludes the San's communal practices of land ownership it falls short of promoting and protecting Indigenous Peoples rights. This is because the Assessment Tool prioritises land, territories and natural resources as key factors in the promotion and protection of Indigenous Peoples' rights. The implication of the Wildlife Act is that the San do not enjoy the protection of their title of ownership over the CKGR as the San are not owners of the land in question for purposes of the said Act. The exclusion of the communal ownership of land as practised by the San effectively means that the land the San own through their traditional laws is *terra nullius* as a matter of policy. This is the case even though the judiciary categorically denounced the applicability of terra nullius in Botswana in the *Sesana case*.

2.3.2 The General National frameworks

Since independence, Botswana is said to have made concerted efforts to create an all-inclusive society rooted on nationalism over tribal interest. Nationalism is often deployed to eliminate the perceived problematic ethnic difference in support of ethnic hegemony. The recurring problem however is that other tribes like the San are expected to lose their identity in the

[159] See Section 2.

interest of the Tswana identity. Nationalism is deeply rooted and peddled through the use of Tswana values and beliefs.

The first attempt at an all-inclusive society can be traced back to the National Principles that guided the development trajectory after independence.[160] These principles were democracy, development, unity, self-reliance and botho (humanity).[161] These principles were even articulated in some of Botswana National Development Plan like the 1973-78 National Development Plan. The GoB argued that these National Principles were important because they were rooted in Botswana' past traditions and culture.[162] The National Principles of unity and social harmony were said to be particularly important considering the potential for conflict arising from underlying ethnic diversity.[163] In light of these National Principles, since independence policies have been formulated in the name of unity and social harmony and have deliberately avoided any ethnic references. For some the decision to adopt ethnic blind policies was a mechanism to ensure the dominance of the Tswana and Tswana principles in the running of the country's affairs.[164] These policies have exacerbated the marginalisation and discrimination of the San as they were the foundation of Tswana centric policies. Some of these principles are in fact premised on Tswana values and rendered the said values as policies and subsequently laws. When the National Principles are scrutinised against the Assessment Tool, they do not promote and protect the San's rights. This is because the National Principles are intended to create monoculturalism which effectively lumps up the diverse ethnic groups under the Tswana umbrella.

Other notable national Frameworks include Vision 2016 and Vision 2036. Vision 2016 was a policy focal point intended to create a Botswana in which all Batswana would thrive individually and as a collective.[165] Arguably Vision 2016 was one of the most influential instruments that ought to have informed the social policy framework specific to Indigenous Peoples. Vision 2016 envisioned an educated and informed nation, a prosperous, productive,

[160] Gerald Steyn, 'The Influence of Botho on Social Space in Botswana Since Independence' (2012) SAJAH 112.
[161] United Nations 2002 Botswana Country Profile. Issued at the World Summit on Sustainable Development, Johannesburg; United Nations Working Group on the Universal Periodic Review. 2008. National Report to Human Rights Council: Botswana. Unpublished Working document.
[162] Leith J. Clark *Why Botswana Prospered* (McGill-Queen's University Press 2005)
[163] Ibid.
[164] Ibid.
[165] Rorisang Lekalake Evaluating Botswana's Performance on National Vision 2016: Public Opinion on Development Pillar Afro Barometer Policy Paper No.38 June 2016 available at https://afrobarometer.org/sites/default/files/publications/Policy%20papers/ab_r6_policypaperno33.pdf Vision 2016: Towards Prosperity For All available at https://paris21.org/sites/default/files/3144.pdf accessed on 3 August 2022.

and innovative nation, a compassionate, just, and caring nation, a safe and secure nation, an open, democratic, and accountable nation, a moral and tolerant nation, and a united and proud nation. It is of utmost importance to note that while the Vision 2016 is a broader document, Indigenous Peoples rights were an important part of it. This is because some of the Vision 2016 pillars focused directly on addressing some of the burning issues the San struggle with such as illiteracy, discrimination by dominant groups and safety and security in modern day Botswana. Pillars such as an open, democratic, and accountable nation are equally important in the promotion and protection of Indigenous Peoples, as in theory this pillar envisaged the GoB taking accountability for transgressions perpetrated against the San in both pre-colonial and colonial Botswana and adopting concerted efforts to redress the resultant justices.

Post Vision 2016, Botswana adopted Vision 2036 which is founded on four broad pillars namely sustainable economic development, human social development, sustainable environment and governance, peace and security.[166] These broad pillars can be linked to some specific principles in some international and regional instruments such as UNDRIP, African Charter and specifically the Sustainable Development Goals.[167] The broad pillars do not make specific reference to Indigenous Peoples, however they are intended to benefit Indigenous Peoples as they are part of the targeted population within the greater Botswana population. Moreover, the issues referred to resonate with the survival of the San in a rapidly developing world. Both Vision 2016 and Vision 2036 seem to have drawn inspiration from some international trends and commitments such as MDGs and the SDGs.

Both Vision 2016 and Vision 2036 may be commendable as they are illustrative of the possibility of the GoB drawing lessons from some international mechanisms on other issues such as the protection and promotion of Indigenous Peoples' rights. However further scrutiny of both the Vision 2016 and Vision 2036 against the Assessment Tool raises several issues. The two visions highlight the GoB's quest to prioritise nationalism and specifically promote the Tswana centric life, in the process disregarding the ethnic minorities including Indigenous Peoples. By way of example, the use of Setswana as an official language to the exclusion of all

[166] Emmanuel Botlhale, 'Sustaining the Developmental State and Moving Towards a Developed State in Botswana' (2017) 34 Development Southern Africa 90.
[167] Norbert Musekiwa and David Mandiyanike, 'Botswana development vision and localisation of UN Sustainable Development Goals' (2019) 20 Commonwealth Journal of Local Governance 135.

other indigenous languages is one-way Tswana norms, values, beliefs and identity is used to promote the façade, nationalism in Botswana.[168] The GoB was short of calling it *Tswanaism.*[169]

The two Visions do not: nurture recognition of the San as an independent ethnic group in Botswana nor do they promote equality between the San and the Tswana for example, address discrimination, promote San's autonomy, facilitate for the political participation of the San nor recognise or promote the San's traditional governance and institutional structures as crucial in decision making in Botswana. This is because the two Visions use generic terminology extended to benefit the general population and even more particularly serve as one of the many nation-building initiatives by the post-colonial government. Effectively, both Visions are not intentional on addressing issues of concerns by the San but rather do exacerbate the marginalisation and discrimination of the San in the name of nation building. Failure to address all issues that are critical in the welfare of the San's render the Visions inadequate for purposes of promoting and protecting the San's rights.

The following discussion focuses on the practical aspects of the Indigenous Peoples rights through the critique of the *Sesana case.*

2.4 An Analysis of the Roy Sesana and Others v Attorney General Case

The practical application of the MDA of the San in contemporary Botswana is best captured in the *Sesana case.*[170] This is a case in which the San challenged their relocation from the CKGR to resettlement villages of Kaudwane, Xere and New Xade. On 19 February 2002, the Applicants filed an urgent application seeking an order declaring that the termination by the GoB of specified basic and essential services to the Applicants in the CKGR was unlawful and unconstitutional and seeking restoration of such service.[171] The GoB previously provided: drinking water on a weekly basis; borehole water; rations to registered destitute, registered orphans; transport for the Applicants' children to and from school; healthcare to the Applicants through mobile clinics and ambulance services.[172] Further, the Applicants claimed that some of them were forcibly removed from the CKGR, unlawfully despoiled of their possession of

[168] Herman Batibo, 'Double Allegiance between Nationalism and Western Modernization in Language Choice: The Case of Botswana and Tanzania' in Martin Putz (ed) *Language Choices: Conditions, Constraints and Consequences* (John Benjamins 1997).
[169] For this thesis, Tswanaism is the elevation of Tswana norms, values, and customs to the level of national values, visions, and laws.
[170] Sesana case, Supra.
[171] Ibid.
[172] Ibid.

the land which they lawfully occupied in their settlements, and should immediately be restored to their possession of that land.[173] The Applicants sought a declaratory order that the refusal by the Department of Wildlife and National Parks to issue special game licences to the Applicants and deny them entry in the CKGR unless they possessed a permit, was unlawful and unconstitutional. Lastly, the Applicant wanted costs of the suit.[174]

The Applicant's case was dismissed by Dibotelo J consequent to the Respondent's points in limine. The Applicants appealed Dibotelo J's decision at the Court of Appeal (CoA). On the 23 January 2003 after the parties agreed on the issues, the CoA ordered that: the High Court deal with substantive issues, the Applicants' oral evidence be heard in Ghanzi and the Respondents' oral evidence be heard in Lobatse as a matter of urgency on the following issues:

> (a) whether the termination of the provision of basic and essential services to the Appellants in the CKGR was unlawful and constitutional; (b) whether the Government is obliged to restore the provision of such services to the Appellants in the CKGR; (c) whether subsequent to 31st January 2002 the Appellants were: (i) in possession of the land which they lawfully occupied in their settlements in the CKGR and (ii) deprived of such possession by the Government forcibly or wrongly and without their consent; (d) whether the Government's refusal to:) issue special game licences to the Appellants; and (ii) allow the Appellants to enter into the CKGR unless they are issued with a permit is unlawful and constitutional.[175]

The *Sesana case* was heard by a panel of three judges, Justice Dibotelo (who previously dismissed it on preliminary points), Justice Dow, and Justice Phumaphi. Dow J captured the main arguments as follows. The Applicants alleged that the Respondent wrongfully, forcibly and without their consent terminated the provision of basic and essential services to them.[176] The unlawfulness and wrongfulness of this action was said to arise from the fact that the Applicants had a legitimate expectation that the services would not be terminated without their first being consulted on the matter.[177] It is said that at the time of the sudden notice to terminate the provision of services, the discussions between the parties suggested that ways could be found that would allow the continued residence in the CKGR of those residents who did not wish to relocate.[178] The relief sought on this point was that the services be restored while Respondent consults the Applicants.[179] It was alleged that the Applicants were in lawful

[173] Sesana case, Supra.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] Ibid.

possession of their settlements in the CKGR and that they were dispossessed of that land forcefully, wrongfully and without their consent.[180] It was alleged further that the condition that those who were relocated in 2002 can only re-enter the CKGR with permits was unlawful.[181] Lastly, the Applicants argued that the decision to refuse the issuance of hunting licences to the Applicants was unlawful and unconstitutional.[182]

The Respondent opposed the Applicants allegations, initially arguing that no services were terminated but had merely relocated to other places but eventually conceded to terminating the services.[183] The Respondent argued that the Applicants consented to the relocation, but Roy Sesana working with some international busybodies sought to prevent the Applicants from relocating.[184] It was the Respondent's case that people relocated voluntarily, with no force, coercion, or improper conduct on the part of the Respondent's representatives. Seventeen out of six hundred people who registered to relocate remained in the CKGR.[185] The Respondent argued that the termination of services was justified as they were temporary, expensive to maintain and repeatedly consulted with the Applicants on the matter.[186] The Respondent gave the Applicants six months before executing the termination.[187] Lastly, that human residence within the CKGR posed a disturbance to the wildlife and was contradictory to the policy of total preservation of wildlife.[188]

The Court decided that: The termination in 2002 by the Government of the provision of basic and essential services to the Applicants in the CKGR was neither unlawful nor unconstitutional, (Dow J dissenting); The Government is not obliged to restore the provision of such services to the Applicants in the CKGR, (Dow J dissenting); Prior to 31 Jan 2002, the Applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR (unanimous decision); The Applicants were deprived of such possession by the Government forcibly or wrongly and without their consent, (Dibotelo J dissenting); The Government refusal to issue special game licences to the Applicants is unlawful, (unanimous decision); The Government refusal to issue special game licences to the Applicants is unconstitutional, (Dibotelo dissenting); The Government refusal to allow the Applicants to enter the CKGR

[180] Sesana case, Supra.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Ibid.
[188] Ibid.

unless they are issued with permits is unlawful and unconstitutional, (Dibotelo dissenting); and that Each party shall pay their own costs, (Dow dissenting).[189]

The *Sesana Case* is central in this thesis as it gives practical perspective on the thematic areas of this research. The research's main thematic areas include indigeneity as an active protective tool and identity marker, the state and Indigenous Peoples' vulnerability and marginalisation, the protection of Indigenous Peoples' land, lifestyle, culture and identity, and the promotion and protection of Indigenous Peoples' rights in the making and implementation of developmental policies.

The *Sesana case* is the first decision to acknowledge and apply core elements of the doctrine of native title in Botswana and it was also the first decision to do so in the Roman Dutch law jurisdictions in Southern Africa.[190] The *Sesana case* defined the property rights of the San. Dow J and Phumaphi J's pronouncements that the declaration of the CKGR as a reserve did not extinguish the San's rights over the CKGR clarifies the nature of the San's rights over the CKGR. To ensure that the San enjoy their property rights over the CKGR, a practice of use and occupation evolved, and specific legislation promulgated that recognised the San's right to enter and remain in the CKGR. The pronouncement by Dow J and Phumaphi J remain crucial in the promotion and protection of the San's rights because there had been a suggestion by the GoB that the San could be removed at the discretion of the government from the CKGR as their rights were extinguished by the declaration of their land as a reserve. It is because of affirmative answers to both questions on possession of land in the CKGR and deprivation of that possession to the Applicants by the Respondent that the Applicants were entitled to and justified in proclaiming victory over the GoB in this dispute.[191] Specifically Phumaphi J was instructive on the foregoing argument when he held that:

The rights of the Bushmen in the CKGR were not affected by the proclamation of the land they occupied to be Crown land, as they continued to live on it, and exploit it without interference from the British Government. They continued to hunt and wander about the land, without let or hindrance except, if they moved to Ghanzi farms, where they were considered a nuisance to the white farmers. Not only is the British Government presumed (on the authority of In re Southern Rhodesia and Amodu Tijani supra), to have respected the "native rights" of the

[189] Sesana case, Supra.
[190] Clement Ng'ong'ola, 'Sneaking the Aboriginal Title into Botswana's Legal System through a Side Door: Review of Sesana & Others v Attorney General' [2007] UBLJ 107.
[191] Ibid.

Bushmen in the CKGR upon proclamation of the Crown land, but the fact that it considered providing them with water, so that they could remain in the CKGR, is a clear indication that it did not extinguish their "native rights" with respect to the CKGR. The "native rights" of the Bushmen in the CKGR were therefore not extinguished in 1910 when the Crown land was declared.[192]

The implications of the above conclusion coupled with Dow J's backing which makes the above the majority ruling effectively confers the landholding rights over the CKGR on the San. The concept of native ownership over land is not new in the context of Botswana given that before colonialism, tribes owned tribes through customary land laws, this ownership was subsequently formalised by the colonial government, a process which excluded the San as previously discussed above. After the Court pronouncements on the rights the San have over the CKGR, the GoB has a legal obligation to formalise the San's title over the CKGR for example by providing the San with the title deed over the CKGR. Interestingly, the San respondents noted that when the court pronounced in their favour, they expected that a community title certificate would be issued immediately to formalise their ownership over the CKGR and avert future conflicts recurring over ownership of the CKGR[193] The respondents noted that efforts to engage through numerous meetings between the San's legal team, community representatives, activists, and the GoB officials on providing the certificate over the CKGR are often side lined by the GoB officials.[194]

The case presented the Court with an opportunity to pronounce on the issue of indigeneity in Botswana. Both Dow J and Phumaphi J made specific pronouncements on the San's indigeneity. Given that this was a three judges panel, the two Justices ruling constitute a majority on the issue of the San's indigeneity. The indigeneity pronouncement should be acknowledged as a stepping stone for the San and other Indigenous Peoples in Africa and elsewhere. As it stands, the San are Indigenous Peoples of Botswana and there has not been any appeal against that by the GoB which effectively means they accept the Court's declaration of the San as Indigenous Peoples of Botswana. The declaration of the San as Indigenous Peoples gives them the right to demand that the GoB invoke the UNDRIP guidelines in

[192] Sesana case, Ssupra, Per Phumaphi J Para 81-82.
[193] Interviews, Supra.
[194] Interviews, Supra.

formulating and implementing developmental policies. The legal status of the UNDRIP and its application is discussed in Chapter 4.

The Court sufficiently dissected the San's status in Botswana particularly on their disadvantaged position by comparison with other tribes in Botswana. There was consensus amongst the three Judges on this issue and that was expressed in different ways. The recognition of the precarious status the San find themselves in, when pronounced by a Court of law should be a springboard on which the GoB and other stakeholders begin the process of addressing the systematic disadvantage alluded to. This is more so that Dow J and Phumaphi J went on to lay some principles that should govern the relationship between the government and its people generally and the government and the disadvantaged populace specifically.[195] The Court's directions here may serve a persuasive purpose in other jurisdictions.

The case domesticated principles of international law relating to the balancing exercise between development imperatives and how such ought to be conceptualised and formulated in relation to Indigenous Peoples. As a dualist state, generally international law makes part of Botswana law only if domesticated. Botswana however has a bad record in domesticating international law generally and human rights specifically.[196] On issues that are contentious or that the GoB holds a strong position on like death penalty and Indigenous Peoples rights, Botswana has proven to be deliberately selective in assuming any national responsibilities stipulated by related international obligations. The court has therefore mitigated the impending delay in domesticating some crucial principles of UNDRIP which will go a long way in the promotion and protection of Indigenous Peoples rights in Botswana. The process of circumventing a dualist state's operation is called creeping monism.[197] Creeping monism is a judicial response to the tension between historical common law dualism and the modern era of human right internationalism.[198] This doctrine ensures that no state can invoke a defence or excuse that it not be bound by the ideals of the comity of nations on the basis of its failure to

[195] Sesana case, Supra.
[196] Midterm Progresss Report on the Implementation of Agreed Recommendations from Botswana's 2nd Ccycle Review Under the Universal Periodic Review Mechanism of the United Nations Human Rights Council (Geneva 2016) Available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2Flib-docs%2FHRBodies%2FUPR%2FDocuments%2FSession15%2FBW%2FBotwana2ndCycle.doc&wdOrigin=BROWSELINK accessed on 12 June 2022.
[197] M. A. Waters, 'Creeping Monism: The Judicial Trend toward Interpretative Incorporation of Human Rights Treaties', 107 Columbia Law Review (2007) 628 at 634.
[198] Waters, Supra; Mogomotsi and Mogomosti, Supra.

incorporate them in their domestic law.[199] This is critical for the promotion and protection of Indigenous Peoples in Botswana.

Dow J provided an instructive yardstick for the GoB to adhere to when implementing MDA policies amongst Indigenous Peoples. As a result of Dow J's pronouncement, the GoB has a legal obligation to desist from copy and paste of developmental policies meant for the general population to the San. The GoB must take cognisance of various factors including the circumstances of the subject of the policies and most importantly engage with the subjects of the policies. Dow J established that:

> This Court has been invited to resolve a dispute, which at first blush is about the termination of water and other named services to a few hundred people, who are demanding access to a specified piece of land and the right to hunt in that piece of land. While that is indeed correct, this dispute cannot be resolved, will not be resolved, unless the Respondent acknowledges and addresses its deeper context, its nub, and its heart. This is a case that questions the meaning of 'development' and demands of the Respondent to take a closer look at its definition of that notion. One of colonialism's greatest failings was to assume that development was, in the case of Britain, Anglicising, the colonised. All the current talk about African renaissance is really a twisting and turning at the yokes of that ideology. Botswana has a unique opportunity to do things differently. The case is thus, ultimately about a people demanding dignity and respect. It is a people saying in essence, 'our way of life may be different, but it is worthy of respect. We may be changing and getting closer to your way of life but give us a chance to decide what we want to carry with us into the future.' Did anyone even think to record settlements on video and/or film, before they disappeared into the grassland? Did anyone consider that perhaps a five-year old being relocated may one day wish to know where she/he came from? Or perhaps the Respondent lifestyle was seen as a symbol of poverty that was not worth preserving. The Respondent's failure has been in assuming that a cut and paste process, where what has worked in someplace else, and even then, taking short cuts at times, would work with the Applicants.[200]

Dow J's observations underscores the importance of people centred development but equally locates the current MDA policies within the colonial structure and mindset. Most importantly, the MDA policies that disregards the subjects has the effect of not only altering their lives permanently but erasing their history literally. As will be demonstrated in Chapter 5, the implementation of the paternalistic MDA policies proved harmful to the San and some of their experiences though not captured in photos by the GoB remain engrained in the San's memories

[199] Waters, Supra; Mogomotsi and Mogomotsi, Supra.
[200] Sesana case, Supra Per Dow J Para I (1-4).

and form part of painful experience for the greater population and an anguish for the unborn generations.

The *Sesana case* equally highlights the extent to which other citizens in general are ignorant of the San's way of life and in the process become insensitive and disrespectful to the San's values, customs, and practices. Senior Counsel Pilane, who is also an Advocate of the Courts of Botswana mirrored such behaviour in court numerous times. Dow J observed:

> When one of the Applicants gave evidence that she did not wish to relocate, because she wished to be near the graves of her ancestors, Mr. Pilane burst out laughing and when it seemed clear by the silence in the Court that he needed to explain the source of his mirth, he explained that he had not been aware that they buried their dead, but had rather thought that they collapsed a hut over their dead and moved on.[201]

The above quote underscores the prevalent ridicule of the San's way of life in Botswana. If a Senior Attorney, privileged enough to acquire education and with a wealth of experience in litigation of human rights issues becomes so insensitive before an honourable court and makes a mockery of a peoples' way of life, what of an individual out there, with limited education and who is free to make any utterances because there is no Courtroom etiquette required of them.

The case served as a springboard for further litigation by the San. After this case, the San litigated against GoB challenging the decision to deny them water.[202] The San have also been in court to challenge the GoB's decision to refuse burial in the CKGR of a deceased San resident outside the CKGR.[203] Undoubtedly, the San found courage to confront the GoB in court over the preceding violations of their rights because of their victory in the Sesana case.

Celebrated and ground-breaking as the *Sesana case* may be, there are notable shortcomings of the said case. The High Court did not make any pronouncements on the GoB's obligation to provide services to those who remained in the CKGR. This is effectively taking away the San's right to remain in the CKGR as they would still have to follow some amenities outside. Following amenities outside has been used by the GoB to harass the San as they are often denied access back into the CKGR.[204]

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[201] Sesana case, Supra. Per Dow J.
[202] Bonolo Ramadi Dinokopila, 'The Right to Water in Botswana: A review of the Matsipane Mosetlhanyane case' [2011] African Human Rights Law Journal 282.
[203] *Lesiame Vice Pitseng v Attorney General and Kabelo Senyatso CACGB-086-22; UAHGB-000064-22*.
[204] Interviews, Supra.

The *Sesana case* has equally highlighted some uncomfortable truths about the status of the San in Botswana. Chief in the current discourse is the precarious situation the San are in as far as land holding rights is concerned. Dibotelo J's view was that the San do not enjoy any landholding rights over the CKGR, effectively what they enjoy is occupation which is subject to the GoB's continued approval. If the GoB followed lawful processes to dispossess the San, the San would have no recourse to the Courts as the GoB as the owner has the right to terminate occupation. Dibotelo J's positivist view is inconsistent with his analysis of the obtaining status quo of the San especially in relating to land ownership and particularly in the creation of the CKGR as a sanctuary for the San. Dibotelo J ought to have interrogated the issue further and justified his decision especially because he acknowledges the purpose for which the CKGR was created for and the prevailing national land dialogue at the material time. The simplistic approach Dibotelo J adopted is costly for the San as it renders them landless. It is also important to note that although Dibotelo J's views on this issue was a minority view, it is the most prevailing in the GoB policies.

In some instances, the Judges adopt a doctrinal, black letter law approach in addressing the issues raised thus reaching conclusions that are absurd. The law in this regard is treated as if it exists in an ivory tower and does not affect the lives of society within which it applies. The law is interpreted with no regard whatsoever of what obtains in the CKGR amongst the San. The approach is more prevalent in Dibotelo J's pronouncements. The black letter law adjudication has robbed the San of a potentially impactful judgement. The San are unable to harness the benefits of the *Sesana case* rulings because the black letter law approach conferred some rights and equally took away some rights that are crucial to render the conferred right meaningful. By way of example, Dibotelo J finds that when the Applicants relinquished possession of the CKGR and relocated outside the CKGR, they were allocated plots in the new settlements.[205] Furthermore, the Applicants were compensated for the structure they had erected in the CKGR.[206]

The preceding observations disregard the Applicants' main contention and the emphasis they place on their relationship with the CKGR and further their traditional communal use and occupation of land. Dibotelo J was quick to pronounce on the adequacy of the allocation of new land in new settlement and the compensations made without interrogating the major arguments by the Applicants of the symbolic and spiritual relationship they have with the

[205] Sesana case, Supra.
[206] Ibid.

CKGR. The Applicants emphasised that the CKGR was not just a piece of land, there are spiritual connotations to the land, a land they buried their loved ones in, a land their ancestors' spirits reside and a land they considered themselves capable of surviving in without the GoB's intervention and interference. Dibotelo J did not pay attention to these important details which make all the difference, namely, that the Applicants hold the CKGR so dearly they were willing to forgo all the services if they were allowed to remain in their ancestral land. Essentially, Dibotelo J finds that wrongful deprivation could not have resulted since there was allocation of some other land to the Applicants. This conclusion is flawed given the historical account of the CKGR and the significance and importance of the CKGR to the San eloquently provided by Dibotelo J. The simplistic conclusion he reached on this issue trivialised the importance of his historical account of the CKGR and the status of the Applicants land holding rights in modern day Botswana. In fact, some scholars have argued that Dibotelo J's approach seemed hurried.[207]

On compensation, given the invaluable nature of the CKGR and every aspect of their lives tied to the CKGR, no amount of compensation could be adequate to the San. Compensation is supposed to mitigate the loss, however given the nature of the loss the San endured when they lost the CKGR, and other aspects of their lives were permanently altered, compensation is impossible. For example, how can one be compensated for losing their foremothers and forefathers' graves? Monetising everything is a creation of the neo-colonial, masculine, greedy, capital monopolies that is prevalent in the globalising world where everything has a price tag. However, the idea of monetary compensation is not relatable to the San who do not subscribe to the money economy. Chapter 5 discusses the San's experiences with money and in the money economy.

The Court missed an opportunity to elucidate on the implications of the Applicants' indigeneity. The case presented the Court with a platform to ventilate the issues of Indigenous Peoples and contextualise it. The case could also have been used as a platform to settle the indigeneity question and provide elaborate guidelines on the implications of the San's indigeneity. This was important because for the longest time the GoB took a stance that all Batswana are indigenous to Botswana. This position was adopted by African countries who opposed some provisions in the draft UNDRIP.[208] An attempt to unravel the issue of Indigeneity was made by Dow J who limited her analysis to the facts of the case, social status

[207] Ng'ong'ola, Supra.
[208] Albert Kwokwo Barume, *Land Rights of Indigenous Peoples in Africa* (IWGA 2020).

of the Applicants and considered limited international law sources. Consequently, Dow J in passing does hold that the Applicants are indigenous to the CKGR but does not mirror this finding against growing Indigenous Peoples' rights policies nor does she elucidate this position considering persuasive authorities from foreign jurisdictions, regional and international Indigenous Peoples framework. Equally does Phumaphi J who found that the San are indigenous to the CKGR without elucidating the source of such a conclusion and implications of such indigeneity.

Furthermore, the intensified tension between the GoB and the San post judgement and the refusal of the GoB to implement the judgement fully highlight the adversarial nature of litigation. The Court ought to have anticipated this hurdle given the acrimonious nature of the relationship between the parties as well as the power disparity between the GoB and the San and provided detailed guidelines and timelines on the implementation of the judgement. This highlights the challenges underscored by Weber in that in the case of the San the MDA is seemingly interested in the material goal of relocating individuals to designated settlements instead of the actual interest of the relocated people. So much so that even after a court of law pronounced that the relocations did not serve the interest of the San, the GoB remained steadfast in its decision. Hoeha observes the challenges presented by Indigenous Peoples litigation as follows:

> Recognition of the rights of Indigenous peoples in Canada has come through negotiation, especially in the form of treaties, and through litigation, in the form of court judgments. Of these two approaches, only negotiation is consistent with the objective of reconciliation. Successful negotiation ends with agreements that draw on common interests and that are conducive to improving and nurturing relationships. Litigation ends with one side's interests dominating or defeating those of the other, and a weakened or even acrimonious relationship. Accordingly, the Supreme Court of Canada has observed that "[t]rue reconciliation is rarely, if ever, achieved in courtrooms."[209]

Symbolic as the case may have been said to be for Indigenous Peoples around the globe, it has not resulted in any tangible impact for an average San in Botswana. The pronouncements made by the Court meant nothing as the GoB has been accused of blatantly refusing to honour the Court order. The GoB is said to have interpreted the court order so narrowly that it has not been possible for the successful Applicants to enjoy the outcome of their legal battle.[210] Often cited, is the fact that the GoB decided to allow only the Applicants in the *Sesana case* to return to the

[209] Felix Hoeha, 'The Duty to Negotiate and Ethos of Reconciliation' (2020) 83 Sask L Rev 1.
[210] Interviews, Supra.

CKGR.[211] It is alleged that where a family man/woman who was a litigant in the *Sesana case* sought to return with his/her family, GoB agents refused for them to bring their spouse and minor children into the CKGR, thus constructively compelling them to remain in the resettlement villages.[212] This development however does not come as a surprise, as at the very inception of the case the Respondent's attorney of record had moved the court to establish as a matter of fact who the Applicants were for purposes of enforcement should they be successful.

What is regrettable however, is the fact that whilst both Dow J and Phumaphi J acknowledged the communal way of living, they did not extend the order to the San community. Such a pronouncement was necessary for maintaining the social fabric of the San community. In delineating the issues, the CoA should have instructed that the High Court establish by oral evidence whether this was a class action brought on behalf of the San by their leader, Roy Sesana who was the First Applicant in this case or not. This minor detail could have made all the difference for the San who at the end of the day emerged victorious but were unable to fully enjoy the positive legal outcome because of the GoB 'dirty tricks'.

The Court should have made an order on the next cause of action as a further/ alternative relief prayed for by the Applicants. There was consensus amongst the learned Judges that the orders made would not resolve the matter between the Applicants and Respondent, particularly that for the matter to reach a logical conclusion, there would be need for some further engagement between the parties. The Judges were also in agreement that there were power imbalances between the Applicants and the Respondent, particularly in reaching conclusions that the Applicants were disadvantaged by their place in society and that has resulted in systemic violation of their basic rights. Thus, an order on the specific actions and actors to assist in the way forward was an absolute necessity. That the Court left that to the Applicants and Respondent to engage without any supervision is a serious let down on the part of the honourable court. Giving direction on the next cause of action was done by the CoA when it referred the matter back to the High Court. The CoA ordered specific actions to be taken, specified the actors and even provided timelines on which all those actions were to be taken. The CoA further provided some measures of supervision by roping in other bodies beyond those litigating and the panel of judges. The High Court's omission has been costly to the

[211] Interviews, Supra.
[212] Ibid.

Applicants in that the GoB has blatantly refused to fully comply with the Court order. The minimal compliance has been slow paced, effectively resulting in constructive denial of justice.

Lastly, the case demonstrates the potential constraints of the justice system and how judges may use their prejudices to either advantage or disadvantage parties to a litigation. This point is with reference to the fact that whilst the rules allow that a CoA refer a matter on appeal back to the presiding judge for consideration like it did now, such rules may allow a judge's prejudices against parties to permeate the ultimate orders. The matter had come at first instance before Dibotelo J where he dismissed the matter on account of preliminary points raised by the Respondent pertaining to non-compliance with the Rules of High Court by the Applicants. Whilst Dibotelo J cannot be said to have been *functus oficio* because he did not pronounce on the substantive issue, there was a danger that he may have pre-determined the substantive issues, so in the interest of justice it was an imperative to constitute an entirely new Panel to consider and determine the dispute between the Applicants and Respondent. In fact, it would have been more prudent for the Applicants' attorneys of record to move that Dibotelo J rescues himself and be replaced with another judge. It has been observed that the exclusion of Dibotelo J would have been useful to avoid allegations, insinuations, or perceptions of predilection since the case to be heard was stated from an appeal against his decision, he should have been regarded as functus officio.[213]

2.5 Conclusion

For the longest time, Botswana was deemed exemplary as it seemingly followed intently a developmental trajectory that was all inclusive and transformative. Reports on Botswana painted a government that implemented sound economic policies and getting return from such policies year after year. There was a general perception that the promotion and protection of human rights was second nature to Botswana and discrimination of any sort was at its lowest. However, recent scholarship demonstrates Botswana's limitations as a democracy. In fact, Botswana has received international attention for all the wrong reasons. The San's forced relocation from the CKGR, their litigation against the GoB and the GoB's disregard of the court order provides case studies to back assertions from scholars who have been condemning Botswana's democratic accolades.

[213] Ng'ong'ola, Supra.

The collision between the GoB and the San is not one for intellectual interest only, it is illustrative of the modern-day struggles of many Indigenous Peoples around the world who seek to assert their Indigenous Peoples status, safeguard their land rights, and extend their agency as communities in a rapidly changing world and many States' s opposition to such an endeavour. What is interesting about the San's experiences is that their marginalisation, discrimination, and persecution was a long time coming. The violations and abuse of the San preceded colonialism, was endorsed by the colonial government, and now forms the cornerstone of the democracy of modern-day Botswana. The modern-day struggles of the San were sown during the pre-colonial era when the Tswana groups 'invaded' modern day Botswana and dispossessed the San of their land. The colonial government's decision to disregard the San simply entrenched the Tswana's dominant position and further relegated the San into the periphery. At independence, the policies relating to land, economic activities and political participation were spearheaded by the Tswana elites and as such were tailor made to suit the Tswana to the detriment of the San.

Post independence Botswana has been characterised by persisting abuse of the San's rights, discrimination, and disregard of their agency as communities. In the literature, scholars have trivialised the social, economic, and political evolution of the San to justify their erasure resulting from subsuming them under Tswana evolution. The attempt to assimilate the San even in the historical account of their evolution is opposed by San writers, activists, and San at grassroot level.

The legislative framework has not evolved in any way to address the marginalisation of the San in Botswana. No legislative pieces or policy framework directly address Indigenous Peoples rights. Furthermore, the GoB extended the Indigenous Peoples status to all tribes in Botswana which demonstrates that the GoB has no intention to improve the San' status of deprivation, marginalisation, discrimination, and dispossession.

Whilst the San still occupy the lowest strata in post-colonial Botswana, they have undoubtedly intensified their activism and resistance against abuse of their rights which manifests in their dispossession, discrimination, and marginalisation. The San assert their First Peoples status in Botswana, are consistent in their advocacy against any policies and laws intended to disintegrate them as communities and have even gone further to form alliances with international stakeholders to support their cause.

The *Sesana case* highlights many facets of San's advocacy. The San's decision to litigate against the GoB as a community challenges the perception of timidity and helplessness often associated with them, thus it is markedly brave, a trait necessary in vindicating their rights. The court's ruling on various issues has incredible potential in positively transforming Indigenous Peoples policies in Botswana. The declaration of the San's indigeneity, their right of ownership over the CKGR, the governmental obligations when implementing developmental policies on Indigenous Peoples, the findings on the persisting discrimination, marginalisation and abuse of the San's rights are important in policy direction. In fact, the court's ruling as binding on the GoB should be the cornerstone of any policies relating to the San going forward.

The *Sesana case* did not alleviate the struggles faced by the San. Thus, the *Sesana case* demonstrates both the struggles and victories of Indigenous Peoples in their articulation of their grievances before the judiciary. The outcome of the case particularly suggests that in the context of Botswana, judges may be struggling with comprehending the Indigenous Peoples rights politics and contestations; and may not be so confident in navigating them and creating cutthroat pro Indigenous Peoples rights jurisprudence. The *Sesana case* speaks to the foregoing in that whilst the majority of the judges held in favour of the San in more issues, they did not fully provide the San with the much-needed redress which binds the GoB to performance within specific deadlines. It is no wonder the GoB is still referring to the implementation of the 2006 judgement as ongoing in 2023. Chapter 6 addresses some of the recommendations for the San, GoB and other stakeholders in improving the status of the San in the contemporary Botswana.

CHAPTER 3
THE CONTESTATIONS AND POLITICS OF INDIGENEITY

3.1 Introduction

This chapter examines the contested notions of indigeneity through the national, regional, and international lens. The chapter considers the meaning, content, and application of indigeneity in Botswana as applied to the San's experiences. The chapter seeks to unpack the relevance of these contestations and politics to the promotion and protection of the San's right to own and occupy ancestral land. This is against the background and arguments made herein that indigeneity is intimately linked to land, which land is required by states in implementing the Modern Development Agenda (MDA).

A discussion on the meaning, content, and application of indigeneity and how it relates with the right to own and occupy ancestral land is central to this thesis for many reasons. Firstly, the genesis of this research is the contestation between the GoB and the San over indigeneity and rights over the Central Kalahari Game Reserve (CKGR). Secondly, understanding indigeneity is indispensable in identifying the rights and privileges the San ought to enjoy consequent to their indigenous identity. Thirdly, understanding definitional parameters of indigeneity help appreciate the contentious nature of indigeneity, how some definitions are divorced from social contextualisation and highlight issues that require immediate attention in the quest to promote and protect Indigenous Peoples rights to inform policy.

The chapter makes several arguments. Firstly, indigeneity remains a contested terrain as a result there is no universally accepted definition of indigeneity. Various criteria, descriptions and working definitions have been used to assert what indigeneity mean for different stakeholders. Secondly, the understanding and implications of indigeneity has changed over the years. Whilst in the colonial era, indigeneity was used as a basis for abuse of those who identified as such, in the post-colonial period that is slowly changing with an end goal of using indigeneity as a basis for protection. The change is a slow painstaking process owing to the entrenched contestations and politics of indigeneity.

Thirdly, even though the international law construction of indigeneity was intent on empowering Indigenous Peoples in practice indigeneity may be one of the most notable hurdles to the promotion and protection of Indigenous Peoples 'rights. This is because the discretion to recognise and accord the necessary treatment as articulated in law is bestowed on national

governments.[1] States as exemplified by Botswana have elected to deny even those declared by a court of law such status. The other basis for contentions on indigeneity is its association with colonialism. There are scholars who problematise indigeneity as a response to addressing the aftermath of colonialism on Indigenous Peoples and argue that the position insinuates that Indigenous Peoples are a postcolonialism emergence, yet Indigenous Peoples predate colonialism.[2]

Fourthly, indigeneity can be understood from the point of view of structures, activists, and Indigenous Peoples.[3] What is notable about indigeneity in these three instances is that indigeneity as understood by structures is a legal creation, formal in nature and an end goal of extensive negotiations between different stakeholders. Indigeneity as understood by Indigenous Peoples is social and has no formal legal basis, it is lived through generations and acknowledged as an integral identity marker for Indigenous Peoples themselves. The understanding of indigeneity between structures and Indigenous Peoples has an unescapable gap. The activists tend to fill the said gap by attempting to harmonise the extreme position of what is indigeneity constituted by structures and Indigenous Peoples. The San activists' account of indigeneity seems to be somewhat biassed towards the legal constructions of indigeneity.[4] Fifthly, the contentions over the definition of indigeneity may serve as a serious hurdle to the realisation of the promise of indigeneity. The case of the San in Botswana serves as an example.

Lastly, the understanding of indigeneity in content and indigeneity in context ought to be harmonised. This can be done by allowing the social constructedness of indigeneity to define the parameters of indigeneity. The argument is that the goal of indigenous rights and recognition is best served by recognising the social constructedness of indigeneity as a political

[1] Felix Mukwiza Ndahinda, *Indigenousness in Africa: A Contested Legal Framework for Empowerment of 'Marginalised' Communities* (Asser Press 2011).

[2] J. Kēhaulani Kauanui, 'A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity' 2016 LATERAL 1 available at https://ia800707.us.archive.org/9/items/Lateral5-1/J.%20Ke%CC%84haulani%20Kauanui%2C%20_%E2%80%9CA%20Structure%2C%20Not%20an%20Event%E2%80%9D_%20Settler%20Colonialism%20and%20Enduring%20Indigeneity_%20-%20Lateral.pdf accessed 12 May 2023; Eve Tuck and K. Wayne Yang, 'Decolonization is not a Metaphor' (2012)1 Decolonization: Indigeneity, Education and Society 1.

[3] Timo Duile, 'Paradoxes of Indigeneity: Identity, the State, and the Economy in Indonesia' Dialect Anthropol (2021) 45 357; Antonio A. R. Ioris, 'Indigeneity and Indigenous Politics: Ground-breaking Resources'(2023) 85 Revista de Estudios Sociales 1; Martin Premoli, 'Indigeneity and the Anthropocene' (2021) 7 Transmotion 1.

[4] Interviews were conducted in Xere, Kaudwane, New Xade and Central Kalahari Game Reserve between May 2022 and August 2022 amongst the San at grassroot level, civil servants and politicians; and virtual Virtual interviews were conducted between June 2021 and June 2022 amongst San activists, activists, academics, civil servants, lawyers, and politicians.

tool to ground claims within nation states.[5] An indigenous right to internal self-determination can be framed as a human right if understood as a bottom-up construction of self-assigning authors.[6]

The chapter begins with this introduction, followed by a preface on the contentious nature of indigeneity in Botswana, then a consideration of the social and legal construction of indigeneity in Botswana, followed by a discussion on indigeneity within regional and international law, then an examination of the relationship between indigeneity and land and a conclusion.

3.2 A Preface on the Contentious Nature of Indigeneity in Botswana

The San's indigenous identity has been the subject of intense social, economic, legal, and political debates.[7] It has attracted scholarly attention that culminated into what came to be known as the Kalahari debate.[8] The Kalahari Debate started as a reaction to the ethnographic studies carried out by anthropologists throughout the 1960s and 70s, which tended to present San groups as pure, isolated, and traditional hunter-gatherer communities, uncontaminated by modernity and change.[9]

In response to the traditionalist view, the revisionists argued that rather than looking at individual groups one must consider the socio-economic system of the Kalahari and the wider southern African region, in which different groups were integrated in a highly unequal

[5] Benjamin Gregg, 'Indigeneity as Social Construct and Political Tool' (2019) 41 Human Rights Quarterly 823.
[6] Gregg, Supra.
[7] Maria Sapignoli, 'Indigeneity and the Expert: Negotiating Identity in the Case of the Central Kalahari Game Reserve', in Michael Freeman, and David Napier (eds), *Law and Anthropology: Current Legal Issues Volume 12*, Current Legal Issues (Oxford, 2009); Festus Mogae (2004) Statement by His Excellency Mr. Festus G. Mogae, President of the Republic of Botswana. Officially Opening the 5th Civicus World Assembly. 21st March 2004, 17:30 Hours, at Boipuso Hall. Available at: www.gov.bw/docs/CIVICUS%20STATEMENT%20BY%20HE.rtf accessed 30 March 2023; and Survival International (2003) Bushmen aren't Forever. Botswana: Diamonds in the Central Kalahari Game Reserve and the Eviction of Bushmen. Survival International Fact Sheet, available at 11_14_195_Diamonds_facts.pdf (survivalinternational.org) accessed 5 November 2022 ; Jeremy Sarkin and Amelia Cook, 'Who is Indigenous?: Indigenous Rights Globally, in Africa and Among the San in Botswana' (2009) 38 Tulane J. Of Int'L & Comp. Law 93.
[8] Alan Barnard, 'Kalahari Revisionism, Vienna and the Indigenous Peoples Debate' (2006) 14 Social Anthropology 1.
[9] Åse Haram Indigenous or Citizen? Discourses of Indigenousness, Nationhood and Development in the Conflict over Relocation of San / Basarwa from the Central Kalahari Game Reserve, Botswana (2005) available at https://www.duo.uio.no/bitstream/handle/10852/15995/Indigenousorcitizen.pdf?sequence=1 accessed 12 October 2022; Jacqueline Solway, 'Human rights and NGO 'Wrongs': Conflict Diamonds, Culture Wars and the 'Bushman question' (2009)79 *Africa* 312; Robert Hitchcock and WA Babchuk, 'Kalahari San Foraging, Land Use, and Territoriality: Implications for the Future' (2007) 3 Before Farming 1; Michael Taylor, 'Life, Land and Power: Contesting development in northern Botswana' (2000) Unpublished PhD Thesis, University of Edinburgh available at https://era.ed.ac.uk/handle/1842/7158 accessed 22 June 2022.

fashion.[10] San were persistently at the bottom of the social hierarchy, and were involved in trade, pastoralism, and farm labour according to the prevailing circumstances.[11] The traditionalists created the image of the 'hunter gatherer' as custodian of inherited indigenous ecological knowledge and social practices, while the revisionists created the image of an impoverished underclass of 'hunters, clients and squatters'.[12] The Kalahari debate could go on for so long, resulting in over 300 articles in scientific journals, because it was more a polemic between researchers than it was a dialogue between San and researchers.[13]

The San's indigeneity has equally formed a basis for policy formulation in Botswana with the Government of Botswana (GoB) taking contradictory positions on the San' s indigeneity from time to time.[14] The contradictory positions taken by the GoB has resulted in constant contentions over indigeneity in Botswana generally and over the San's indigenous identity specifically. This gives credence to Hindeya's observation that the answers to the indigeneity question and the criteria for that determination are far from clear because the relevance and appropriateness of seeking protection based on indigeneity is highly contested.[15]

To exemplify the contentions on indigeneity as a social construct, some tribes in Botswana consider themselves indigenous to Botswana and therefore do not recognise that marker as exclusive to the San. Most of these tribes in fact originate in other parts of Africa and migrated from there to Botswana. Other tribes, however, acknowledge their origin as outside Botswana, and often have social relationships with their tribes in such countries. Even though not all tribes in Botswana claim to be indigenous to Botswana, the GoB adopts a policy position that all tribes in Botswana are indigenous to Botswana and refuse to accord special treatment to the San on that basis.[16] This results in the legal construction of indigeneity through a policy position that there will be no legal recognition of a single tribe as Indigenous Peoples of Botswana. The GoB argues that giving special treatment in accordance with international law is a sure way to cause ethnic disintegration as it likens that to apartheid South Africa practices

[10] Haram, Supra; Solway, Supra; and Hitchcock and Babchuk, Supra.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Robert K. Hitchcock, 'We are the First People': Land, Natural Resources and Identity in the Central Kalahari, Botswana' Journal of Southern African Studies (2002) 28 797.
[15] Tilahun Weldie Hindeya, 'Indigeneity of Peoples in the Context of Ethiopia: A Tool in the Pursuit of Justice Against Land Dispossession' (2019) 27 African Journal of International and Comparative Law 1.
[16] Renee Sylvain 'Essentialism and the Indigenous Politics of Recognition in Southern Africa' (2014) American Anthropology 116.

where there was racial segregation which afforded White people privileges such as access to some amenities and resources to the exclusion of Black people.[17]

The stance adopted by the GoB is quite controversial, not substantiated but remains one of the many justifications presented by the GoB, nonetheless. Sylvain explains the genesis of such a position and observes that the San's location in a region historically dominated by apartheid states has made them central figures in debates about whether indigenous activism represents a progressive politics of recognition or a regressive reversion to apartheid-era racialism.[18] This position is predicated on the historical meaning assigned to indigeneity where indigeneity was perceived as representing weakness, barbarism and justifying the interference with and on the land of those identified as indigenous. However, it ought to be noted that indigeneity is different from apartheid in various ways. For example, in the contemporary world, indigeneity is used as both a social and legal tool intended to empower those who identify as indigenous without taking away the power of those who do not identify as indigenous. Whilst, in an apartheid set up, the law was used to empower one race and disempower the other.

Consequent to the existing policy on non-recognition of indigeneity as a marker, the GoB does not proffer any special treatment to the San, but rather has been actively integrating them into the mainstream political, social, and economic platforms.[19] In fact, the GoB perceives this policy position as integral in nation building through overlooking tribal differences and focusing on being citizens of Botswana. The marginalisation of Indigenous Peoples under the pretext of equality of tribes and nation building is not peculiar to Botswana. It is generally deployed by nation states to deter Indigenous Peoples from advancing their advocacy and claiming what legitimately belong to them, like land and other natural resources. Gray illustrates the foregoing in the context of Peru in the following way:

> When someone comes into the community and says "todos somos Peruanos" (We are all Peruvians) watch out, he is trying to screw you. This comment was made by a young Arakmbut man in June 1992, expressing the tension between Peruvian and indigenous identity. When colonists or state officials use the appeal to common nationality in order to persuade a sceptical Arakmbut community into making a

[17] Goemeone E.J Mogomotsi, and Patricia K. Mogomotsi, 'Recognition of The Indigeneity of the Basarwa In Botswana: Panacea Against Their Marginalisation and Realisation of Land Rights?' (2020)28 African Journal of International and Comparative Law 555.
[18]Sylvain, Supra.
[19] Michaela Pelican and Junko Maruyama, 'The Indigenous Rights Movement in Africa: Perspective from Botswana and Cameroon' (2015) 36 African Study Monograph 49; Jacqueline Solway, '"Culture Fatigue": The State and Minority Rights in Botswana' (2011) Indiana Journal of Global Legal Studies 211.

> particular decision, the division between indigenous paisano and alien colon takes precedence over common national identity and frequently leads to a clash of interests and identities.[20]

The observation above is relatable to Botswana where the GoB deploys the nation building tactic as often to mitigate any attempts by the San to assert their rights as communities. The effect of nation building policies on Indigenous Peoples is assimilation into mainstream and dominant tribes' way of life. Assimilation is not a neutral or necessarily a "natural" process, but rather a political one resulting from unequal power relations.[21] In the context of Botswana, it is quite an intentional policy pursuit to ensure that the historically dominant Tswana groups continue to enjoy certain privileges at the cost of the marginalised groups like the San. Majority of the respondents interviewed attest to the implementation of policies by the GoB intended to integrate the San into mainstream Tswana.[22]

The impact of integrating the San into mainstream Tswana lifestyle is well documented in the literature. Similarly, some respondents shared their views on the integration of the San in mainstream Tswana lifestyle in the following ways: Professor Young, with extensive research experience spanning over fifty years on the San in Botswana, argues that integrating the San into mainstream society has no value added to the San and most importantly that it deprives the GoB an opportunity to diversify the economy through indigenous knowledge.[23] Young further alludes to the fact that the GoB was not willing to have any constructive conversation on this particular issue as he sought to engage different administrations since 1987.[24] San respondents state that the compounded effect of their forced assimilation into dominant Tswana mainstream renders them subordinate, resulting in the loss of identity, culture including their language.[25] These Respondents further observe that their assimilation triggered dispossession through forced relocations from their ancestral land to designated modernised villages.[26] The forced relocations inevitable come with the alteration of the San's traditional lifestyle and the adoption of Tswana economic, social, and political lifestyle.[27]

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[20] Andrew Gray, *Indigenous Rights and Development: Self-determination in an Amazonian Community* (Berghahn 1997) 54.
[21] Solway, Supra.
[22] Interviews Conducted in Xere, Kaudwane, New Xade and Central Kalahari Game Reserve between May 2022 and August 2022 amongst the San; Virtual interviews conducted between June 2021 and June 2022 amongst activists, academics, civil servants, lawyers, and politicians.
[23] Ibid, Respondent uses a pseudo name.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Pumza Fihlani Botswana Bushmen: Modern Life is Destroying Us BBC News 7th January 2014 available at Botswana Bushmen: Modern life is destroying us - BBC News accessed on 22 March 2022.

The dispossession of the San of their ancestral land is a complex, deeply seated, generational and irreparable loss as their land has multiplex meaning beyond an economic commodity as understood in the neoliberal context.[28] Furthermore, the San argue that their ancestral land has a multifaceted meaning and the loss there from results in religious, cultural and identity genocide, social assimilation, deprivation, and interference with livelihoods amongst others.[29] It is because of their comprehension of their indigenous identity and their articulation of the meaning of that identity in relation to the land that the San have become relentless in asserting their indigeneity as a social construct. Furthermore, the San resist against assimilation into the mainstream and most importantly advocate against the inherent loss of their ancestral land because their overall wellbeing is anchored on their ancestral land.[30]

The following discussions will expand more on the politics and contestation of indigeneity within the national, regional, and international contexts.

3.3 The Contestations and Politics of Indigeneity

This part of the chapter analyses the prevailing debates on indigeneity as they relate to the definition or characteristics of indigeneity and ways of assigning and assuming indigeneity. The discussion also demonstrates the controversies of indigeneity as they feature in the San's attempts to claim indigeneity as individuals and as communities. Indigeneity remains one of the most contested and controversial concepts in scholarly debates, as is in social and political debates.[31] For some scholars the attempt to define people as 'Indigenous Peoples' is a continuation of the colonial legacy and a manifestation of an endorsement of colonial values within the international system. To this end Newcomb argues that:

> The idea of certain peoples being classified as 'Indigenous' is not part of an 'objective reality' physically existing in the world *independent of the human mind*. It is the human mind, and, more specifically, the western or occidental mind, that came up with the metaphorical idea of certain peoples being termed and categorised as 'Indigenous'. The category was developed based on particular characteristics or properties ascribed to 'Indigenous Peoples' in a dominating context of empire and 1qcolonialism or in the contemporary context of a given 'state' of domination. Peoples called 'Indigenous' in international law,

[28] Interviews, Supra.
[29] Ibid.
[30] Ibid.
[31] Asebe Regassa Debolo, 'Contrast in the Politics of Recognition and Indigenous Peoples' Rights' (2011) AlterNative: An International Journal of Indigenous Peoples 1.

> for example are typically framed in terms of metaphors of hierarchy, and thus are characterised as 'occupying' a lower order or 'subordinate' 'space' 'beneath' the political authority of 'polities' called 'states'…The metaphor of a subordinate position or status is sometimes stated in the United Nations as such peoples being 'non-dominant'.[32]

The preceding observations hold water to a greater extent in that the need to categorise a certain group as an Indigenous Peoples emanates from the 'new world order'. The new world order is characterised amongst others by the language of protection and promotion of human rights and most importantly in theory an attempt to redress past injustices. To benefit from the 'promises' of the new world order, beneficiaries may have to identify themselves in a certain way or within a certain group. The mere fact that Indigenous Peoples seek to identify themselves within the confines and dictates of the new world order automatically means they are assenting to modernity. The need to classify rights bearers is a necessity in the post-colonial order. There would be no need to distinguish between the Indigenous Peoples and 'others' but for the events of colonialism and the subsequent movement of decolonisation. Birrell shares the above views in the following way:

> The global articulation of indigeneity has been attributed to the inauguration and development of human rights as inalienable and universal principles, the concomitant rise of identity politics, and the decolonisation inherent within the totalising system of modernity which actually served to create indigeneity as a global concept.[33]

Birrell opens a pandora's box and attest to the controversy inherent in understanding indigeneity and the politics related thereto. One such controversy is to be found in the definition of Indigenous Peoples and the concept of indigeneity. There is a continual engagement on what indigeneity entails, who should define the content and application of indigeneity and who should grant and enjoy benefits of indigeneity. Within the Indigenous Peoples' rights framework, there is consensus amongst scholars that there is no universal definition of indigeneity and various actors adopt a definition suited to their prevailing circumstances. Benjamin observes that:

> No single definition has been embraced consensually by those who regard themselves as indigenous; none has been embraced by scholars of indigeneity. The same holds for nation states: While the Philippines enshrines the notion of indigenous peoples in its state documents, China's government rejects the term for what it calls China's "national minorities." The governments of Bangladesh, India, Indonesia, and Myanmar regard all members of their respective populations as "indigenous," none a

[32] Irene Watson (ed) *Indigenous Peoples as Subjects of International Law* (Routledge 2018) 26.
[33] Kathleen Birrell, *Indigeneity: Before and Beyond the Law* (Routledge 2016) 11.

> particular kind of group embedded in a larger society. Some peoples in Africa describe themselves as indigenous in ways incompatible with various of the internationalist understandings on offer.[34]

It is not farfetched to argue that the concept of indigeneity has rendered itself so fluid and cannot be cast in stone, in both its historical and contemporary context. To capture the pliability of indigeneity, Li asserts that, "Indigeneity is a mobile term that has been articulated in relation to a range of positions and struggles."[35] For Ludlow et al indigeneity as a concept, and project, has not been without critique, being subject to limitations, risks and appropriations, and engendering disputes over definitional boundaries, inclusivity, and its performance.[36]

Pre colonialism, indigeneity existed as a mere classification but post colonialism, it exists as an active political force.[37] During the colonial period, indigeneity was used as a justification for dispossessing and discriminating those who were classified as indigenous. Nyamnjoh observes that:

> Under Colonial and Apartheid regimes of divide and rule to be called indigenous was first to create and impose a proliferation of nature identities circumscribed by arbitrary physical and cultural geographies, second it was to make possible not only distinction between colonised native and colonising Europeans but also between native citizens and native settlers among ethnic communities within the same colony; and third it was to be primitive and therefore a perfect justification for the Colonial mission *civilizatrice* (civilization mission), for dispossession…..In all, being indigenous was for the majority colonized native population to be shunted to the margins.[38]

This introduces other dimensions to the complexities of indigeneity whilst highlighting the contrast between indigeneity in the colonial and post-colonial period, indigeneity in law, indigeneity in action and who has authority to construct the concept of indigeneity. From a legalistic point of view, indigeneity is constructed through law making processes and through players who may not always include Indigenous Peoples. The said law is expected to cure a mischief, confer rights, and even promote and protect Indigenous Peoples as a cohort in a social context. In this instance the legal (processes) precede the social (implementation) which may result in the disparity in what the law provides for in content and what the social challenges

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[34] Benjamin Gregg, 'The Indigenous Rights State' (2020) 33 Ratio Juris 98.
[35] Tania Murray Li, 'Indigeneity, Capitalism and the Management of Dispossession' (2010) 51 Current Anthropology 385.
[36] Francis Ludlow, Lauren Baker, Samara Brock ,Chris Hebdon, and Michael R. Dove 'The Double Binds of Indigeneity and Indigenous Resistance' (2016) 5 Humanities 1.
[37] Jonathan Friedman, 'Indigeneity: Anthropological Notes on a Historical Variable' in Henry Minde (ed) Indigenous Peoples Self-determination Knowledge Indigeneity (EA 2007) 145 available at Indigeneity: Anthropological notes on a historical variable — Lund University accessed on 27 March 2022.
[38] Francis B. Nyamnjoh, '"Ever-Diminishing Circles" The Paradoxes of Belonging in Botswana' in Marison De la Cadena & Orin Starn (eds) *Indigenous Experiences Today* (Berg 2007) 305.

require in context. The likelihood of the indigeneity in law failing to satisfy the expectations of the Indigenous Peoples when actioned is highly probable given the fluidity of understanding the concept, relationship between state machineries and Indigenous Peoples. The argument here is that indigeneity in the law may be too detached and highly fictitious to meet the needs of indigeneity in practice a potential problem diagnosed by Bello-Bravo in the following way:

> Legal definitions of indigeneity at times fail to compass some Indigenous People, thereby formally and legally excluding them from the very process of protections that such legal frameworks are intended to afford.[39]

Another cause for controversy in understanding indigeneity is assigning authority to recognise indigeneity and implications, thereof. States are clothed with power and authority to make laws and policies at national, regional, and international platforms. Even if other stakeholders participate in the process of law and policy making, ultimately states make the decision as to what goes into policy and what is excluded. The scales are thus favourable to states to decide crucial questions pertaining to indigeneity. The effect of the power imbalance, disparity in participation and influence of outcome between the nation state and Indigenous Peoples results in the gaps highlighted by Bello-Bravo, the most notable being the distinction between indigeneity in the law and indigeneity in action. Indigeneity in the law is as agreed by the nation states at the UN negotiation tables and possibly at parliamentary platforms within states whilst indigeneity in motion is a lived reality for many Indigenous Peoples around the world.

The San can be used an example in this regard. The criteria for indigeneity as constructed in law is constituted in cumulative elements on who is indigenous.[40] For example, Errico argues that the distinctive nature of Indigenous Peoples derives from their specific lifestyles, cultures, customs and social institutions and the way in which their culture and existence are built on their special relation with the lands and territories that they have traditionally occupied or used.[41] As a result of several factors including interaction with 'others' even beyond the borders, some San do not fit perfectly in Errico's 'definitional criteria.' Where a certain element is missing in an individual's peculiar circumstances, they might be met with resistance when they seek to assert their indigeneity. Interestingly, the hurdle may be presented by both the state

[39] Julia Bello-Bravo 'When is indigeneity: Closing a Legal and Sociocultural Gap in a Contested Domestic/International Term' (2019) 15 *AlterNative* 111.
[40] The introductory Chapter of the thesis provides criteria.
[41] Stefania Errico, *The rights of Indigenous Peoples in Asia Human Rights-Based Overview of National Legal and Policy Frameworks against the Backdrop of Country Strategies for Development and Poverty Reduction* (ILO 2017).

and other Indigenous Peoples. An example can be drawn from some respondents who are classified as San activists and San at grassroot in the interviews.[42] Some of these respondents were born and raised in the CKGR. They left the CKGR from time to time to attend modern schools and eventually left the CKGR for University, thereafter, they pursued life in different places around the world. Even in pursuit of life outside the CKGR, the respondents stay in contact with their families who remain in the CKGR and maintain a very strong relationship with the CKGR itself through regular visits, honouring cultural dictates and retreating to the CKGR for healing. The respondents state that when the GOB relocated their families from the CKGR they wanted to partake in the litigation against the decision and one controversial issue that was raised against them during the preliminary preparations was whether their participation in the litigation would not jeopardise the chances of success for the San who were *legitimately* (emphasis mine) affected by the relocation.

Some of the respondents illustrate how the differentiation between the San who never left the CKGR, those who have left and returned shortly and those who left but return from time to time is harmful to the greater community and a constraining practice. Mogodu Mogodu a San activist who is also a lawyer notes that the differentiation between him and those who were deemed real victims of the GoB decision made him realise that, in legal terms, he might be deemed to be a *meddlesome interloper* who had no business litigating against the relocation as at the time of the decision he had been staying outside the CKGR for a considerable number of years.[43] Annabel a San who works and resides in Gaborone observes that she still wanted to participate in the litigation as the CKGR was still her home despite her extensive travels in search of livelihood elsewhere.[44] Thul a San who moved from CKGR for University education was aggrieved by the 'rejection' coming from his community, he is the view that their exclusion in the litigation was an extension of the discrimination that the community was trying to redress with the courts.[45] The respondents note that their participation in the litigation was the only issue that the Legal Advisory team, Government Officials and other Indigenous Peoples reached consensus on.[46] It seem like there was a belief from all these stakeholders that the law

[42] Interviews, Supra.
[43] Interviews, Supra. The respondent used their real names with consent.
[44] Interviews, Supra. The respondent uses a pseudo name.
[45] Ibid.
[46] Ibid.

requires that Indigenous Peoples claim their indigeneity only when they remain in their ancestral land without any interruptions in their stay.[47]

In the post-colonial period, it seems there is a general scepticism against people who identify as Indigenous Peoples. Niezen observes that:

> A radically constructivist approach to identity besides offering insult to those with cherished assumptions about ageless traditions, tends to be dismissive of such important questions as the circumstances under which a new identity gains acceptance, who benefits from its acceptance, who opposes it and why some accept or oppose it. It is important to recognise that indigenous identity is invoked by a minority of educated leaders in any given society, by an intelligentsia. It is part of a shifting continuum or *bricolage* of identities ranging from the individual actor to the family, clan, tribal group, language group, village, region, province, nation, and not least of all international affiliations. [48]

The preceding observations capture the attitude of the GoB and ethnic majority towards the San. There is a general belief by the GoB officials that the indigenous identity claimed by the San is fictitious and a political stunt of a minority and educated activists who have been exposed to the world beyond Botswana and are now using activism to cause a rift between the San and the GoB.[49] The attitude of the GoB and other Batswana on the indigeneity of the San formed the subject of the High Court's critique in the *Roy Sesana and others v Attorney General (Sesana case)*.[50] Dow J observes that one major defence presented by the GoB against this suit was that the San had no issue with the relocations, the litigation was a front by an international non-governmental organisation that used Roy Sesana to politicise the relocations and interfere in internal issues.[51] The GoB and other Batswana dismiss the San's indigeneity claims and do not seek to understand anything about it but that is a mere political stunt intended to frustrate the GoB's efforts at nation building. More often than not, a discussion ensues as to how the San should shed themselves of their 'historical identity' and assume their 'new identity'.

Historical identity refers to the perceived unadulterated identity whilst new identity refers to what is perceived as modernised San with contact with the outside world including other Batswana, Indigenous Peoples of the world, international organisations, and other stakeholders. Interestingly though, those who seek to push for the assumption of the so-called modern identity tend to suggest that such is not authentically indigenous, that it has been diluted by

[47] Interviews, Supra.
[48] Ronald Niezen, *The Origins of Indigenism; Human Rights and the Politics of Identity* (UCP 2003).
[49] Interviews, Supra.
[50] *Roy Sesana and Others v Attorney General [2006] 2 BLR 633*.
[51] Ibid.

interacting with others. This line of thinking is not peculiar to the GoB and the San. The Ogiek in Kenya have equally encountered similar reasoning as a justification of their forced removal from Mau Forest.[52] The bottom line is the failure of the GoB in appreciating the fluidity of identity and disregarding the critical questions as posed by Niezen.[53]

Some scholars posit indigeneity as a panacea for all transgressions visited against Indigenous Peoples by the nation state and other stakeholder.[54] Birrell argues that indigeneity is important as a positive identification accrues benefits in terms of international law.[55] Notably, the evolution of indigeneity from colonial to modern period has revolutionised the promotion and protection of Indigenous Peoples rights. For example, the acknowledgment of indigeneity as a basis for non-discrimination in international treaties may serve as a buffer against transgressions on Indigenous Peoples with impunity as much as it is a springboard for Indigenous Peoples to articulate their claims over their rights. It is observed that Indigenous Peoples upon embracing indigeneity as identity want to maximise its usefulness to them by forging alliances and making demands for redress.[56]

However, given the well documented experiences of Indigenous Peoples even at the face of indigeneity awareness and activism such optimism does not necessarily translate into the promotion and protection of Indigenous Peoples rights. This presents indigeneity as a double-edged sword as captured by Ludlow et al who argue that with indigeneity no matter what a person does, he can't win.[57]

The argument here is that indigeneity presents an opportunity and in some instances a hurdle in the promotion and protection of Indigenous Peoples' rights. Canessa argues that claiming indigeneity is an important strategy for marginalised groups to gain recognition and resources from the nation state where lobbying through international NGOs can be much more effective than organising nationally.[58] Indeed, many indigenous activists have better access to international organisations and power structures than they do in their own countries, and accessing transnational indigenous networks can be an effective way of circumventing

[52] *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*.
[53] Niezen, Supra.
[54] Mogomotsi and Mogomotsi, Supra; Francesca Merlan, 'Indigeneity: Global and Local' (2009) 50 Current Anthropology 303.
[55] Birell, Supra.
[56] Ludlow et al, Supra 1.
[57] Ibid.
[58] Andrew Canessa, 'Who Is Indigenous? Self-Identification, Indigeneity, And Claims to Justice In Contemporary Bolivia' (2007) 36 UAS 195.

antagonistic local bureaucracies.[59] The San may be used to exemplify this assertion. The mobilisation that took place during the forced relocations had extensive international backing and audience, arguably more than it did nationally. In fact, the San received enormous support from Survival International throughout the CKGR ordeal and the subsequent litigation challenging the relocations.

On the other hand, indigeneity presents hurdles in some instances and attempts to adjudicate over indigeneity claims are aborted preliminarily. In the context of the San, the GoB has authority to assign indigeneity status and has extended it to every ethnic group ignoring the nuances of difference that exist amongst ethnic groups in Botswana. Consequently, there being no consensus on what indigeneity in Botswana entails and on the definitional parameters of indigeneity, the 'promise of indigeneity' cannot be met. Compounding the hurdles of indigeneity are the political and ideological controversy that are well acknowledged.

The construction and identification of 'Indigenous Peoples' is an internationally recognised identity that has become a tool for empowerment, with which to harness previously inaccessible resources.[60] This is by comparison with the status quo that prevailed during the colonial period and immediate years post-colonial reign where to be an Indigenous Peoples meant to be deprived of the basic respect, was synonymous with weakness, barbarism and to fall target of continued harassment and assets dispossession.

Birrell is however quick to caution that the reality for present day Indigenous Peoples may not be all rosy as indigeneity itself "is highly fraught, encumbered with expectations that may bear little or no resemblance of lived realities.[61] Notions of hybridity must contend with the old misconception that 'the only real Aboriginals are tribal Aboriginals' or 'the ones sitting on a desert rock with a spear'.[62] These observations are particularly true in the legal construction of indigeneity which theoretically should result in conferment of some benefits for those who identify as Indigenous Peoples. As a matter of fact, the expected rights and privileges are often denied or delayed.[63] States simply refuse to comply with international law dictates on rights and privileges of Indigenous Peoples.

[59] Canessa, Supra.
[60] Ludlow, Supra; Birell, Supra.
[61] Birell, Supra.
[62] Ibid, 130.
[63] An example is that of the Ogiek Community in Kenya, even after succeeding before the African Court on Human and Peoples Rights in 2017, their status quo has not changed as at 2023. Report show that the Kenyan government still refuses to comply with the judgment of the African Court.

The challenges alluded to by Birrell can be illustrated by numerous cases where Indigenous Peoples sought to lay claim on land within nation states and the nation state's counter to such claims were that such Indigenous Peoples had shed their indigenous identity, modernised, and lost touch with their traditions, religion, and indigenous identity. For example, the Kenyan government used this analogy when the Ogiek sued the government before the African Court on Human and Peoples rights.[64] Young supports the foregoing by asserting that those who claim international human rights as Indigenous Peoples performatively become identifiable subjects of international law but that does not, however, provide them with control over, or emancipation from, a state-based legal system.[65] As illustrated by the experiences of the San, their self-assignation as Indigenous Peoples in terms of the dictates of international law and in accordance with their social construction of indigeneity has not materialised into any protection nor has it 'delivered them from the shackles of the oppressive state machineries'.

Despite all the politics and contestations that beset indigeneity, the one accepted fact is that while the concept of indigeneity is complex and cannot be bound by a single definition, it essentially describes one's identity and as such is continually evolving, in flux, and determined by the relationships between peoples rather than a static state of being.[66]

The politics and contestations of indigeneity such as the question of who can legitimately claim an indigenous identity, who should assign such an identity and the implications of indigeneity as discussed above permeate the policy, legal and social debates in Botswana as would be demonstrated in the following discussion.

3.4 The Social and Legal Construction of Indigeneity in Botswana

Indigenous Peoples in Botswana like elsewhere exist in the shadows of colonialism. An account of the San's relationship with the GoB and ethnic majority in Chapter 2 highlight the myriad difficulties Indigenous Peoples of the world face in the process of finding their place in

[64] ACHPR v. Kenya, App. no. 006/2012, judgment of African Court of Human and Peoples' Rights, issued 26 May 2017 (the 'Ogiek judgment'), available at: http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf accessed 17 August 2023.
[65] Stephen Young, *Indigenous Peoples, Consent and Rights* (Routledge, 2019).
[66] Jonathan Woof Indigeneity and Development in Botswana The Case of the San in the Central Kalahari Game Reserve (2007) available at Indigeneity and Development in Botswana (psu.edu) accessed on 30 March 2022.

an ever-changing post-colonial world. At the heart of the issues Indigenous Peoples must deal with is the meaning and implications of indigeneity.

The San's indigeneity has not been void of the inherent controversies in the definition, recognition, performance and implications of indigeneity. So controversial is the San's identity so much that there exist contentions on their name. The San, Bushmen, or Basarwa are terms referring to Khoisan speakers in Botswana who make up 3.5% of the population of Botswana.[67] These terms encompass numerous distinct linguistic and identity groupings. These labelling have problematic histories. The official term Basarwa, when used to refer to the San, is often deemed pejorative as it means 'those who do not raise cattle' indicating a primitive way of life.[68] The stigma that comes with not raising cattle was popularised by the Tswana whose primary economic activity was and is still cattle rearing. In 1992 the indigenous NGO Kgeikani Kweni (First People of the Kalahari, or FPK) suggested the use of '/Noakhwe which means 'first people'.[69] The thesis adopts the name San to reference the subjects under study as it is the most preferred by the San respondents.[70] The San respondents and San activists asserted that reference to them as San has become acceptable to them although it falls short of adequately capturing them as a collective.[71] Respondents who are lawyers who represent the San in several cases attested to the preference of the term San over others and noted that their clients deemed that reference palatable.[72] Young agrees to a certain extent, but notes that in their extensive interaction, the San were sensitive to referencing with derogatory connotations, at the top of such being Basarwa.[73]

Interestingly though, the GoB and ethnic majority insist on using the term Basarwa. In fact, Basarwa is an official reference to the San.[74] The fact that the GoB insists on using Basarwa to refer to the San whilst aware of its derogatory connotation and knowing that the San reject same is in itself an indication of the nature of the relationship between the GoB and the San. According to the respondents, the fact that the GoB refuses to acknowledge the name the San

[67] Louiza Odysseos 'Governing Dissent in the Central Kalahari Game Reserve: 'Development', Governmentality, and Subjectification amongst Botswana's Bushmen' Globalizations (2011) Globalizations 439.
[68] Oyvind Mikalsen, 'Development communication and the paradox of choice: Imposition and Dictatorship in Comparing Sámi and San Bushmen Experiences of Cultural Autonomy,' (2008) 22 Critical Arts: A Journal of South-North Cultural Studies 295.
[69] Ibid.
[70] Interviews, Supra.
[71] Ibid.
[72] Ibid.
[73] Interviews, Supra. The respondent uses a pseudo name.
[74] Ibid.

prefer epitomises the GOB's repressive approach relating to the San.[75] There was consensus amongst Development Officers that as a matter of fact referring to the San as 'Basarwa' is often intended to belittle them and reduce them to 'nothing'.[76] It is said to be common to refer to the San as 'lesarwanyana' or 'masarwanyana' which is effectively the top notch in the threshold of ethical disrespect in Botswana. The acceptable way of referencing people in Botswana is with the use of *'Ba'* when referring to multiple people and *'Mo'* when referring to an individual, the use of *ma* when referring to more than one San and *le* when referring to one San is deemed disparaging.[77] This is because referencing one's ethnic identity as *ma* in plural and *le* in singular is considered disrespectful and derogatory in Botswana.[78]

As discussed in the earlier chapter, apart from the name or reference of the San as Basarwa, the other controversy that has found its way into policy is the San's indigeneity. Post-colonial Botswana is deeply divided ethnically yet there is a policy that creates superficial unity. This policy is the basis of the apparent oppression of ethnic minorities generally and the San specifically. In fact, the policy is used to create a homogenous society which is dominated by the ethnic majority, the Tswana. Sarkin and Cook term this policy a rejection of the nuances of indigeneity by interpreting the concept uniformly and ignoring the heterogeneity that exists in the country.[79] Effectively, the policy drive is to erase the identity, culture, and distinctiveness of amongst others including the San. Consequent to this policy, the San have become the face of the persecution of the minority groups in Botswana and it has been argued that their status remains one of the most contentious issues the GoB ever faced[80] and that no other group symbolises the limits of Botswana's democracy better than the San.[81]At the heart of the persecution meted out against the San is a heated debate on indigeneity. The demographic realities of the San underscore their social, economic, and political status anchored on the GoB's policy rejecting their indigeneity.

Tribes in Botswana do not generally claim that they are indigenous to Botswana. It is the GOB that persistently ascribes indigeneity to all tribes and has adopted a policy to that effect. In fact, many Tswana that migrated from South Africa still retain relationships with their South African counterparts and often assert their South African origin. An example here can be drawn from

[75] Interviews, Supra.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Cook and Sarkin, Supra.
[80] Hitchcock, Supra.
[81] Interviews, Supra; Saugestad, Supra; Cook and Sarkin, Supra.

the Bakgatla, a tribe found in both Botswana and South Africa. These tribes, although separated by borders, still maintain close relationships so much that when the Bakgatla royal chief was persecuted by the GOB he sought refuge from their South African counterpart. The Bakgatla in Botswana are so proud of their South African heritage and continuously acknowledge it.

The GOB's decision to adopt a policy indigenising all Batswana is consistent with the general trend in African countries. Assigning indigeneity to many tribes in post-colonial Africa is made by contrast with colonists who arrived in Africa and do not originate in Africa.[82] This is also a colonial construct, as during colonialism all Africans were deemed Indigenous Peoples.[83] Although the GoB assign indigeneity to different tribes, the ethnic majorities tend to perceive themselves as superior and the San as an inferior ethnic group. This perception is consistent with the policies adopted by the GoB in terms of which the San are a constant state project that ought to adopt the Tswana' s social, political, and economic organisation. An example can be drawn from the development policies that effectively force the San to abandon their ways of being and doing and replace that with the Tswana's ways of being and doing.[84] The GoB adopts developmental policies that are paternalistic when dealing with the San and that is not the case with many other tribes especially the Tswana, who are treated as capable of self-constituting and representing their needs as communities. The GoB's attitude towards the San serves as a springboard for other ethnic groups to ill-treat the San.

In response to the general treatment from the ethnic majority and the GoB, the San assert indigeneity as a protective tool. The San seek to assert themselves First Peoples of Botswana who are rights bearers and address entrenched discrimination.[85] The San joined on the "resistance movement" and "indigeneity bandwagon" to assert their autonomy as a people, protect their community rights over ownership and occupation of ancestral land and condemn the imposition of dominant developmental patterns.[86] The San affirm their sense of indigeneity by critiquing the post-colonial development discourse, attempting to restore their land rights in the CKGR and by implementing 'life-projects' which affirm their ontologies and traditions.[87] For many years the San argued that their status as 'first nations' or 'aboriginal people' should

[82] Interviews, Supra.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Cook and Sarkin, Supra.

be recognised and that they should be treated in accordance with international standards on Indigenous Peoples. To this end, it is observed that:

> The San contend that the title of indigenousness is crucial both to their ability to access certain human rights and to the obligation of the GOB under international law to promote and protect these rights. For the San, two things are certain: (1) they are not currently able to fully access the rights afforded to indigenous groups under international law; and (2) the GOB, by allowing and sometimes even enabling this denial of access, is violating international agreements and treaties that it has signed.[88]

The definition of indigeneity and Indigenous Peoples seems elusive and 'foreign' to the San at grassroot level who use the terminology 'First People' and 'Aborigional' in reference to themselves.[89] Whilst the San activists perceive indigeneity as an identity marker which underscores the uniqueness in their lifestyle, culture, identity and prioritises their relationship with the land, the San at grassroot level do not use the Indigenous Peoples or indigeneity as their identity marker.[90] Notably though, the San at grassroot level characterise their identity through their First peoples status, culture, lifestyle, livelihood and as all intrinsically linked to their ancestral land, the CKGR.[91] Whilst the San activists' articulation is informed by the international law construction of indigeneity they use their lived experiences to exemplify their understanding of indigeneity.[92] Both the San activists and San at grassroot level use various facets of their lives to demonstrate that their identity is different from that of other Batswana and argue that they require special treatment as communities from the GoB.[93] The San respondents argue that the special treatment granted to their communities would be preservative if it focused on safeguarding their culture, identity, livelihood and promoting their use and occupation of the CKGR.[94]

To exemplify what indigeneity entails for different respondents, Satau notes that indigeneity is an identity specially reserved for historically marginalised, vulnerable, and discriminated ethnic groups like the San who originate in a given demographic location, have a special relationship with their land and were found by various settlers who may be African or White

[88] Cook and Sarkin, Supra 97.
[89] Interviews, Supra.
[90] Interviews, Supra.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.

colonial settlers.[95] The African and White colonial settlers would have become dominant and subjugated the Indigenous Peoples. Roy Sesana articulates indigeneity as a complex state of being, better comprehended by those who identify as Indigenous Peoples and entails possessing certain characteristics which relate to their identity, lifestyle, and land as a community.[96] Mogodu notes that no ethnic group in Southern Africa is the best-case study of what indigeneity is than the San.[97] Maxwii a San activist argues that indigeneity represents an identity that attest to the persecution of ethnic groups by other ethnic groups or White settlers mainly because of their unique lifestyle that is dependent on their ancestral land; and that those who persecute the indigenous ethnic groups usually do so incrementally and seek to attack their sources of identity being the ancestral land.[98]

In Roy Sesana amplifies other respondents' views and states that the San are Indigenous Peoples of Botswana because:

> We possess certain unique characteristics as communities. The said characteristics are identical throughout the San communities in Botswana, Namibia, South Africa, and Zimbabwe. We are one with our land, they call it 'strong link to land and nature', We have unique systems that regulate our economy, social arrangements and leadership, our language and culture are peculiar and are often the subject of ridicule by other because they just do not understand what we are all about, and we want to stay in our ancestral land, take our last breath there and be buried there in terms of our beautiful cultural practices. The land is important, and we perceive it as a living being. We equate the ancestral land to a custodian of our lives yet we too perceive ourselves as custodians of the land which we pass with all its goodness to our grandchildren.[99]

Martha a San activist narrates an encounter that made her realise that her identity is a cause for concern for other people:

> Someone inviting me for an official meeting in Gaborone told me not to come wearing my animal skin regalia as I would embarrass them. There was no way I was going to allow anyone to dictate to me how to present myself and my community. They must know me as a San through my dress and many other exciting facets of my culture. We are different from other tribes in Botswana, and we seek to hold on to our difference in this ever-changing world. However, the world is not interested in allowing us to maintain our different and unique being. Our ancestors were abused, used, and dominated by the Tswana, same is happening to us and same will happen to my grandchildren if we do not put an end to it.[100]

[95] Interviews,Supra. Respondent uses their real name.
[96]Ibid.
[97] Ibid.
[98] Interviews, Supra. The respondent used a pseudo name.
[99] Interviews, Supra.
[100] Interviews, Supra. Respondent uses a pseudo name.

The San at grassroot level tease out the characteristics of their life as illustrative of their indigenous identity, chief amongst them were that the San were the First peoples of Botswana and that they have a special relationship with their ancestral land which is the source of their survival.[101] These respondents emphasise their First Peoples status using their ethnic language. In their native language the San referred to themselves as *Noakhwe* which translates to First People.[102] Kelojetse a San at grassroot level observes that the central feature of the San's identity is their land hence the GOB's attempt to decultarise the San began with their forced relocations and destruction of their dwelling houses within the CKGR.[103] Kelojetse further notes that from the land flow all other aspects of the San's identity namely culture, lifestyle, livelihood, religion, and spirituality, all which are important in constituting the San's indigeneity.[104] Oneone emphasises the exceptional dependency on land as an integral part of the San's indigeneity.[105] Oneone points out that whilst one may argue that land is important for all tribes in Botswana, for the San what is important is not just any land but their ancestral land which was passed from one generation to another.[106]

Goonamo is of the view that the unique lifestyle of the San that has stood the test of change over years is what renders the San different, the lifestyle coupled with intentional pursuit of maintaining that lifestyle were essential in the San's indigenous identity.[107] Roselyn a San at grassroot level focuses on culture as an anchor of the San's indigenous identity.[108] For Roselyn, everything else revolves around culture which entails many aspects of the San's ways of life like their dependency on nature to provide food, health, well-being, and contentment.[109] Sister buttressed the essentials of their indigeneity as the San's close relationship to the land, their culture, practices, and lifestyle which they are keen on maintaining at the face of a push from the world to move on from the 'wilderness'.[110]

[101] Interviews, Supra.
[102] Ibid.
[103] Ibid. The respondent used a pseudo name.
[104] Ibid.
[105] Interviews, Supra. The respondent uses their real name with consent.
[106] Ibid.
[107]Ibid.
[108] Ibid. The respondent used a pseudo name.
[109] Ibid.
[110] Interviews, Supra. Respondent uses their real name with consent.

In amplifying the views of other San at grassroot level, Extra sees indigeneity as an uncommon term amongst the San but he encountered it on limited instances and understood it to relate to the San's status as the First Peoples of Botswana.[111] Extra opines:

> The San are the First Peoples of Botswana. The status should be the basis for protection and preservation of our lives instead of it being a cause for shame for the government. All facets of our lives that we seek so strongly to hold on to are interesting and worthy. Although the government constantly abuses us based on who we are, the same government is often quick to encourage us to use our identity to make profits for tourism entities operating in the CKGR. You often hear officials saying, be sure to show that you are a real San. The ideology of real and fake San confuse me. I do not know what a fake San means.[112]

In providing a personal understanding to her indigeneity, Stobadiphuduhudu articulates indigeneity in the following way:

> We are the first people. Our indigeneity can be deduced from how we live our lives. Even at the face of external pressure manifesting as forced relocations we insist on maintaining our traditional lifestyle. In resettlement villages we still live in small communities as we did in our ancestral land. Did you notice how this village is demarcated into wards with names of settlements in the CKGR? We still perceive hunting and gathering as our only way of survival. We still perceive our ancestral land as our source of life. We yearn to return to the CKGR and continue our lives. They can call us outsiders, the underdeveloped, poor and all other names intended to belittle us, but for as long as we are in the CKGR we are whole.[113]

It is observed that in defining themselves as 'indigenous' before and during the San case, the San did so purposely.[114] They sought to re-assert their rights, using the concept of indigeneity as a means of defining themselves as a group that: (1) was different from the majority population; (2) that historically had been mistreated and discriminated against; and (3) that this treatment occurred in part because of their lifestyles and distinct cultural attributes.[115]

The foregoing observations are supported by the San Respondents and San activists who generally perceived the recognition of their indigeneity as a panacea for their discrimination, marginalisation, and dispossession.[116] The respondents however differ on the extent to which indigeneity could redress them as communities. Roy Sesana highlights that because of personal experiences, indigeneity is a double-edged sword that may redress Indigenous Peoples and may

[111] Interviews, Supra. Respondent uses their real name with consent.
[112] Ibid.
[113] Ibid.
[114] Robert Hitchcock, Maria Sapignoli & WA Babchuk, 'What about our Rights? Settlements, Subsistence and Livelihood Security among Central Kalahari San & Bakgalagadi' (2011) 15 Int'Journal of Human Rights 67.
[115] Ibid.
[116] Interviews, Supra.

on the other hand fail them.[117] Sesana seems biased on the positive performance of indigeneity in Botswana considering the litigation against the GOB they were involved in.[118] San activists perceive the promise of indigeneity from a formalistic international lens. There was consensus among the respondents that international law should propel their quest to enjoy all rights and privileges promised in the UNDRIP, and that national law is unlikely to facilitate that.[119] The San respondents at grassroot level, perceived their indigeneity as arising from two primary factors namely, that the San were the first inhabitants of Botswana ahead of the now ethnic majority and secondly, that they have a special relationship with their land.[120]

As discussed previously, the GoB holds a different position on the meaning of indigeneity from that of the San which has culminated into an operational policy. The GoB has been consistent on its position that all tribes in Botswana are indigenous to Botswana.[121] The GoB policy that extends the indigenous identity to all citizens effectively adopts the colonial approach.[122] Saugestad observes that the GoB policy on indigeneity is not peculiar to Botswana but a common practice amongst African states and explained that status quoin in the following way:

> The new African states predominantly pursued a policy which in the name of national unity dismissed cultural differences as tribalism and a threat to the sovereign state. Tribal conflicts have left their mark on national politics in a way that makes indigenous organisations-with their need for 'special treatment'-particularly vulnerable to accusations of being divisive, even secessionist. Or alternatively, the claim has been made that all Africans are indigenous. The dominant position of white colonial forces left all black Africans in a subordinate position that in many respects was similar to the position of indigenous peoples in other parts of the world. In relation to the colonial powers *all* native Africans were (a)first comers (b)non-dominant (c) different culturally from white intruders. Thus, the dominant black/white dichotomy in Africa could be used to reinforce a notion that all native Africans were 'indigenous'. [123]

Although the GoB acknowledges the existence of Indigenous Peoples in the country, it has on many occasions snubbed international attempts targeting Indigenous Peoples. The reason for that is likely that international law has a different characterisation of Indigenous Peoples that

[117] Interviews, Supra.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Kenaope Nthomang, 'Relentless colonialism: the case of the Remote Area Development Programme (RADP) and the Basarwa in Botswana', (2004) 42 Journal of Modern African Studies 415; Richard Werbner, Introduction: Challenging Minorities, Difference and Tribal Citizenship in Botswana (2002) 28 Journal of Southern African Studies 671; Lydia Nyati-Ramahobo, Minority Tribes in Botswana: the Politics of Recognition (2008) 1 Minority Rights Group available at https://www.refworld.org/pdfid/496dc0c82.pdf accessed 17th August 2021.
[122] Ibid.
[123] Sidsel Saugestad, 'Beyond the 'Columbus Context' New Challenges as the Indigenous Discourse is Applied in Africa' in Henry Minde (ed) *Indigenous Peoples Self Determination Knowledge Indigeneity* (Eburon 2008) 66.

the GoB contest. The GoB refused to participate in the 1993-2003 United Nations Decade of Indigenous Peoples and originally opposed the UNDRIP.[124] The GoB was concerned that the UNDRIP did not suit the 'African Setting' and had the potential to invoke ethnic conflict and divisive tribalism while interfering with state sovereignty and nation building. The GoB eventually voted for the UNDRIP in 2007, but that decision has not translated into any policy change in Botswana. Summing up the position of the GoB on the indigeneity of the San, Odysseos observes that the GoB adopted a specific development policy that is predicated on the classification of the San as discriminated, poor remote dwellers who were socio-politically marginalised and not a distinct indigenous group since 1978. Interestingly, this policy position was publicised by the Former President Mogae who was of the view that the San's way of life was a manifestation of poverty and not a culture. The GoB went further to claim that the San's long history of interaction and assimilation has rendered their way of life no longer distinct.[125]

While the GoB refuses to refer to the San as "indigenous," it does define the San in other, divisive ways that suggest that they are not, in fact, considered equal.[126] In Setswana textbooks the San are referred to as people of the past, stone-age people, in blatant disregard of the reality that San are presently living in contemporary Botswana.[127] Through its Remote Area Development Programme (RADP), the GoB has negatively defined the San, categorising them by their "absence of valued Tswana qualities" by targeting non-Setswana speakers and people who live "outside village settlements."[128]

The foregoing argument was expanded by Development Officers (DOs), experts on the San's rights, scholars, lawyers, and politicians. Most of these respondents adopt an international law inclined characterisation of indigeneity which prioritises marginalisation of the group in question, historical and continual domination by other groups, relationship with the land, unique lifestyle and culture and strong inclination to preserve both culture and culture whilst residing the ancestral land.[129] Although these respondents did not acknowledge international law as their source, their characterisation of indigeneity for example their being first inhabitants of Botswana and their special relationship with the CKGR were strikingly like the regional and international law articulation of indigeneity.[130] The intense controversy was presented by

[124] Interviews, Supra.
[125] Odysseos, Supra 443.
[126] Ibid.
[127] Ibid.
[128] Woof, Supra 17.
[129] Interviews, Supra.
[130] Ibid.

politicians. Politicians drawn from the ruling party adopt the GoB policy focused definition of indigeneity whilst those drawn from opposition parties condemned the GoB's definition of indigeneity as 'insensible' and 'demonstrative of the GoB's insensitivity to difference' and were inclined to the San's definition of indigeneity.[131]

As previously discussed, the San's indigeneity was the subject of litigation in the case of *Sesana case*.[132] In this case, the High Court accepted the San's indigenous status and the need for the GoB to abide by the 1996 Convention for the Elimination of All Forms of Racial Discrimination to which Botswana has been a signatory since 1974 and thus had an obligation to ensure that the San have equal rights and enjoy effective participation in public life and that no decisions directly relating to their rights and interests are taken without meaningfully engaging them in the decision-making process. Phumaphi J who after traversing the history of the CKGR posits that:

> It appears from the foregoing that, 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.[133]

Dow J established the defining features of indigeneity in Botswana when analysing the distinct characteristics of the San, the history of the CKGR and the relocation policies. Dow J put an emphasis on the San's ties with the CKGR; communal living in one of the six settlements in huts built completely from locally harvested materials such as grass, wooden poles, and some bush; inability to read or write, except for the occasional person who could read and write a little Setswana; limited proficiency in speaking Setswana and their inclination to Se seG//ana, and/or seG/wi and/or Sekgalagadi (some of the languages spoken amongst the San), depending on one's own ethnicity or associations over the years; high mobility constantly within the CKGR as well as to places outside; hunting and gathering lifestyle within defined territories, hunted for meat, employing such methods as chasing down game on horseback and killing it by the aid of dogs, trapping and bows and arrows; dependency on the government to provide essential services to augment their subsistence; dependency on clothes donations. Dow J noted that when the Court went through the CKGR, it observed that most of the residents found at Molapo had uniform towels to protect them from the cold.[134] The group that huddled for a

[131] Interviews, Supra.
[132] *Sesana case,* Supra.
[133] Ibid, Per Phumaphi J *at Para 68*.
[134] *Sesana case,* Supra.

photograph, on the suggestion of the Applicants' counsel, Mr. Bennett resembled a group one might see at a refugee camp – bare-footed, poorly clad for the weather, and the desert temperatures that do, during winter nights, plummet to freezing, and obviously without enough water for proper hygiene.[135]

Dow J also focused on the San's place within the Botswana social, economic, and political strata and underscored the disadvantaged position of the San as illustrated by six facts namely: the deliberate exclusion of the San's languages in everyday life, the colonial government's decision that denied the San tribal territories when carving tribal land to other tribes and the colonial government's policy position that the San voters were of little value, excluding the San representation in the Constitution, prevalent illiteracy amongst the residents of CKGR, and the GoB's admission on the social, economic and political disadvantage position of the San.[136]Through Dow J's judgement a criterion that harmonises the San's understanding of indigeneity and international law's criteria of indigeneity emerged. It appears from Dow J's judgement that the San's *source* (italic mine for emphasis) of indigeneity is their historical experiences with both the dominant Tswana groups and the colonial government, distinctive cultural, lifestyle, language, and other characteristics by comparison with other Batswana, continued marginalisation in the post-colonial Botswana, their peculiar relationship with their ancestral land and their desire to maintain their traditional lifestyle within their ancestral land. In her analysis of indigeneity, Dow J evidently prioritises self-identification as an integral component of the indigeneity as opposed to external objective criteria that if adopted may constrain the San's indigeneity.

It is observed that the High Court's acknowledgement of the San as Indigenous Peoples suggests that they may refute the GoB's homogenous understanding of settled life outside CKGR as the only viable and desirable path to development.[137] Furthermore, as indigenous, the San are acknowledged as having a special relationship to the land and in acknowledging spiritual and cultural ties to the land, the judgement agreed that their land was not a commodity which can be acquired, but a material element to be enjoyed.[138]

The foregoing analysis has shown that indigeneity in Botswana is both a social and legal construct. Whilst the San perceive themselves as indigenous to Botswana because of social

[135] Sesana case, Supra.
[136]Ibid, Per Dow J Paras ll.
[137]Odysseos, Supra.
[138] Ibid.

factors, the Court in Botswana considered both social and legal factors in ascribing indigeneity to the San. The GoB relies on historical factors which are social in nature in its indigeneity policy which recognise every ethnic group in Botswana as indigenous to Bots wana. This is the legacy of colonialism 'haunting' the San.

Based on the characteristics of indigeneity discussed above the thesis adopts a working definition of indigeneity. For purposes of this thesis indigeneity is a post-colonial construct targeted at distinguishing the identity of the San as an ethnic minority with peculiar and unique characteristics that set them apart from other tribes within Botswana. The element of post-coloniality of indigeneity is crucial in this instance and underscores the differentiation of the construction of indigeneity in the colonial period which referenced all natives in Botswana as Indigenous Peoples and the current international law developments that assigns indigeneity to specific groups that shares similar characteristics as the San. The key characteristics that this thesis will focus on more are the historical and continual marginalisation and discrimination of the San; the San's unique lifestyle, identity, and culture; the San's special relationship with their land and the continued plight to occupy and use ancestral land with minimal intervention from other tribes and the GoB. The thesis posits that indigeneity is contingent on historically constructed contexts in which it is embedded. Thus, the identity must be assessed as evolutionary in nature. As experiences unfold in each context they shape, define, and redefine the meaning and content of indigeneity. Acknowledging the fluidity of indigeneity is an important aspect of the enjoyment of the indigenous identity as it aids in positioning some San respondents who are pursuing an individual life different from that of their communities but still retain contact and pay allegiance to their communities.

Indigeneity may take various articulations and displays for different indigenous communities. Whilst others may emphasise their homes, others would prioritise their traditional attire and so on and so forth. However, the articulation and expression of indigeneity often resonates on the Indigenous Peoples strong will to retain their ways and not deal with imposing developmental paradigms. Gowlland articulate the forgoing in the following way:

> By pointing out crumbling cement, the villager was commenting on poor workmanship, the fragility of materials, and the unsuitability of cement in the mountain environment. Implicitly, he was also commenting on the consequences of a recent history of participation in the market economy, and loss of local building knowledge and know-how. Moreover, because cement represented a way of becoming

> modern, his comments had broader resonance in relation to a history of dealing with colonial powers and their assimilationist ambitions.[139]

As regards indigeneity in Botswana, there are three notable observations. Firstly, politics are an inescapable part of indigeneity. The San's quest to own and occupy their ancestral land and their challenge against dominant developmental paradigm is a fight to balance the power equilibrium. Secondly, the very act of seeking recognition and inclusion in the social, economic, and political spaces as unadulterated communities is a form of authenticating their identity and their power through a political act. Lastly, the act of recognition and non-recognition of indigeneity in Botswana has been significantly shaped by the exercise of political power. The continual engagement of assigning indigeneity to the San is a political dialogue and the disregard of the court order conferring indigeneity on the San is an exercise of political power.

3.5 Indigeneity in the Regional and International Context

For many years now, there have been seismic shifts in the articulation and performance of indigeneity. Regional and international law have evolved to include indigeneity as a ground for non- discrimination thus providing redress avenue for Indigenous Peoples. Some Indigenous Peoples have been remotely protected by regional and international law, more than national laws.[140] Clifford observes that Indigenous People have emerged from history's blind spot and are no longer pathetic victims or noble messengers from lost worlds but are visible actors in local, national, and global arenas.[141]

Despite the notable regional and international shift on the promotion and protection of Indigenous Peoples rights, a lot of work remains to be done. There are many factors that diminish the strides made towards the promotion and protection of Indigenous Peoples through regional and international frameworks. States habitually support the progressive regional and international framework on the protection and promotion of Indigenous Peoples rights yet neglect to domesticate such into national frameworks or put national enforcement mechanisms in place. Moreover, states extensively qualify the enjoyment of Indigenous Peoples' rights to an extent where such qualifications diminish the intended protection. Furthermore, the existing

[139] Geoffrey Gowlland The materials of indigeneity: slate and cement in a Taiwanese indigenous (Paiwan) mountain settlement (2020) 26 JRAI 126.
[140] Thomas Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013/14) 35 U. Pa. J. Int'l L. 113.
[141] James Clifford, *Returns: Becoming Indigenous in the Twenty First Century* (HUP 2013).

regional and international framework on Indigenous Peoples rights has not enjoyed universal acceptance with some states objecting to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) until its adoption. Merlan observes that international indigeneity has received opposition from various fronts especially states that have not supported indigeneity in any unqualified way namely Australia, the United States, Canada, and New Zealand.[142]

The golden thread that connects the contentions on Indigenous Peoples rights between the national, regional, and international platforms is the meaning, content, and application of indigeneity. Bello-Bravo sums the contestations of indigeneity from the national, regional, and international platforms in the following way:

> Indigeneity is a much-contested term, complicated by formal definitions under domestic and international law, the unlimited right to self-identification by indigenous people, conflicts and/or contradictions between these legal principles, and the political inequalities that result from variations in access to the processes and legal actions that invoke these terms. In particular, this generates a gap between legal definitions of indigeneity (framed, then and now, by hegemonic powers) and sociocultural practices of indigeneity (expressed and experienced, then as now, by cultures themselves).[143]

For example, indigeneity in regional and international frameworks is a construction of the politics and political power with limited participation by Indigenous Peoples. There is a likelihood of Indigenous Peoples of the first world and Indigenous Peoples of countries that have 'Indigenous Peoples conscious Constitutions' participating in policy making structures. The preceding criterion excludes the San. Even then, the majority of participants in the making of these definitional criteria are political and state representatives. Where Indigenous Peoples participate in such platforms their contribution will be subject to state review, and states have the ultimate power in defining what should be encapsulated in the final policy. Here an example can be drawn from the negotiation of the UNDRIP.

Indigenous Peoples are said to have participated throughout the negotiation of the draft declaration, however substantively what was adopted was a grave compromise of what Indigenous Peoples desired and more of what States were willing to accommodate as sole and key players in the adoption of declarations within the United Nations.[144] For example, when

[142] Merlan, Supra 303.
[143] Bello-Bravo, Supra 111.
[144] Dominic O'Sullivan, *We are all Here to Stay: Citizenship, Sovereignty and the UN Declaration on the Rights of Indigenous Peoples* (ANU 2020).

the UNDRIP was adopted, the provision on the right to self-determination in Article 3 remained unchanged but its significance and scope was significantly curtailed by a crucial addition to Article 46(1) stating that nothing in the Declaration may be: "construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of any state.[145]

Apart from the political nature of the process of defining indigeneity, Niezen identifies two axes of difference: a North-South line and in the African/Asian controversy. According to Niezen, Indigenous Peoples of the North are advantaged by the liberal democratic states and their assimilation-oriented educations that allow them to understand international governing systems while the Indigenous Peoples from the South struggle to survive in oppressive political systems.[146] Indigenous peoples in Africa and Asia face challenges to politicising their status as indigenous because the state is liberated from its coloniser.[147] Attributing the inability of African Indigenous Peoples to politicise their indigeneity to liberation fails to take cognisance of the fact that the status quo of Indigenous Peoples in Africa is a direct result of colonialism and the hurdles nation states are putting against the recognition quest by Indigenous Peoples is a continuation of colonialism. Consequently, Indigenous Peoples in Africa will continue to face numerous challenges regarding their indigeneity for as long as the nation states make no attempt to decolonise their administrative structures and policy outlook.

The Indigenous Peoples Movement (IPM) itself is structured as would be nation states in the international political order. The hierarchical nature of the international Indigenous Peoples movement is residual from the hierarchical structure created by colonialism and international law as the embodying framework of the movement. Appiagyei-Atua argues that international law is overtly biased as it guarantees sovereign equality and self-determination but still maintains a colonial and imperialist trait.[148] Pahuja perceives international law as hierarchical, hegemonic, dictatorial and classist.[149] These traits propel international law to promote a 'universal culture' of human rights with no developing world input.[150] The key constitutive dynamic of international law was the colonial experience, which continues to hold a powerful

[145] Siegfried Wiessner, 'Re-Enchanting the World: Indigenous Peoples Rights as Essential Parts of a Holistic Human Rights Regime' (2010) 15 UCLA Journal of International Law and Foreign Affairs 239.
[146] Niezen, Supra.
[147] Ibid.
[148] Kwadwo Appiagyei-Atua, 'Ethical dimensions of Third World Approaches to International Law (TWAIL): A critical review' (2015) 8 African Journal of Legal Studies 209.
[149] Mutua, Supra.
[150] Eslava and Pahuja, Supra.

sway over the legal architecture of global regulation thus perpetuating inequality and oppression.[151]

In the context of the IPM, Indigenous Peoples of the developed world occupy a position of superiority by comparison with 'others'. The effect of this structuring is that Indigenous Peoples of the developed countries have an added advantage of participating and influencing both regional and international frameworks whilst Indigenous Peoples of the insignificant international political players like Botswana have little to no influence over international frameworks. The implication of the foregoing is that the San suffer a double baggage of exclusion and marginalisation, from the national government and from the regional or international platforms. This minimises the extent to which the San makes representation on issues of concern. Some respondents offered explanations as to why Indigenous Peoples of African states fail to influence international law frameworks.

Satau, a San activists observes that in his travel and interaction with the Indigenous Peoples movement of the developed world, he noticed that they enjoyed the privilege of interacting with intergovernmental organisations as much as they had access to their national governments as individuals and as communities.[152] Furthermore, Satau notes that, Indigenous Peoples in the developing world struggle to constitute as communities and confront injustices against them as they often must deal with an array of issues some of which are a matter of life or death.[153] This according to Satau is akin to similar struggles developing countries still deal with by comparison with the developed countries, an example being how developed countries are talking 5G whilst developing countries are still trying to get around 3G.[154] Roy Sesana shares the above sentiments and adds that the exclusion of some Indigenous Peoples from regional and international structures should be perceived as a way states mitigate their exposure in the said fora.[155] For Sesana, nation states have ways they can facilitate their Indigenous Peoples' participation within regional and international platforms, but states do not do so because an ignorant Indigenous Peoples is more docile and less problematic.[156] Sesana posits that Indigenous Peoples who are not exposed to governance structures tend to be less articulate and

[151] John D Haskell, 'TraiL-ing TWAIL: Arguments and blind spots in Third World Approaches to International Law' (2014) 27 Canadian Journal of Law and Jurisprudence 383.
[152] Interviews, Supra. Respondent uses their real name with consent.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.

less organised in their plight, characteristics which get them overlooked.[157] Venkateswar shares the views expressed by the respondents in the following way:

> The organised, articulate, effectively more mainstreamed Indigenous Peoples have tended to dominate this cause, whereas actually the most significant problems are faced by the more remote, numerically smaller peoples who one categorises as tribes.[158]

At regional and international level, the contentions on indigeneity are intensified as states seek to; challenge the authenticity of those identifying as indigenous; condition those assuming indigeneity as an identity to adapt in the ever-changing world or perish; and promulgate and implement developmental policies intended to undermine Indigenous Peoples with impunity. Africa presents an ideal case study to exemplify the above arguments. The consensus amongst African states is that all Africans are indigenous to Africa and therefore the majority of African governments are not proactive in making policies to protect Indigenous Peoples.[159]

Africa states have been intentional in conditioning Indigenous Peoples to let go of their indigeneity and join in the development bandwagon or face hardships.[160] If all fails, national governments resort to the promulgation of policies intended to 'develop' Indigenous Peoples as a way of ensuring that the communities are integrated and assimilated with major tribes.[161] All these is understood by African states as necessary to attain the MDA threshold and catch up with the developed world. In recent years African states have been promulgating land policies intended to reverse the disparity in land ownership occasioned by colonialism.[162] Through these policies nation states are explicitly rejecting the mandate to ensure the promulgation of policies and laws that ensure that Indigenous Peoples enjoy their right to own and occupy their ancestral land by introducing 'indigeneity blind' policies. This is the case even though Indigenous Peoples suffered the most through legal dispossession by colonial states and in the post-colonial countries which disregard the implications of the colonial land

[157] Interviews, Supra.
[158] Sita Venkateswar, 'Indigeneity and International Indigenous Rights Organisations and Forums' in Sita Venkateswar and Emma Hughes (eds) *The Politics of Indigeneity: Dialogues and Reflections on Indigenous Activism* (ZED 2011).
[159] Odysseos, Supra.
[160] Odysseos, Supra; Interviews, Supra.
[161] Ibid.
[162] Ibid.

laws.[163] Clifford underscores the difficulties faced by Indigenous Peoples in Africa in the following way:

> On every continent, survivors of colonial invasions and forced assimilation renew their cultural heritage and reconnect with lost lands. They struggle within dominant regimes that continue to belittle and misunderstand them, their very survival a form of resistance.[164]

The Majority of African states are vocal on their non-recognition of indigeneity to a point where they vehemently oppose any regional and international decisions geared towards the promotion and protection of Indigenous Peoples rights.[165] An example can be drawn from the drafting process of the UNDRIP where African states raised many issues. Some of the concerns were that the failure to provide definition of Indigenous Peoples would create problems for the implementation of the Declaration in Africa; that the use of the term right of self-determination could be misrepresented as conferring a right of secession on Indigenous Peoples; that the right of Indigenous Peoples to maintain their political, social, cultural, and economic institutions contradicts numerous African constitutions.[166] Concerns by the African states were arguably unfounded because they related to rights that already existed in the majority of African constitutions and issues that were already addressed in African human rights instruments like the African Charter on Human and Peoples rights.

Both the African Union and the United Nations are interesting platforms in that they served as both a platform where states articulate their disdain for Indigenous Peoples and their claims over rights and recognition, yet both equally served as platforms that propelled the recognition of the Indigenous Peoples rights movement. The protracted processes in the negotiation and subsequent adoption of Indigenous Peoples legal framework such as the African Charter on Human and Peoples Rights and UNDRIP bear testimony to the preceding observation.

States at regional and international level are unable to reach consensus about the promotion and protection of Indigenous Peoples rights as they are still navigating the definitional

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[163] Albert Kwokwo Barume, *Land Rights of Indigenous Peoples in Africa* (IWGA 2020) ; African Commission of Human and Peoples' Rights v Kenya APPLICATION No. 006/201 available at African Commission on Human and Peoples Rights v Kenya (006 of 2012).pdf (africanlii.org) accessed on 24 March 2022.

[164] Clifford, Supra 1.

[165] Birgitte, *Feiring Indigenous Peoples Rights to Land Territories and Resources* (2013, ILC Rome) available at https://d3o3cb4w253x5q.cloudfront.net/media/documents/IndigenousPeoplesRightsLandTerritoriesResources.pdf accessed 12 June 2022.

[166] Ernest Duga Titanji, The right of indigenous peoples to self-determination versus secession: One coin, two faces? (2009) 1 AHRLJ 52; Jérémie Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples Rights' (2011) 60 International & Comparative Law Quarterly 245.

characteristics of indigeneity. This is because the first thing one encounters wherever a discussion about Indigenous Peoples is raised is the issue of definition.[167] A debate on the definition of 'Indigenous Peoples' has ensued for many years and that debate is far from over. The coming into effect of the UNDRIP did not abate the debate, but it has rather intensified it, with most scholars arguing that there is need for a universally accepted definition of Indigenous Peoples.[168]

In his assignment as a Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, Jose R. Martinez Cobo adopted a 'working definition' of Indigenous Peoples which has since been used by others. For Cobo, Indigenous Peoples are defined in terms of their historical connection and continuity with pre-colonial societies that emerged on their territories, they are non-dominant and consider themselves distinct from others in their societies and are determined to preserve facets of their being like ancestral territories, identity, legal systems etc.[169]

The definition proposed by Cobo has been under scholarly scrutiny. For Ademodi, Cobo's definition requires a consideration of both objective and subjective elements such as ancestry, cultural aspects including religion, tribal organisation, community membership, dress and livelihood, language, group consciousness, residence in certain parts of the country and acceptance by the Indigenous community.[170]

After reviewing the Cobo Report, the U.N. Sub-Commission on the Prevention and Protection of Minorities established a Working Group on indigenous peoples. The Working Group undertook a second study on indigeneity and concluded that:

> no single legal definition could account for the complexity and regional variation of the concept [of indigeneity and] . . . focusing on key factors [such as] . . . priority in time, voluntary perpetuation of cultural distinctiveness, self-identification, and a historic or present experience in subjugation, marginalization, dispossession, exclusion, [and] discrimination [, the Working Group] . . . confirmed the . . . definition [of indigeneity] that Cobo had introduced.[171]

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[167] Olugbenga Ifedayo Ademodi The Rights and Status of Indigenous Peoples in Nigeria (Bauu Institute and Press 2012).
[168] Aristotle Constantinides and Nikos Zaikos (eds) *The Diversity of International Law Essays in Honour of Professor Kalliopi K. Koufa* (BRILL 2009).
[169] The full report is available at http://www.un.org/esa/socdev/unpfii/documents/MCS_intro_1983_en.pdf. accessed on 15th December 2020.
[170] Ademodi, Supra.
[171] Michaela Pelican, Complexities of Indigeneity and Autochthony: An African Example, (2009)36 AFR. ETHNOLOGIST 52, 56.

Another relevant 'definition' from a United Nations assignment is from Erica-Irene Daes, who provided the following factors as crucial in understanding 'indigenousness' namely; priority in time in the occupation and use of a specific territory, the voluntary perpetuation of cultural distinctiveness and self-identification, as well as recognition.[172]

The United Nations Permanent Forum on Indigenous Issues (UNPFII) has not adopted any official definition of the term Indigenous Peoples but has adopted some characteristics to be used in identifying Indigenous Peoples. The characteristics include self-identification, historical continuity with pre-colonial societies, strong link to land, territories and resources, distinct social, economic, and political system, and a resolve to retain their traditional life.[173]

The ILO Conventions do not provide any definition of Indigenous or Tribal Peoples. However, Convention No. 169 provides a set of subjective and objective criteria, which are jointly applied to identify who Indigenous Peoples are in a given country. In fact, in terms of Article 1 of Convention No. 169 the Convention pertains to tribal people with distinct social, economic, and cultural conditions as well as people who inhabited the land prior to colonialism or their descendants.

The subjective criteria relate to self-identification as belonging to an Indigenous Peoples.[174] On the other hand, an objective criterion identifies Indigenous Peoples as descendent from populations, who inhabited the country or geographical region at the time of conquest, colonisation, or establishment of present state boundaries. They retain some or all their own social, economic, cultural, and political institutions, irrespective of their legal status.[175]

From the word Indigenous Peoples, the term indigenous, long used to distinguish between those who are "native" and their "others" in specific locales, has also become a term for a geocultural category, presupposing a world collectivity of "indigenous peoples" in contrast to their various "others."[176] The understanding of Indigenous Peoples has brought to the fore a need to understand other associated terms that denotes identity of Indigenous Peoples. In fact, Birrell asserts that:

[172] Ademodi, Supra.
[173] UN Permanent Forum on Indigenous Peoples, Who Are Indigenous Peoples?, Factsheet http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf accessed on 15th December 2020.
[174] Ademodi, Supra.
[175] Ibid.
[176] Merlan, Supra.

> In claims for rights to cultural integrity and expression, access to and management of land and resources, and political and economic autonomy, Indigenous Peoples of the world present a collective struggle. Such struggles have given rise to a new kind of global political entity termed 'indigenism' and an associated international discourse of indigeneity.[177]

The African Commission on Human and Peoples Rights (African Commission) defines Indigenous Peoples in the following terms:

> Indigenous Peoples has come to have connotations and meanings that are much wider than the question of 'who came first'. It is today a term of global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction.[178]

The criteria adopted by the African Commission is interesting for numerous reasons. It does not seek to attach much significance to what some Indigenous Peoples may deem crucial in their indigeneity, namely the question of who came first. For example, a recurring characteristic of the San's indigeneity is their First Peoples status, in fact, the San do not have the Indigenous Peoples terminology in their language, but they have First Peoples in their native language. The problem presented by diminishing the importance of the question of who came first certainly gives leeway to national government, like the GOB who seek to lump all tribes into one and disregard peculiar circumstances the different tribes may find themselves in. On the same token, the very act of diminishing the importance of the question of 'who came first' may have the positive effect of opening up the criteria to many other tribes who may not satisfy the 'first to arrive ingredient'. The rest of the characteristics in the African Union criteria, may be easily satisfied by the majority of the tribes in Africa who seek to assert their indigeneity. This is the case because from the Maasai in Kenya, the San in Namibia, the Karamojong in Uganda, the Dogon in Mali, these tribes find themselves marginalised, perceived negatively by other tribes, structures and governments, their way of life is often the subject of ridicule and contempt, their existence is in a perilous state with the real threat of extinction. This, however, does not mean that there is consensus on the meaning of indigeneity in the context of Africa. The contentions are as heated as if there is no regional definition of Indigenous Peoples.[179]

[177] Birell, Supra 9.
[178] Gabrielle Lynch, 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 African Affairs 24.
[179] Ndahinda, Supra.

To mitigate the challenges presented by asserting the definitional parameters of indigeneity, some scholars have argued that the question of who is indigenous is best answered by indigenous communities themselves.[180] Self-identification policies for indigenous nations have increasingly become an accepted international legal practice beginning 1977.[181] Self-identification is unequivocally supported by Gregg who asserts that:

> Indigenous rights and recognition is best served by recognizing the social constructedness of indigeneity as a political tool to ground claims within nation states. An indigenous right to internal self-determination can be framed as a human right if understood as a bottom-up construction of self-assigning authors.[182]

In this instance self-identification is deemed a key element in the assumption of the indigenous identity. Self-identification feeds in perfectly with the social construction of indigeneity as those assuming the indigenous identity define the parameters and performance of indigeneity. The challenge here is however presented where the nation state like Botswana adopts a policy that indigenises every tribe in the country. In this instance, indigeneity cannot perform to redress the San.

3.6 Scholarly Critique on the Meaning of Indigeneity

Using the United Nations and African Union definitions of Indigenous Peoples, scholars from different disciplines have contributed to the growing controversy on who is an 'Indigenous Peoples' through the interrogation of what indigeneity entails. A consideration of the scholarship demonstrates that the construction of indigeneity is highly contested but it is necessary as a legal and political instrument for rights advocacy and a globalising discourse.[183] For Birrell, indigeneity has become a multifarious yet globally cohesive marker of unity, defined in accordance with a cultural distinctiveness resistant to colonial imposition, spiritual and ancestral connections to land and waters, marginalisation and dispossession, and political agitation against neo-colonial expansion.[184] Venkateswar & Hughes liken addressing indigeneity as answering the question 'who are you?' and posit that such a question requires more than a name and assert that:

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[180] Merla, Supra; and Ioris, Supra.
[181] James Anaya, *Indigenous Peoples in International Law* (OUP 1996).
[182] Gregg, Supra 823.
[183] Michelle Harris, Martin Nakata and Bronwyn Carlson (eds) *The Politics of Identity: Emerging Indigeneity* (UTSePress 2013); Brigitta Hauser-Schäublin (ed) *Adat and Indigeneity in Indonesia Culture and Entitlements between Heteronomy and Self-Ascription* (GUP 2013); Alpa Shah, 'The Dark Side of Indigeneity? Indigenous People, Rights and Development in India' (2007) 5 History Compass 1806.
[184] Birell, Supra.

> Indigeneity is, then, a 'process; a series of encounters; a structure of power; a set of relationships; a matter of becoming in short, and not a fixed state of being; as de la Cadena and Starn (2007:11) note in their edited volume. Benno Glauser emphasizes in this volume that indigeneity alludes to a set of relationships between people and what has become to be understood as 'nature', an 'identity' not []responding to the question "who" but []responding to the question "how" a distinctively specific and different way to conceive identity and to "be in the world" (p.40). The concept of identity here appears as 'way of being'. Or as Kenrick and Lewis suggest, indigenous identity represents only one side of the relationship, 'the side which has been dispossessed…and "indigenous rights" describe a strategy for resisting dispossession that employs a language understood by those wielding power.[185]

Divergent as the definitions of Indigenous Peoples and indigeneity are, there is seemingly a golden thread that connects them, namely that the construction of indigeneity and the understanding of who is an Indigenous Peoples is not without constraints. An example can be drawn from Australia where the native title as a construction of the Common Law calculates and constrains indigeneity requiring claimants to 'prove an unbroken connection with the ancient tribe'.[186] Secondly, the concepts on Indigenous Peoples and indigeneity are both understood within the context of modernity. In Soguk's words indigeneity persists in 'a condition of marginality in modernity'.[187] This suggests that Indigenous Peoples and indigeneity cannot be understood absent of 'a grander identity' from which a comparison would then be drawn. The grander identity from the preceding definitions had at one point interrupted Indigenous Peoples and their indigeneity, causing fragmentation of some sort and now there is an endeavour to piece together 'pieces of fragmentation'. Thirdly, any definition and understanding of Indigenous Peoples and indigeneity can be both a blessing and a curse for the Indigenous Peoples in that such can be used to deny or bestow certain benefits. This is best furthered by Birrell when she asserts that:

> Characterised by both an excess and lack, inclusion and exclusion, presence and absence, indigeneity has been described as ambivalent present in an ability to claim rights, absent insofar as such claims are necessary. International and national definitions of Indigenous Peoples simultaneously locate indigeneity in the colonial and pre-colonial, suggesting both an indigenous continuity and its colonial interruption.[188]

The construction of indigeneity itself is an appreciation that Indigenous Peoples may have lost their identity through assimilation, amalgamation, MDA policies that characterised colonial

[185] Sita Venkateswar & Emma Hughes (eds) *The Politics of Indigeneity* (Zed Books 2011).
[186] Birell, Supra.
[187] Nevzat Soguk "Indigenous Peoples and Radical Futures in Global Politics" (2007) 29 New Political Science 5.
[188] Birell, Supra 32.

administrations in different parts of the world. The definition of indigeneity may be seen to be restorative in nature, an acknowledgement of the need to return to Indigenous Peoples preferred identity and do away with a colonial ridden identity. In a way, the continued struggle to settle the construction of indigeneity demonstrates that despite the 'colonial civilising missions', Indigenous Peoples have never ceased to be Indigenous Peoples.[189] The clash between Indigenous Peoples and colonialism served amongst other things to strengthen the Indigenous Peoples quest to be who they have always been. Mar supports the above proposition and demonstrates that the colonial administrative efforts to reduce native worlds to a singular notion of native became a critical site of interplay, dialogue, and resistance identity.[190]

According to Niezen Indigenous Peoples, like some ethnic groups derive much of their identity from histories of state sponsored genocide, forced settlement, relocation, political marginalisation, and various formal attempts at cultural destruction.[191] For Birrell irrespective of the implicit and explicit heterogeneity of Indigenous Peoples throughout the world, which persists despite colonialism, indigeneity itself has become a multifarious yet globally cohesive marker of unity, defined in accordance with a cultural distinctiveness resistant to colonial imposition, spiritual and ancestral connections to land and waters, marginalisation and dispossession, and political agitation against neo colonial expansion.[192] Wiessner perceives Indigenous Peoples as having characteristics that relate to land dispossession by conquerors, the conqueror's ways of life was imposed on them, their communities made of peoples with limited political freedom; and such communities languish in abject poverty and despair.[193]As regard the meaning of indigeneity Pelican and Maruyama observe that:

> Indigeneity has been a highly controversial concept, particularly in the African context. Within the past 20 years, many ethnic and minority groups in Africa have claimed 'indigeneity' based on their political marginalisation in their country or region of residence and their cultural difference from the majority population.[194]

While the meaning of indigeneity is contested across different legal and scholarly contexts, three elements typically recur: a legal and moral right of unlimited self-identification by

[189] Marjo Lindroth &Heidi Sinevaara-Niskanen, 'Adapt or Die? The Biopolitics of Indigeneity—From the Civilising Mission to the Need for Adaptation' (2014) Global Society 180.
[190] Tracey Banivanua, *Mar Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (CUP 2016) 76.
[191] Niezen, Supra..
[192] Birell, Supra 9.
[193]Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comprehensive and International Legal Analysis' (1999) 57 HARV.HUM.RTS. J 111.
[194] Pelican and Maruyama, Supra.

peoples as indigenous , an association of indigeneity with both ongoing or historical trauma (colonial or globalising), and efforts to seek protection from, or redress of, those wrongs, and that indigenous people "are inextricably linked to the lands on which they live and the natural resources on which they depend".[195] These three elements equally recur in the San's criteria for their indigeneity as discussed above.

3.7 The Relationship between Indigeneity and Land

The relationship between land and indigeneity is highly contested, in fact it is one facet of indigeneity that renders indigeneity highly contentious. The issue of the relationship between land and indigeneity as it relates to the San is no exception. Boko observes that the San have generated a myriad of controversial research especially from anthropologists.[196] Boko argues that this controversy has been wide and varied covering whether the San have any concept of territoriality and, consequently, whether the land they have inhabited and roamed from time immemorial belongs to them amongst others.[197] The controversy is said to have been so serious that the GoB even sought a legal opinion on it.[198] Interestingly, the legal opinion denounced the existence of any land, territorial and resources rights amongst the San. According to Boko, the opinion advised, in part that: [199]

> ….As far as I have been able to ascertain the Masarwa (sic) have always been true nomads, owing no allegiance to any chief or tribe, but have ranged far and wide for a long time over large areas of the Kalahari in which they have always had unlimited hunting rights. ... Tentatively, however, it appears to me that the true nomad Masarwa (sic) can have no rights of any kind except rights to hunting (*Re Common Leases* cited in Hitchcock 1978:.[200]

The foregoing presents another dimension to the indigeneity and land debate. The legal opinions acknowledge hunting as an integral aspect of the San's lives but still concludes that they do not have any other rights whatsoever. The question would become, on whose land are the San supposed to hunt? In this thesis, the relationship between land and indigeneity is perceived as twofold. Firstly, the Indigenous Peoples' unique relationship with their ancestral land is an indispensable characteristic of indigeneity.[201] Secondly, indigeneity as constructed

[195] Bello-Bravo, Supra.
[196] Duma Boko, 'Integrating the Basarwa Under Botswana's Remote Area Development Programme: Empowerment or Marginalisation?'(2002)8 AUJlHRights 153
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Corinne Lennox and Damien Short (eds) *Handbook of Indigenous Peoples' Rights* (Routledge 2016).

in the post-colonial period is necessary for the promotion and protection of Indigenous Peoples rights over their ancestral land.[202] This thesis posits that, to avoid any obligation towards Indigenous Peoples, states often deny the existence of a peculiar relationship between Indigenous Peoples and their land. The legal opinion cited above may be used as an example. The GoB having received a legal opinion denouncing the existence of any land, territorial and resources rights amongst the San formulate policies that further exacerbate the San's marginalisation, discrimination, and dispossession. Further, states deny the existence of indigeneity as a differentiating marker, and which accrues any rights towards a specific community as a way of denouncing any protection over their lands demanded by Indigenous Peoples.

An important feature of indigeneity in most definitions is the permanent attachment of a group of people to a fixed area of land in a way that marks them as culturally distinct.[203] The San, like other Indigenous Peoples of the world, are engaged in a protracted, desperate struggle for ownership and occupation of land as a community, for a place within Botswana's economy and society that provides space for their unaltered existence in their ancestral land. In the San's endeavour to assert their indigeneity, they emphasise the special relationship they have with their ancestral land. In support of the preceding argument Koot, Hitchcock and Gressier observe that:

> Such questions of belonging in relation to land are of central significance also to the 'indigenous' people of Southern Africa, who articulate their indigeneity in many ways: perhaps none more potently than through their struggle to demonstrate their unique connections to and interdependence with the land within these neoliberal contexts. Most notably, the indigenous San (or 'Bushmen') have to resist continuing pressure in order to maintain access to land and natural resources.[204]

As mentioned previously, the findings of the field work demonstrate that the San articulate their indigeneity through their interconnectedness with their ancestral land, the CKGR. The Respondents who identified as San at grassroot and San activists note that there is a long standing and peculiar relationship between them and their land.[205] The relationship is exemplified by the San's dependence on their ancestral land for food, spiritual fulfilment,

[202] Lennox and Short, Supra.
[203] Tania Murray Li, 'Indigeneity, Capitalism, and the Management of Dispossession' (2010) 51 Current Anthropology 385.
[204] Stasja Koot, Robert Hitchcock, and Catie Gressier, 'Belonging, Indigeneity, Land and Nature in Southern Africa under Neoliberal Capitalism: An Overview' (2019) 45 Journal of Southern African Studies 341.
[205] Interviews, Supra.

shelter, retreat, and many others. The CKGR is perceived as the centre that holds all other aspects of the San's lives together. However, the San respondents note that they could not enjoy their ancestral land because the GOB refused to acknowledge the special relationship the San have with their ancestral land. The San respondents assert that the decision of the GoB is based on racial stereotypes and prejudices that exist against the San which culminated into policies that negate the existence of any special relationship between the San and the CKGR. From the findings of the field work, Selelelalehatshe Gaexohoro sums up the interface between land and indigeneity as follows;

> My land is my whole being. There is no aspect of my life that is not dependent on my land. My land is who I am. I cannot live, or survive, or worship, or play my traditional games in another man's land. I chose to stay here because this is wholly who I am. I have never understood the GOB's decision to remove us from the CKGR. This is our land, we inherited it from our forefathers, who inherited it from their forefathers. I am staying put here, so that I can pass this land to my grandchildren, who will pass it to their own children. If you seek to remove me here, you might as well kill me for anywhere else I would be a dead woman walking.[206]

In the *Sesana case*, Phumaphi J citing with approval the *Mabo case* underscored the deep spiritual relationship the San have with their land and noted that such meaning has greater implications than possession and means of production.[207] The San respondents articulate the relationship between land and indigeneity in various ways that effectively supported the assertions by Justice Phumaphi and highlighted the centrality of land to the San's identity. Gooinamo observes that:

> To be San means to roam the CKGR, to hunt wildlife in the CKGR, to harvest berries in the CKGR, to die in the CKGR and be buried in the CKGR with your ancestors. All these are important to us as communities and are entirely dependent on us having access to our ancestral land. I long for the CKGR and I have not felt whole for the past twenty-five years.[208]

Extending the San's support of the Learned Judge's observations, Setobadiphuduhudu shares similar sentiments on the relationship between land and indigeneity in the following way:

> The CKGR is the land of our unborn great grandchildren. We did not inherit it from our forefather and foremothers for ourselves but rather did so on behalf of those yet to be born. Often, we are asked why

[206] Interviews, Supra. The respondent used a pseudo name.
[207] n 53 Per Phumaphi J para 81.
[208] Interviews, Supra.

> we are so determined to stay in the CKGR, yet it represents such backwardness, my answer is often this simple, my soul is tied to the CKGR, I was only whole when I was in the CKGR.[209]

For the San activists, the ancestral land is crucial for all San because it is an integral part of their identity no matter their personal circumstances. The crux of the argument was focused on the San who choose to live elsewhere and pursue a different life from San communities. Mogodu notes that:

> The CKGR is the cornerstone of our indigeneity. It is through the CKGR that you get to see exactly who we are and what we are all about. There is no us without our ancestral land. Our identity is so intrinsically linked to our ancestral land. One would be right to say our ancestral land is our identity. The foregoing applies to me, even after I chose to pursue life elsewhere, I still retreat to the CKGR. The CKGR will always be my home. The argument that once we leave, we have turned our back on our indigenous selves is without merit. [210]

The above views were shared by Roy Sesana in whose view, the basis for the conflict between the GOB and the San is the parties' divergent understanding on the meaning of land and its centrality to the San's lives. Sesana opines that:

> The CKGR is not for sale. The CKGR is not for business. It is our home. Our sacred place. It is the home of our forefathers and foremothers. Our struggle with ascertaining our place in Botswana has always been about the GOB understanding us and what we are all about. If there is one feature of our whole being that our government has never been keen to understand, is our relationship with our ancestral land. There is no San whether modernised as you call them or traditional who does not hold the CKGR in high regard. I can tell you with certainty that, none of my people can ever dessert our ancestral land. Those who wish to stay must be allowed to stay. Those who wish to leave must be allowed to leave, but they must have their unconditional right to return and retreat to the CKGR at will. If you understand how important the CKGR is to us, you will understand why we are fighting so hard and why the fight will go on for decades to come. The GOB must take a moment to listen and hear us.[211]

It is important to note that once a special relationship with one's land is acknowledged as an indispensable feature or characteristic of indigeneity, then naturally an expectation is borne of the need to protect the existing special relationship. It is the 'expectation/obligation' to safeguard the special relationship between Indigenous Peoples and their ancestral land that compounds existing controversies. Land is a sought-after resource in the dominant developmental projects. Post-colonial Africa embarked on a developmental trajectory

[209] Interviews, Supra.
[210] Ibid.
[211] Ibid.

described as "state-led developmentalism enabled by the long post war boom in the world economy and the embedded liberalism of the Bretton Woods system."[212] This developmental pathway is what the thesis term MDA. MDA was imposed on African states as a sure way to catch up with the developed world and as the only way to address global material inequalities or to stand in as a proxy for justice.[213] The end goal of development was stipulated as matching the West, eradicating poverty and improving the standard of living for the citizens.[214] These were perceived as indicators of a successful nation, thus the African Union put in place legislative and institutional mechanisms to drive the development agenda and satisfy the requisite threshold.[215] Development requires capital and given the underdevelopment occasioned by Colonialism in Africa, there was little to no revenue.[216]After exhausting other means of raising developmental revenues, such as public and private partnerships, African countries resorted to Foreign Direct Investment (FDI) which resulted in investors opening profit-making enterprises.

Three of the most common profit-making enterprises in Africa have been agriculture, mining, and tourism. These economic activities require land. Whilst these economic activities may be beneficial for the general population, Indigenous Peoples often see them as a threat and an infringement of their traditional rights related to the use and management of lands and natural resources that they perceive as theirs by way of tradition and usage.[217] The quest for development has thus resulted in conflict between States and Indigenous Peoples. The Report of the AU Working Group on Indigenous Peoples to the African Commission on Human and Peoples Rights highlights conflict between States and Indigenous Peoples in Cameroon, Kenya, Namibia, and Uganda.[218] These conflicts range from derecognition of Indigenous Peoples rights to their lands and economic activities, classification of Indigenous Peoples as beneficiaries and not owners of their ancestral land, degradation and desertification occasioned

[212] Fouad Makki, "Post-Colonial Africa and the World Economy: The Long Waves of Uneven Development" (2015) 21 Journal of World-Systems Research 124.
[213] Pahuja, Supra.
[214] Ibid.
[215] Laundry Signe, *African Development, African Transformation: How Institutions Shape Development Stratergy* (CUP 2019).
[216] On the developmental and economic status of Botswana at independence see Monageng Mogalakwe & Francis Nyamnjoh, 'Botswana at 50: Democratic Deficit, Elite Corruption and poverty in the Midst of Plenty' (2016) 35 Journal of Contemporary African Studies 1.
[217] Okechukwu Ejim, 'The Impact of Nigerian International Petrolem Contracts on Environmental and Human Rights of Indigenous Communities'(2013) Afri J Int' and Comp'L 345.
[218] Report of the African Commission's Working Group on Indigenous Populations/Communities Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights 2017 East, Central and Southern Africa available at https://www.iwgia.org/en/resources/publications/305-books/3294-extractive-industries-land-rights-and-indigneous-populations-communities-rights.html accessed on 27 March 2022.

by developmental projects and continued appropriation of Indigenous Peoples land for developmental projects. These conflicts are symbolic of competing interests between Indigenous Peoples and national governments. National governments are committed to the MDA at whatever cost whilst Indigenous Peoples seek to protect their ownership and use of the land. Mitee succinctly sums up the ongoing Indigenous Peoples' activism as representative of their quest to own and control their ancestral land as follows:

> The struggle of Indigenous Peoples the world over, whether expressed in terms of self-determination, land rights, resource control or whatever, have as the central theme the desire by these peoples to be and express themselves as they were endowed by the Creator. It translates into the struggle against the dislocation of their societies, their cultural and spiritual values, the greedy exploitation of their resources and for the recovery of their independence over their affairs and territories.[219]

Within the MDA framework, land as occupied by Indigenous Peoples is often deemed underutilised. This is because Indigenous Peoples adopt traditional use of the land which is not profit making oriented. In both the historical and contemporary contexts, capitalism appears in the processes of dispossession as an external force against which Indigenous People and their allies stand united.[220] Whilst land is just a commodity to be traded in capitalist parlance, it represents livelihood, identity, religion, source of life, healing, and education from an Indigenous Peoples point of view. Ancestral land is held by the community in custody for generations yet unborn, so the need to sustainably use the natural resources and preserve the land are inscribed in indigenous genes.[221] For Korff land means different things to non-Indigenous and Indigenous Peoples as the latter have a spiritual, physical, social, and cultural connection.[222]

The controversy on the San land holding rights issue found its way into modern-day Botswana having failed to go to rest during the colonial era at the creation of the CKGR.[223] In more ways than one, the controversy on the San's rights over the CKGR attest to, firstly the centrality of land to indigeneity as an identity marker, and secondly, why the GoB feel obliged to denounce not only the San's indigeneity but the existence of a peculiar relationship between San

[219] Ledum Mitee, The Centrality of Self-identity in Indigenous Peoples' Struggles: The Struggle of the Ogoni People (Paper).
[220] Li, Supra.
[221]Onthatile Olerile Moeti, 'In the way of wildlife: Contestations between Indigenous Peoples' Livelihood and Conservation' in Lesego Stone et al (eds) Protected Areas and Tourism in Southern Africa Conservation Goals and Community Livelihoods (London 2022) 87.
[222] Andrew Gray, *Indigenous Rights and Development: Self-determination in an Amazonian Community* (Berghahn 1997)
[223] Mogomotsi and Mogomotsi, Supra.

communities and the CKGR. Mogomotsi and Mogomotsi attribute the recurrence of the San's land issue to the GoB's failure to recognise the San's indigeneity.[224] This argument is consistent with the central argument of the duo's work, that indigeneity is a panacea for dispossession and discrimination against the San. If the GoB can successfully trivialise the special relationship the San have with their ancestral land as 'a relationship like any other', then the GoB would not feel any legal or moral obligation to ensure the protection of the San's rights over the CKGR. This is precisely what is happening in Botswana.

Whilst the San assign sacrosanctity meaning to land and that flows laterally because of their indigenousness the GoB perceives the CKGR as wilderness, good for tourism, conservation, mining, and other capitalist expeditions.[225] The GoB see land as an asset at the center of the implementation of the MDA, and the San see their relationship with the CKGR as special and their land as a complex representation of who they are as a people, land represent livelihood, religion, and identity amongst others.[226] In many ways Kiema shared similar views with his tribesmen and writes authoritatively on what their ancestral land means in the following way:

> Before the white men arrived in Africa we had been living in our land for a long, long time. Even long before the Bantu migrated down here we had been living in Tc'amnqoo for thousands years. Water ponds, hunting grounds, sacred trees and anthills all carry our identity on them. We came from nowhere else other than the land we have now been dispossessed of. We never moved from one place to another until the Bantu arrived; until those who are now busy relocating us came and occupied our land without consent. We survived from the resources on our land. The spirits of our ancestors hover over our tribal territories, looking for their children. Our ancestors want us near them just like the God of Israelites wanted his people to be free to worship him, our ancestors are sad when we are taken hostage far away. We have been spiritually uprooted by ruthless and ungodly people for mere material interests…We died and were buried on our land.[227]

When relocating the San from the CKGR, first the GoB claimed that removing the San was critical to protecting the wildlife and ecology of the Reserve because the San's way of life, specifically hunting and gathering interfered with conservation.[228] Secondly, the GoB argued that the San must 'develop' themselves, something they cannot do if left to their traditional

[224] Mogomotsi and Mogomotsi, Supra.
[225] Interviews, Supra.
[226] Renee Sylvain, 'Foragers and Fiction in Kalahari: Indigenous Identities and the Politics of Deconstruction' (2015) 15 Anthropological Theory 158.
[227] Kuela Kiema, *Tears for my Land* (Bay Publishing, 2010) 23.
[228] Amelia Cook and Jeremy Sarkin Who Is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana Tulane J. of Int'L & Com. Law 2009 (18) 93.

lifestyle within the Reserve.[229] Both the justifications proffered by the GoB undermined the San's relationship with their ancestral land and by extension denounce their indigeneity. If the GoB successfully denies the existence of a special relationship between the San and the CKGR, then the MDA necessitated relocations can be justified. If the GoB denounces the centrality of the CKGR to other aspects of the San's lives, then the dispossession, deculturasation, alteration to lifestyle, identity and many others may be legitimised. The relationship between indigeneity and land is thus very important in asserting the indigenous identity and in protecting the indigenous identity, as the right of the land allows the indigenous identity to flourish through the maintenance of traditional lifestyle, cultural practices, religion, livelihood, maintenance of the community unity amongst others.

As discussed in the previous sections, the politics and contestations of indigeneity have a direct bearing on the relationship between indigeneity and land. While the San claim their indigeneity based on their being the first people to arrive in Botswana and their special relationship with their land, the GoB on the other hand trivialises the existence of such a relationship and refuse to put measures in place to ensure that the San enjoy their relationship with their ancestral land. This dichotomy directly leads to the contested terrain of indigeneity generally and of the relationship between indigeneity and land.

3.8 Conclusion

This chapter has drawn together a series of arguments that demonstrate that indigeneity as a concept is highly contentious. Equally controversial is the implications of indigeneity for those who are identified as such and the responsibility of states towards those who are indigenous. There are several factors that contribute to the controversial nature of indigeneity. There are equally varying manifestations of indigeneity. The process leading to the national, regional, and international definitions of indigeneity are often highly formalised, politicised, overly negotiated, compromised, and biased towards states interests. In some instances, they are exclusive to mainstream political processes that exclude Indigenous Peoples. Indigeneity in content is formalised and negotiated in nature thus it may serve as a barrier to the enjoyment of indigeneity in context. This is to say, if the understanding of who is indigenous is left to the legal and political structures, the social subjects who are to enjoy the benefits of indigeneity

[229] Cook and Sarkin, Supra.

may not have anything to enjoy as legal and political structures are restrictive in nature and are the reason why Indigenous Peoples need protection in the first place.

The experiences of the San underscore the politics and contestations of indigeneity. The chapter uses fieldwork findings to demonstrate the characteristics of indigeneity from a social point of view and cite the law as an active barrier to the San's enjoyment of rights within the CKGR. The decision to relocate the San was predicated on the GoB's understanding of the legal meaning of indigeneity and a disregard of how the San constitute themselves as Indigenous Peoples. GoB's refusal to recognise the San's indigeneity has caused them irreparable harm. As a result of the fluidity of indigeneity, conflict over identity is a constant feature in Botswana.

For many years, the San have been confronting both the GoB and the ethnic majority over discriminatory and paternalistic policies. The litigation by the San over their relocation from the CKGR to settlement villages has placed the politics of indigeneity at the forefront. The outcome of this litigation though positive will be slow in facilitating the promotion and protection of the San's rights until there is an intent policy decision geared towards addressing the deeper, structural aspects of San's marginalisation, discrimination, and dispossession. Since the inequality is a creation of the law, it ought to be addressed and the San redressed through the law. In this instance, Parliament must make laws that are specific to the promotion and protection of Indigenous Peoples rights. Such laws must acknowledge the San's indigeneity as a start. The Courts in Botswana have already demonstrated their willingness to usher in a democratic society that is cognisant of respect for human rights especially of the different and marginalised. In fact, the *Sesana case*, particularly the majority judgement of Dow J and Phumaphi J recognising the indigeneity of the San is a game changer for indigeneity in Botswana and in Africa. Admittedly, litigation outcome is only effective to the extent that the parties are willing to ensure enforcement, this however does not take away from the 'Dow Phumaphi legacy' that recognise the San as Indigenous Peoples of Botswana.

This chapter has equally demonstrated that whilst regional and international law has done notably well in bringing to the forefront issues of indigeneity, the development is yet to result in the actual enjoyment of the rights and privileges for the San in Botswana. This is because the promise of indigeneity emanating from regional and international frameworks and institutions is evidently compromised because often, states do not guarantee the enjoyment of Indigenous Peoples rights without unjustified qualifications. In the context of Botswana, the qualification is that every tribe is indigenous to Botswana and no tribe will be treated in

accordance with its own circumstances as that threatens nation building. This is despite the apparent truth that the actual destruction of nation building is failure to address the marginalisation and discriminatory practices perpetrated against ethnics such as the San.

The following Chapter focuses on the regional and international legislative and institutional frameworks on Indigenous Peoples

CHAPTER 4
REGIONAL AND INTERNATIONAL FRAMEWORK ON INDIGENOUS PEOPLES

4.1 Introduction

This chapter focuses on the Indigenous Peoples regulatory and institutional framework at regional and international level and interrogates their relevance in the promotion and protection of the San's rights. A discussion on the regional and international framework on Indigenous Peoples is indispensable in this thesis for several reasons. It is an amplification of Chapter 2 which in part focuses on Botswana's national regulatory and institutional framework on Indigenous Peoples. It is also a conduit between the chapters on indigeneity and on the impact of the Modern Development Agenda (MDA) on the San's rights as regional and international law are two of the sources of Indigenous Peoples rights.

The understanding of crucial conceptual frameworks such as indigeneity has been possible using national, regional, and international frameworks on Indigenous Peoples. Although there exist many controversies regarding the meaning of indigeneity, Chapter 3 discusses what indigeneity means in this thesis. Indigeneity draws a golden thread between national, regional, and international characteristics of indigeneity.[1] Furthermore, Chapter 5 uses the international Indigenous Peoples cardinal principles discussed herein to gauge how the Government of Botswana (GoB) fairs in promoting and protecting the San's rights. Moreover, the genesis of this thesis was the interest in the overlap between national, regional, and international norms and standards on the treatment of Indigenous Peoples in Botswana and as they were applied in the *Roy Sesana and Others v Attorney General.*[2]

As it has been demonstrated by the findings of the interviews, the importance of the regional and international frameworks in the promotion and protection of Indigenous Peoples is undoubtful.[3] Regional, and international framework play a complementary role to national frameworks in the promotion and protection of Indigenous Peoples.[4] Arguably, in Botswana, Indigenous Peoples regional and international frameworks provide a better normative

[1]James Anaya, *Indigenous Peoples in International Law* (OUP 1996)3.
[2] *Roy Sesana and Others v Attorney General [2006] 2 BLR 633.*
[3] Interviews were conducted in Xere, Kaudwane, New Xade and Central Kalahari Game Reserve between May 2022 and August 2022 amongst the San at grassroot level, civil servants and politicians; and virtual Virtual interviews were conducted between June 2021 and June 2022 amongst San activists, activists, academics, civil servants, lawyers, and politicians.
[4] Willem Van Genugten and Camilo Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions' (2004) 11 IJGR 379.

protection than the national framework. Furthermore, the emergence of customary international law on Indigenous Peoples' rights is likely to intensify the use of national platforms in the promotion and protection of Indigenous Peoples.[5] This is due to the binding nature of customary international law even in dualist states like Botswana.[6] Regional and international frameworks thus contribute to the standard setting on the promotion and protection of Indigenous Peoples' rights even within nation states.[7]

The chapter makes the following claims, firstly, that for many years Indigenous Peoples used the international human rights framework to seek redress against states and other actors.[8] The use of the international human rights framework was problematic as a result of the inherent conflict between the international human rights framework and the Indigenous Peoples rights.[9] However, in recent times, there has been a progress in the formulation of regulatory and establishment of institutions specific to Indigenous Peoples by the African Union (AU) and the United Nations (UN). Although such developments are commendable, there has been notable challenges. For example, the progress in the making of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was painstakingly slow as states denounced the existence of Indigenous Peoples in their contexts. These contestations of indigeneity now diminish the potential impact of the UNDRIP thus rendering the mainstream international human framework a constant backup for articulating claims and redressing Indigenous Peoples.

Secondly, that within the constraints of international politics, some Indigenous Peoples played a pivotal role in the architecture of some regulatory and institutional framework.[10] This is a testament to the fact that the Indigenous Peoples movement is structured like the global world

[5] S.J.Anaya (2004) The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples in R.Kuppe and R .Potz (eds) Law and Anthropology 127 BRILL; Sarah Nykolashein Customary International Law and the Declaration on the Rights of Indigenous Peoples 17 Appeal: Rev. Current L. & L. Reform 111 (2012); Shea Esterling, (2021). Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples. International Journal on Minority and Group Rights, 28(2), 280-305.

[6] Roozbeh B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 EJIL 173.

[7] Mauro Barelli, 'The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime' (2010) 32 JHUP 951.

[8] Florencia Roulet, *Human Rights and Indigenous Peoples: A Handbook on the UN System* (IWGA 1999).

[9] On the shortcomings of international human rights law see Alberto Quintavalla & Klaus Heine Priorities and Human Rights (2019*)* International Journal of Human Rights 23 679 and on the conflict between international human rights law and Indigenous Peoples rights see, Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 EJIL 141.

[10] By way of example, a comparison can be drawn between Indigenous Peoples in Botswana, Australia, and Canada. There is notable number of educated Indigenous Peoples in Australia and Canada who engage in scholarly debates, participate in United Nations processes and are well informed on their regional and the international framework on Indigenous Peoples. A great population of the San are not educated, those who are, have little to no knowledge about regional and international law on Indigenous Peoples. There is hardly any scholarly work on Indigenous Peoples by Indigenous Peoples in Botswana.

order, where there is stratification and classification. The effect of the foregoing is that Indigenous Peoples from some countries are privileged to influence the direction of policies and influence international Indigenous Peoples law to the exclusion of others. Thirdly, that even if some Indigenous Peoples are allowed to participate in the making of the frameworks, the nature of international politics and the treaty making processes that centres decision making on states diminish the potential impact Indigenous Peoples play. power.

Fourthly, that the ever evolving Regional and International frameworks have been used by Indigenous Peoples to seek redress for violations against them. For some scholars, these frameworks are tailor made to redress the past and ongoing injustices and even address potential futuristic systemic issues against Indigenous Peoples.[11] Whilst some scholars dismiss these frameworks as colonial tools that are used to formalise and legalise the marginalisation of Indigenous Peoples, facilitate assimilation and integration of Indigenous Peoples.[12] Even within the contentions it is important to acknowledge the contribution of these frameworks in moving the Indigenous Peoples activism forward. Particular attention is paid to the UNDRIP and few of the rights provided as they are intended to balance the equilibrium between state developmental aspirations and the promotion of Indigenous Peoples rights.

The conclusions of this chapter are numerous. The sound regulatory and institutional frameworks on Indigenous Peoples rights does not translate to the promotion and protection of such rights. The preceding assertions are supported by continual deprivation, assimilation, and dispossession of Indigenous Peoples. States as duty bearers of regional and international law are failing to ensure the promotion and protection of Indigenous Peoples rights because of several factors including the ambivalence of the legal ordering. In some instances, the failure is a blatant manifestation of lack of political will. Courts play a pivotal role in the promotion and protection of Indigenous Peoples' rights. At the face of an unwilling Executive and Parliament, the Judiciary in Botswana domesticated the regional and international norms and standards on the treatment of Indigenous Peoples into Botswana laws in the *Sesana case*. Furthermore, there is a configuration between both regional and international principles on the promotion of Indigenous Peoples and what the San as Indigenous Peoples consider essential to their survival and thrive as communities. Both emphasise equitable access to ancestral land

[11] Sheryl Lightfoot and David Macdonald , 'The UN as Both Foe and Friend to Indigenous Peoples and Self-Determination' (2020) available at https://www.e-ir.info/2020/03/12/the-un-as-both-foe-and-friend-to-indigenous-peoples-and-self-determination/ accessed on 28th November 2020.

[12] Engle, Supra. Charmaine White Face, *Indigenous Nations' Rights in the Balance: An Analysis of the Declaration on the Rights of Indigenous Peoples* (Living Justice Press 2013).

including all its resources, self-determination, consultation, involvement, and participation in policies relating to them and their resources as indispensable in creating an Indigenous Peoples conducive environment.

The following discussion focuses on the specific regional and international frameworks on Indigenous Peoples.

4.2 Regional and International Frameworks on Indigenous Peoples

For many years, Indigenous Peoples' issues were considered domestic concerns, other platforms were not willing or able to address them.[13] States perpetrated most violations of Indigenous Peoples rights either actively or passively. It could not be said that states had any duty to redress violations perpetrated against Indigenous Peoples as the national, regional, and international frameworks did not recognise the existence of Indigenous Peoples let alone their rights. Communities that identified as Indigenous Peoples had minimal to no recourse to the law because of various factors including inadequate financial resources, limited availability of internal remedies and limited access to the judicial system. On the inadequacy of international law specifically, Saul observes that:

For a long time, indigenous peoples were scarcely mentioned in international human rights law. They appear neither in the Universal Declaration of Human Rights of 1948 nor in most of the major human rights conventions…[14]

Postcolonialism, Indigenous Peoples worldwide are actively pursuing a recognition agenda. In Africa, the quest for Indigenous Peoples recognition has become a cornerstone of the decolonisation endeavour, rightly so against the history of settler colonialism of displacement and replacement of any indigenous being. Indigenous Peoples in Africa have lodged legal proceedings in national and regional platforms for orders endorsing their recognition agenda, identity rights, land rights and freedom to determine their developmental trajectory as communities amongst others.[15]

[13] Marjo Lindroth & Heidi Sinevaara-Niskanen, *Global Politi and its Violent Care for Indigeneity* (Palgrave Macmillan, 2018).
[14] Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016) 134.
[15] Jeremie Gilbert, "Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges and Limitations" (2017) 66 Int'l & Comp. L.Q. 657; STATE SPECIFIC CASES.

Indigenous Peoples' activism reached unprecedented heights and compelled decision makers from state to international platform to pay attention. The quest for recognition continues to-date with Indigenous Peoples pushing back against violations of their rights, land dispossessions, interference with their lifestyle amongst others. Mitee succinctly sums up the ongoing Indigenous Peoples' activism in the following way:

> The struggle of Indigenous Peoples the world over, whether expressed in terms of self-determination, land rights, resource control or whatever, have as the central theme the desire by these peoples to be and express themselves as they were endowed by the Creator. It translates into the struggle against the dislocation of their societies, their cultural and spiritual values, the greedy exploitation of their resources and for the recovery of their independence over their affairs and territories.[16]

The recognition and activism agenda has resulted in the evolution of an Indigenous Peoples rights regime at both regional and international level. These frameworks encourage states to provide effective mechanisms for prevention and redress of actions that: deprive Indigenous peoples of their integrity as distinct peoples; dispossess Indigenous Peoples of land; force population transfers, assimilation, or integration; or promote discrimination.[17] The operation word is encourage as the mechanisms have a long way to go in compelling states to *right* the wrongs perpetrated against Indigenous Peoples. Although these frameworks to a larger extent lack the capacity to provide actual redress for Indigenous Peoples, their existence strengthen a foundation through which states have begun to recognise the ability of the international community to influence the way governments treat citizens.[18] Regional and international frameworks on Indigenous Peoples are necessary to highlight the importance of national efforts in protecting Indigenous Peoples. The collaboration between the national, regional and international frameworks in the advancement of Indigenous Peoples' rights attest to the observation that human rights practices are never the result of a single force or factor.[19] Advances in human rights are due to multiple social, cultural, political and transnational influences.[20] The same applies to the increasing recognition of the rights and privileges of

[16] Ledum Mitee, The Centrality of Self-identity in Indigenous Peoples' Struggles: The Struggle of the Ogoni People (Paper).
[17] Sandra Pruim, 'Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples' (2014) 35 Adel L Rev 269.
[18] Amelia Cook and Jeremy Sarkin "Who Is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana" (2009) 18 Tulane J. Of INT'L & Comp. Law 93.
[19] Beth A Simmons, *Mobilising for Human Rights: International Law in Domestic Politics* (CUP 2009)
[20] Ibid.

Indigenous Peoples, which has been spearheaded by Indigenous Peoples around the world and supported by various stakeholders.[21]

The following discussion examines the AU and UN regulatory and institutional framework on Indigenous Peoples and demonstrate how they apply to the San.

4.2.1 African Union Regulatory and Institutional Mechanisms

Post-colonial Africa has been characterised by mass violations of human rights which persist in some parts to date. The Organisation for African Unity (OAU) at independence and now the African Union (AU) at the helm of African politics and spearheading decolonisation emphasised the principle of non-interference in the internal affairs of member states which encouraged member states to violate human rights with impunity.[22] Many segments of the African population experience human rights abuse.[23] There have been reports of incarceration of opposition leaders without trial, rigged elections, coups, questionable judiciary amongst others.[24] The massive violation of human rights at the face of protective constitutional developments led to an argument that Africa needed more home-grown constitutions and not the 'Western imposed constitutions'.[25] This was in line with the Pan African motto of African solutions for African problems.[26] Underpinning this motto was an argument that solutions conceptualised elsewhere could not resolve half the problems Africa faced. In the context of the constitution, this argument was premised on the undeniable fact that majority of African states simply adopted Constitutions from their colonial masters with no amendment to factor in prevailing circumstances that are contextual.[27]

Equally challenging for Africa was underdevelopment and poverty which had to be addressed through the deployment of the MDA. MDA had two implications for Indigenous Peoples. Firstly, it meant their relocations from the resource rich ancestral land for the nation state to

[21] Ibironke T Odumosu-Ayanu and Dwight Newman, *Indigenous-Industry Agreements, Natural Resources and the Law* (Routledge 2020).
[22] U. Oji Umozurike, 'The African Charter on Human and Peoples' Rights' (1983) A J of Int'L 902.
[23] Susan E Waltz *Human Rights and Reform: Changing the Face of North Africa Politics* (UCP 1995).
[24] CRM Dlamini, 'The violation of Human Rights in Africa: A lesson for South Africa' (1991) SALJ 291.
[25]Balakrishnan Rajagopal, *International Law from Below* (CUP 2003).
[26] Terry M. Mays, 'African Solutions for African Problems: The Changing Face of African-Mandated Peace Operations' (2003) Journal of Conflict Studies 1.
[27] In the Context of Botswana, the colonial Constitution adopted at Independence remain in force. This Constitution does not reflect the society Botswana is fifty-seven years later.

designate the land for productive use or for the state to utilise the natural resources found in the ancestral land. To facilitate access to resources, states often relocate Indigenous Peoples under the pretext of conservation as it is seemingly less contentious and may be perceived as a necessary evil. Secondly, Indigenous Peoples are relocated from their ancestral land to modernised resettlements that states deem compliant with the MDA dictates. Either way, Indigenous Peoples suffer thus making MDA problematic for Indigenous Peoples. Communities identifying as Indigenous Peoples in Africa are often at loggerheads with states over MDA. This has caused enormous and perennial conflicts between states and Indigenous Peoples. Thus, the emergence of the AU regulatory and institutional mechanisms was a welcome development. These mechanisms have been useful in providing a platform for Indigenous Peoples to ventilate their concerns. Furthermore, regional mechanisms contributed to the emergence of the global regime of Indigenous Peoples' rights in two main respects.[28] They strengthened the global political process aimed towards the recognition of Indigenous Peoples rights and contributed significantly to the legal process of clarification and interpretation of some of the most controversial provisions of the regime.[29]

The African Charter on Human and Peoples Rights (African Charter) is considered the primary and chief legislative framework on human rights and Indigenous Peoples rights in Africa. As a legally binding treaty, the African Charter was adopted in 1981 by the OAU, entering into force in 1986. All fifty-four African states are now parties. The African Charter as a regional instrument derives from universal human rights and considers the cultural and political traditions of the region, tailored constructive response to the human rights problems arising within Africa.[30] Consequently it is expected that the African Charter as a genuine representative of the region's values be rewarded with a higher degree of trust by constituent states.[31] However that has not been the case, as the state parties often fail to satisfy their obligations under the African Charter.

The African Charter was ground-breaking for many reasons, one of which was the recognition of first, second and third generations of rights on an equal footing.[32] The African Charter recognises civil and political rights, socio-economic rights, and People's rights. In a first for a

[28] Mauro Barelli, 'The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime' (2010) 32 JHUP 951.
[29] Ibid.
[30] Barelli, Supra.
[31] Ibid.
[32] Frans Viljoen *International Human Rights Law in Africa* (2nd Edn OUP 2012).

regional instrument, the African Charter introduced some principles that have become critical in the Indigenous Peoples discourse. The Peoples' rights included in the African Charter are the right to self-determination;[33] the right to freely dispose of wealth and natural resources (including the right to recovery of property and adequate compensation);[34] the right to economic, social, and cultural development;[35] and the right to a satisfactory environment suitable to development.[36]

On paper, the African Charter provides a springboard for the promotion and protection of Indigenous Peoples in Africa. The articles referenced above have a specific application to Indigenous Peoples who are often confronted with issues relating to self-determination, development, natural resource control, among others. The African Charter would therefore provide a compass for Indigenous Peoples in finding a best suited solution for their prevailing circumstances. Of great importance, is the obligations bestowed on State parties to facilitate the enjoyment of these rights. By comparison with other regional mechanisms, the African Charter mirrors the UNDRIP to a greater extent.[37] Consequently, Africa was deemed well positioned to support the UNDRIP and its implementation, however that has not been the case as the promotion and protection of Indigenous Peoples' rights remains hotly contested in Africa.[38]

As discussed in Chapter 1, 2 and 3, the singular contention by Africans states remains that all Africans are indigenous to Africa and thus there is no need to grant special rights to any one segment of the population.[39] These arguments should be treated as self-defeating in that, if all Africans were indigenous to Africa and African states truly believe that, there would not have been the need to specifically set out rights relating to Indigenous Peoples and communities in Africa as the general provisions of the African Charter would be sufficient for Africans. The 'all Africans are indigenous to Africa' is an argument of convenience. [40]African states advance

[33] Article 20.
[34] Article 21.
[35] Article 22.
[36] Article 24.
[37] Jennifer Hays & Megan Biesele, 'Indigenous Rights in Southern Africa: International Mechanisms and Local Contexts' (2011)15:1 Int'JHR 1.
[38] Ibid.
[39] Laher and K. Singí Oei (eds), *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (Africa Institute of South Africa 2014); Solomon Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (PULP 2010) & Willem van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems'(2010) 104 A.J.I.L. 29.
[40] On the debate on indigeneity in Africa see Gabrielle Lynch, Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Right and Endorois (2011) African Affairs 24; Dorothy Hodgson, Becoming Indigenous in Africa (2009) 52 African Studies Review 1.

it whenever there is an attempt to hold them accountable for the promotion and protection of Indigenous Peoples.

Charged with the enforcement obligation of the regulatory frameworks are the African Court on Human and Peoples Rights (African Court) and the African Commission on Human and Peoples Rights (African Commission). The African Court was established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights.[41] The African Court complements the protective mandate of the African Commission.[42] Its jurisdiction relates to amongst others interpretation of the African Charter and any related human rights instrument ratified by the state.[43] The African Court provides advisory opinion when requested to do so but it cannot do so on matters examined by the African Commission.[44] Several bodies including the African Commission and state parties have access to the African Court.[45] The African Court may be guided by the African Commission on issues of admissibility and it must take into consideration the African Charter, in the determination of other issues the African Charter and other relevant human rights instrument must be considered.[46] The African Court's independence ought to adhere to international law standards.[47] The African Court has a broad mandate to make appropriate orders to remedy the violation including the payment of fair compensation or reparation.[48] Decisions of the African Court are binding.

The African Commission is the second institution charged with the responsibility to enforce the African Charter. It was established in terms of the Africa Charter with eleven-members and its mandate include a communication procedure which examines complaints from individuals, NGOs, and others, and a reporting procedure which examines reports presented by states party to the Charter.[49] The mandate of the African Commission is to promote human and Peoples' rights, ensure protection of Africans in terms of the Africa Charter, interpret all the provisions of the Charter as requested and perform any other tasks as entrusted by the Assembly of Heads of State.[50] The African Commission has addressed economic exploitation, environmental

[41] Article 1.
[42] Article 2.
[43] Article 3.
[44] Article 4.
[45] Article 5.
[46] Articles 6 and 7.
[47] Article 17.
[48] Article 27.
[49] Articles 30-44.
[50] Article 45.

concerns, the exclusion, and domination of one ethno-cultural group by another and claims for autonomy and secession.[51] Since 2001, representatives of Indigenous Peoples have attended the sessions of the African Commission testifying on their desperate situations and the human rights violations to which they are victims.[52] The African Commission regularly questions states' representatives about the Indigenous Peoples and pays attention to the issue of indigenous rights in its Concluding Observations on state report.[53] As a quasi-judicial body, the African Commission does not make binding decisions, but can make recommendations.[54]

The third institution is the Working Group of Experts on Indigenous Populations/Communities (Working Group). It was established in 2001 with the mandate to examine the concept of indigenous communities in Africa, as well as to analyse their rights under the African Charter. In 2003 the African Commission adopted the report of the Working Group which proposes several avenues for the recognition and promotion of indigenous rights in Africa.[55]

The mandate of the Working Group now includes gathering information and communications on violations of indigenous populations' human rights and fundamental freedoms, undertaking country visits to study the human rights situation of indigenous populations/communities, and formulating recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/ communities.[56] Additionally, the Working Group co-operate when relevant and feasible with other international and regional human rights mechanisms.[57]Apart from conducting several country visits and missions, it has met and cooperated with several UN bodies, including the Permanent Forum on Indigenous Issues, the Special Rapporteur on the Rights and Freedoms of Indigenous People and the ILO.[58]

The implementation limitations of these regulatory and institutional mechanisms are glaring. While most African states are parties to the African Charter, they remain reluctant in facilitating the promotion and protection of Indigenous Peoples' rights. The ground-breaking normative

[51] Manisuli Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) Neth Int Law Rev 259.
[52] Barelli, Supra.
[53] Ibid.
[54] Ibid.
[55] Jeremie Gilbert, 'Indigenous Peoples'Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) International & Comparative Law Quarterly 245.
[56] Barelli, Supra.
[57] Ibid.
[58] Gilbert, Supra.

framework that should have pioneered the recognition of Indigenous Peoples rights is met with constant opposition by the very same states that adopted it, even years later. The irony here being that this is quite typical of regional and international treaty making output. The institutional frameworks equally represent bottlenecked processes that would render the outcome of the African Commission binding. As an example, the African Commission decisions become binding only when adopted by the African Union. This effectively rests the final decision with politicians who are responsible for making regressive national policies relating to Indigenous Peoples in Africa. Thus, politicians' power is amplified against other actors and given the prevailing national position on Indigenous Peoples, it is highly unlikely that politicians would vote in favour of decisions favourable to Indigenous Peoples they do not recognise. Whilst decisions of the African Court are binding, the implementation still rests on state parties who have been consistent in their disregard of the regional decisions.[59]

The San have been the subject of the AU human rights mechanisms. The human rights situation of the San in Botswana makes a substantive part of the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (The Working Group). The Working Group provides an elaborate analysis of the experiences of the San and highlights some challenges in their everyday lives. The Report of the Working Group indicates the historical experiences of the San as rooted in discrimination, marginalisation, and deprivation.[60] The said experiences have culminated into current inequalities.[61] The Working Group highlights exclusion in constitutional protection, political and traditional leadership and assimilationist developmental policies which integrate the San into mainstream with the effect of worsening the San' situation.[62] Dispossession has been occasioned by the relocation policies, and refusal to recognise ownership and confer title of ownership on the San over their ancestral land.[63] Similarly, the GoB shuns any alternative forms of development, which could utilise the indigenous knowledge systems of the San, within the CKGR amongst other issues.[64]

[59] ACHPR v. Kenya, App. no. 006/2012, judgment of African Court of Human and Peoples' Rights, issued 26 May 2017 (the 'Ogiek judgment'), available at: http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf accessed 17 August 2023.

[60] Report of the African Commission Working Group of Experts on indigenous Populations/Communities (IWGIA 2005) available at AFRICA-2-ENGELSK.indd (iwgia.org) accessed on 23 October 2022.

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Ibid.

Furthermore, the interviews reveal plans to take the GoB before the AU human rights mechanisms.[65] According to the activists and some San at grassroot level, there is currently negotiations with funders to facilitate the mobilisation of communities to discuss and revise the final decision on taking the San's human rights related grievances to the AU.[66] Key issues to be referred on this new mandate to the AU include the forced relocations, restriction of freedom of movement, denial of access to the CKGR for the San residing outside the reserve, recurring and severe harassment amongst others.[67] The respondents suggest that the decision to take the GoB was taken before and had it not been for COVID-19 the complaint may have been taken before the African Commission in 2020.[68]

4.2.2. The United Nations Regulatory and Institutional Mechanisms

For many years Indigenous Peoples were relegated to the lowest strata and were an insignificant lot within international 'corridors'.[69] Classic international law generally and international human rights law specifically deemed Indigenous Peoples to be beyond the scope of international legal personality, with its myopic focus on states.[70] Thus, classical international law was responsible for the erasure of indigenous sovereignty, identity, and land ownership through the application of the principle of terra nullius and Western conceptions of identity, property, and property ownership. Crucial to the current discourse is the Eurocentric international law that did not recognise the rights of a collective to own property jointly which effectively endorsed dispossessions that had been occasioned against Indigenous Peoples. To illustrate the lacuna within international human rights law, Engle posits that key human rights instruments such as the Universal Declaration of Human Rights (UDHR) made no provision for Indigenous Peoples.[71] However, the omission has been rectified as there has been a paradigm shift resulting in the inclusion of Indigenous Peoples in international human rights

[65] Interviews, Supra.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Nathanael Ojong, 'Indigenous Land Rights: Where are we Today and Where Should the Research go in the Future?' (2020) 10 Settler Colonial Studies 193 & Corinne Lennox and Damien Short (eds) *Handbook of Indigenous Peoples' Rights* (Routledge 2016).
[70] Władysław Czapliński Recognition and International Legal Personality of Non-State Actors (2016) 1 Pécs Journal of International and European Law 7.
[71] Engle, Supra.

law framework and Indigenous Peoples rights framework. Some of these instruments made mention of non-discrimination based on indigenous origin.[72]

The acknowledgment of indigeneity as a ground for non- discrimination was progressive and provided an avenue for Indigenous Peoples to use the international human rights law to seek redress for violations perpetrated by states. International human rights frameworks such as the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been useful in the advancement of Indigenous Peoples rights. These instruments set the minimum obligations of member states on the treatment of the citizenry generally and the standards set extend to Indigenous Peoples. The UDHR confers the right of participation in cultural life amongst others.[73] The recognition and provision of the right to cultural life is critical for Indigenous Peoples as at the face of the MDA, their culture is at the risk of extinction. The ICCPR equally protects ethnic, religious, and linguistic minorities' rights to enjoy, profess and practise their culture, religion, and language.[74] The ICESCR protects the right to self-determination, politically, economically, and culturally.[75] The protection of self-determination is the cornerstone of the Indigenous Peoples activism in the Postcolonial world.

Although the UDHR, ICCPR and ICESR do not contain a specific article on Indigenous Peoples, they have been extended to Indigenous Peoples in practice. For example, the Committee charged with ICESCR deals with issues that are of concern to Indigenous Peoples. ICESCR is structured as a programmatic or promotional human rights treaty with the basic obligation for the States' parties undertaking to take steps...'to the maximum of their available resources, with a view to achieving progressively the full realisation of the rights' recognised in the Covenant.'[76] Another international human rights institution that has been used to advance Indigenous Peoples rights is the Universal Peer Review (UPR). The UPR was created in 2006 with the aim of examining the human rights practices and policies of all UN member states every four to five years. The UPR opened up significant opportunities for the participation of non-governmental organisations (NGOs) and civil society groups in the state review process.[77] This development provides an important avenue for the involvement of groups representing

[72] Engle Supra.
[73] Article 27(1)
[74] Article 27(1).
[75] Article 1.
[76] Article 2.
[77] Noelle Higgins, 'Creating a Space for Indigenous Rights: The Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' (2019) The Inter' Journal of Human Rights 125.

Indigenous Peoples within the UN human rights framework and for the voices of Indigenous Peoples to be heard within the organisation.[78] This avenue expands the agency of Indigenous Peoples within the UN system. Acts and omissions of state parties relating to Indigenous Peoples' rights are subjected to scrutiny by other member states and positive developments shared. This is an example of how Indigenous Peoples benefit from what Pahuja terms 'the elevated parochial set of values'.[79] The said values standardised 'universal' basic treatment of humanity and where states fall short, aggrieved individuals may seek redress from what Pahuja terms 'specific institutional structures of contemporary international law'.[80]

International law has its shortcomings. It diminishes the role and significance of the nation state,[81] as it inherently organises the world resulting in the troublesome distribution of rights, obligations, and forms of authority, perpetuating an ongoing cycle of disempowerment, mainly affecting the most vulnerable in the world.[82] International law in so pulling processes, spaces, and subjects `particular directions reorganise the power players and impact social realities of marginal residents.[83] Indigenous Peoples constitute the world's most vulnerable and marginalised. The international human rights mechanisms are not devised specifically to address the historically rooted grievances of Indigenous Peoples and therefore can only partly address the full range of claims legitimately advanced by Indigenous People.[84] For example, international human rights regime is generally individual rights oriented and does little to protect group rights. Additionally, International law is riddled with tensions and contradictions. In some instances, it confers rights to an individual and confers other rights to another that greatly impede the enjoyment of the said rights by two individuals simultaneously. An illustration given is that of the field of contemporary international human rights law which legitimises the internationalisation of property rights and hegemonic interventions, but codifies a range of civil, political, social, cultural, and economic rights which can be invoked on behalf

[78] Barelli, Supra.
[79] Sundhya Pahuja, *Decolonising International Law, Development, Economic Growth and the Politics of Universality* (CUP 2011)
[80] Ibid.
[81] Luis Eslava, *Local Space, Global life: The everyday operation of international law and development* (CUP 2015)
[82] Ibid.
[83] Ibid.
[84] Barelli, Supra.

of the poor and the marginal groups.[85] In fact, in some instances, the international human rights frameworks have been indicted for exacerbating Indigenous Peoples struggles.

By way of illustration, a focus on the ICESCR demonstrates the pros and cons of the international human rights framework in the advancement of Indigenous Peoples rights. The ICESCR focuses on issues of concern to Indigenous Peoples, such as deprivation, exclusion and thus obliges States' parties to take steps to the maximum of their available resources, with a view to achieving progressively the full realisation of the rights' recognised in the Covenant.'[86] In this spirit, the ICESCR may be used to underscore the bleak truth about the existence of many Indigenous groups under modern conditions: of poverty, deprived of subsistence, education, health, land and culture.[87] With acknowledgement and recognition of the ongoing struggles of Indigenous Peoples, targeted solutions may be conceptualised and implemented. For example, the ESCR Committee has made critical observations about 'the gross disparity between aboriginal peoples and the majority of Canadians with respect to the enjoyment of Covenant rights' and 'the direct connection between aboriginal marginalisation and the ongoing dispossession of aboriginal peoples from their lands'.[88] The Committee then recommended 'concrete and urgent steps to restore and respect an aboriginal land and resource base adequate to achieve a sustainable aboriginal economy and culture'.[89]

4.2.3 The United Nations Indigenous Peoples Specific Regulatory and Institutional Mechanisms

The inherent conflict between Indigenous Peoples and international human rights law necessitated Indigenous Peoples focused frameworks. The call to formulate Indigenous Peoples rights specific framework was heeded through the promulgation of the International Labour Organisation Conventions No 107 (ILO No 107) and No 169 (ILO No 169) and the United Nations Declaration on Rights of Indigenous Peoples.

Adopted by the International Labour Organisation (ILO) with the backing of the United Nations System in 1957, Convention No.107 was the first international convention specific to

[85] Larissa Raminai, 'TWAIL-Third World Approaches to International Law and human rights: Some considerations' (2018) 5 Journal of Constitutional Research 261.
[86] Article 2.
[87] Patrick Thornberry, *The UN draft Declaration on the Rights of Indigenous Peoples* (MUP 2013).
[88] Fergus MacKay (ed) *Indigenous Peoples and United Nations Human Rights Bodie*s (FPP 2016).
[89] Ibid.

Indigenous Peoples.[90] Convention No.107 applies to populations regarded as indigenous on account of their descent from the populations which inhabited the country or a geographical region to which the country belongs and live more in conforming with their own social, economic, and cultural institutions.[91] Convention No.107 sought to *integrate* Indigenous Peoples into the national life of their respective countries.[92] The emphasis is on the intention to integrate Indigenous Peoples into some mainstream life.

Some notable principles in Convention No.107 include, an obligation on governments to ensure coordinated and systematic action in the protection of Indigenous Peoples; an obligation to adopt special measures for the protection of the institutions, persons, properties and labour of Indigenous Peoples; involvement of Indigenous Peoples in processes; consideration of Customary Laws in rights and duties formulation with a provision for retention of customary law where there exist any conflict between national laws and customary laws; recognition of Indigenous' land rights; recruitment of Indigenous Peoples in employment; and education of and access to opportunities. Convention No.107 was superseded by Convention No. 169 which did away with the integrationist approach, however majority of the principles contained therein remains the bedrock on which the regulatory framework on Indigenous Peoples at international law rests.

Convention No.169 enjoins governments to protect the rights of Indigenous Peoples and such protection extends to the promotion of the social, economic, and cultural rights with emphasis on social, cultural identity, customs, traditions, and their institutions.[93] It provides for full measures of human rights and fundamental freedom for the Indigenous Peoples without hindrance.[94] Indigenous Peoples have the right to decide their own priorities for the purpose of developing their lives, beliefs, institutions, and spiritual wellbeing and to exercise control over their own economic, social, and cultural development.[95] Indigenous Peoples have rights to their customs or customary law and institutions if such customs and laws are not in conflict with the fundamental rights defined by the national system.[96] Indigenous Peoples enjoy rights of ownership and possession over the land which they traditionally occupy with an obligation

[90] James W. Colborn, 'International Labour Organisation Convention Number 169: Celebrate the Differences' (1994) 2 Willamette Bulletin of International Law and Policy 1.
[91] Article 2 (1).
[92] Article 2.
[93] Article 2(2).
[94] Article 3(1)
[95] Article 7(1)
[96] Article 8(2)

on governments to guarantee effective protection of these rights including natural resources and consultation regarding exploration or exploitation of such natural resources.[97] Indigenous Peoples may be relocated on genuine grounds but retain the right to return to their ancestral lands as soon as the grounds for relocation cease.[98] The Convention has other general provisions that relate to implementation in accordance with characteristics of each country, specificities of Indigenous Peoples and the consultation and participation of Indigenous Peoples on issues that affect them.[99]

In Africa only the Republic of Central Africa ratified Convention No. 169. The Convention No. 169 has played a pivotal role in the establishment of Indigenous Peoples rights regime. Convention No. 169 set the tone on some of the most contentious issues relating to Indigenous Peoples. It provided Indigenous Peoples and States with a document that sets ideal parameters within which the two parties can work. Before Convention No. 169 there was no international instrument that elucidated the rights and privileges of Indigenous Peoples in more bold terms.[100] Convention No.169 was a bolder instrument by comparison with Convention No. 107. Convention No.169 should be used as a negotiation tool for a peaceful solution to land problems and not to be used as a weapon for confrontation.[101] The Convention No.169 fast tracked the recognition of Indigenous Peoples as right bearers, acknowledged their vulnerabilities, and put forth obligations that have the potential to address this group's vulnerable position.[102]

Although Convention No.169 builds on Convention No.107, it is distinguishable and departs from some of the foundational principles. Two notable differences include that Convention No 107 prohibits discrimination against Indigenous Peoples whilst Convention No 169 condemns discrimination and advocates for Indigenous Peoples' right to determine their priorities as it affects their lives, beliefs, institutions, and spiritual wellbeing and the land they occupy or use.[103] Convention No 107 provides that Indigenous Peoples must live more in conformity with

[97] Article 14(1)
[98] Article 16(3)
[99] Olugbenga Ifedayo Ademodi, *The Rights and Status of Indigenous Peoples in Nigeria* (Bauu Institute and Press 2012).
[100] Ademodi, Supra.
[101] Ibid.
[102] Ibid.
[103] Ibid.

the social, economic and cultural institutions of that time, Convention No 169 removed the qualification 'of that time'.[104]

Some TWAIL scholars argue that even with its bolder stance, Convention No. 169 fails to adequately effectuate Indigenous Peoples' rights because the Convention is couched in the vocabulary of traditional international law.[105] Ultimately, the traditional international legal vocabulary places states and sovereign rights at the forefront of all international legal discourse, and furthermore, when non-traditional rights are declared such as under the human rights regime the traditional system has other mechanisms that basically nullify such rights.[106] On a closer scrutiny, Convention NO. 169 fails to effectuate Indigenous Peoples rights because of its orientation within the international system thus should not be viewed as the pinnacle of indigenous rights within the system but, rather, as a starting point from which international scholars and interest group can recognise the inherent problems within the system as a whole and begin to formulate a regime that not only recognises indigenous rights but also effectuates those rights.[107] The position adopted by TWAIL with regard to the relevance of Convention No.169 is crucial in this thesis because it is important to acknowledge the evolution of Indigenous Peoples' rights regime and illuminate the potential constraints presented by classic international law in ensuring the realisation of the Indigenous Peoples specific normative framework.[108] These challenges are recurring and as such would likely hamper the potential of every other framework unless they are addressed.

After the foundation laid by Convention No. 107 and Convention No. 169, the UNDRIP was adopted. The UNDRIP is the primary legal instrument to use when assessing member states' performance on the promotion and protection of Indigenous Peoples' rights. According to Ademodi, the provisions of Convention No.169 are compatible with the UNDRIP.[109] The UN General Assembly adopted the UNDRIP in September 2007. This was a celebrated milestone as the process had been protracted with nearly 25 years having passed since the UN formally began its work on elaborating the UNDRIP provisions.[110] Through these UN mechanisms, in

[104] Ademodi, Supra.
[105] Gaetano Pentassuglia Towards a Jurisprudential Articulation of Indigenous Land Rights EJIL (2011) 22 , 165; Seth Gordon, 'Indigenous Rights in Modern International Law from a Critical Third World Perspective' (2007) 31 American Indian Law Review 401.
[106] Gordon, Supra.
[107] Ibid.
[108] Ibid.
[109] Ademodi, Supra.
[110] Claire Charters & Rodolfo Stavenhagen (eds) *The UN Declaration on the Rights of Indigenous Peoples: How It Came to be and What it Heralds* (IWGIA, 2009).

a first for international law, Indigenous Peoples as rights bearers played a pivotal role in the negotiations on the content of the UNDRIP.[111]

The UNDRIP represents the culmination of an extraordinary process which has gradually transformed Indigenous Peoples from 'victims' to 'actors' of international law.[112] Although not binding, the UNDRIP affirms the legal existence of indigenous communities and sets minimum standards for their recognition, participation, and due process rights in domestic and international law.[113] One feature of UNDRIP is that it offers some flexibility and ambiguity which may be useful in that it allows states and Indigenous Peoples to find a mutually acceptable and pragmatic interpretation of the rights of Indigenous Peoples.[114] It is significant as the only international instrument that specifically addresses the rights of Indigenous Peoples.[115] The UNDRIP filled a crucial gap by providing universal and comprehensive recognition of Indigenous Peoples and obligation to ensure protection of the world's Indigenous Peoples and may potentially guarantee coherence to a regime previously characterised by different approaches and frameworks.[116]

The UNDRIP has been used extensively by experts of UN treaty bodies, regional human rights courts as well as domestic courts as a reference and a means of determining rights and corresponding state responsibilities.[117] Although some scholars hold an expectation that the UNDRIP will establish itself as customary law,[118] some Indigenous People perceive it as one of the many tools that have buttressed the limited place of Indigenous Peoples in international platforms by comparisons with states as actors who eventually have the last say within the United Nations framework.[119] In buttressing the pessimistic views about the UNDRIP

[111] Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 International and Comparative Law Quarterly 957.
[112] Julia Burger, 'After the Declaration: Next Steps for the Protection of Indigenous People's Rights' (2019) 23 IJHR 22.
[113] David Fautsch, 'An Analysis of Article 28 of the United Nations Declarations on the Rights of Indigenous Peoples, and Proposals for Reform' (2010) 31 Mich J Int'l L 449
[114] Burger, Supra.
[115] Pruim, Supra.
[116] On the potentials and constraints of the UNDRIP in the context of Africa See: Frans Viljoen, *International Human Rights Law in Africa* (2nd Edn OUP 2012).
[117] Burger, Supra.
[118] Ibid.
[119] The process of negotiation and subsequent adoption of the UNDRIP explains the power relations between different players, i.e the State and Indigenous Peoples and most importantly show the limitations of Indigenous Peoples as actors in the UN space as an inherently State driven process. On this issue See: John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz (eds*) Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance Innovation 2019) and Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge 2016).

Newcomb argues that the UNDRIP is not designed to end the relationship of domination between states and Indigenous Peoples nor does that document fundamentally change the manner in which that dominating relationship is written about in the ideal system of international law.[120] The fact that in the UNDRIP the word 'States' is still spelled with the honorific capital 'S' and the word 'indigenous peoples' still spelled with a symbolically subordinate lower case 'i' is both symbolic and constitutive of the dominant system of 'the state' of 'states'.[121]

Furthermore, states hold the key to the implementation as they may decide the extent to which they will bind themselves at international level and translate such commitments to national policies. Thus, the effect of the UNDRIP is limited to its ability to create "diffuse legal consequences for the development of both international and domestic law."[122] The efficacy of the UNDRIP is further limited by its failure to specify concrete standards for states and other international actors.[123]

In summing up the arguments made in favour and against the UNDRIP Barelli observes that the UNDRIP has been met with both optimism and radical criticism.[124] The UNDRIP signals the transformation of dispossessive and victimising international law into an Indigenous Peoples right protecting and justice yielding instrument.[125] On the other hand however, the UNDRIP does not go far enough in addressing the problems faced by Indigenous Peoples and privileges individual civil and political rights over equally important economic, social and cultural rights.[126] Whilst Barelli's argument presents a balanced assessment of the UNDRIP, it fails to assess the genesis of the problematic aspects of the UNDRIP and the international legal order in general.

The thesis posits the UNDRIP as a crucial step in the right direction in the promotion and protection of Indigenous Peoples rights. The monumental and historical essence of Indigenous Peoples participation in the process of the making of the UNDRIP constitutes one of the many steps required to dismantle states power in the international legal space. The fact that the UNDRIP in fact has a semblance of what Indigenous Peoples consider important to their

[120] Newcomb, Supra.
[121] Irene Watson, (ed) *Indigenous Peoples as Subjects of International Law* (Routledge 2018).
[122] David Fautsch, 'An Analysis of Article 28 of the United Nations Declarations on the Rights of Indigenous Peoples, and Proposals for Reform' (2010) 31 Mich J Int'l L 449.
[123] Ibid.
[124] Barelli, Supra.
[125] Ibid.
[126] Ibid.

survival and thrive is also significant. The view of the San on the UNDRIP and international law on Indigenous Peoples is discussed in Chapter 5. Given that this was a first of its kind, Indigenous Peoples have their springboard. The obligation they have is now to find innovative ways to use the existing framework to push the boundaries of international law space and constantly chip away at the state power/sovereignty at this platform. The real crisis which present hurdles in the promotion of Indigenous Peoples' rights is not per say the content of the UNDRP but the states' mightier than thou attitude and the fact that international law is structured in such a way that it sustains that.

Other scholars have acknowledged the shortcomings of the UNDRIP but posit that the mere fact that it was finally adopted following a protracted process was a score for the Indigenous Peoples movements around the world.[127] Smis et al posit that the adoption of the UNDRIP is an acknowledgment that Indigenous Peoples rights are crystallising into rules of international law but are quick to note that the legal nature of the UNDRIP and the absence of Indigenous Peoples rights binding legal instruments is a cause for concern.[128] Specific clauses of the UNDRIP relevant to this thesis are discussed subsequently in an interrogation of international law cardinal principles in the development of Indigenous Peoples.

The UN has several institutional mechanisms that are focused on Indigenous Peoples. Some of the notable institutions include the Working Group Indigenous Populations, Universal Periodic Review (UPR), the UN Permanent Forum on Indigenous Issues, UN Committee on Economic, Social and Cultural Rights, the Special Rapporteur Rights of Indigenous Peoples, and an Expert Mechanism on the Rights of Indigenous Peoples.

In 2001, the Commission on Human Rights appointed a Special Rapporteur on the rights of Indigenous Peoples (Special Rapporteur), as part of the system of thematic Special Procedures.[129] The Special Rapporteur has an obligation to report on the overall human rights situations of Indigenous Peoples in selected countries, addresses specific cases of alleged violations of the rights of Indigenous Peoples through communications with governments and others, conducts or contributes to thematic studies on topics of special importance regarding

[127] Stefaan Smis, Dorethee Cambou & Genny Ngende, 'The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources ' (2013) 35 Loy. L.A. Int'l & Comp. L. Rev 493.
[128] Ibid.
[129]The Role of the UN Special Rapporteur on the Rights of Indigenous Peoples within the United Nations Human Rights System A Handbook for Indigenous Leaders in the United States(Indigenous Peoples Law and Policy Program of The University of Arizona 2012) available at http://unsr.jamesanaya.org/docs/data/UNSR-Handbook-USA.pdf accessed 2 July 2022.

the promotion and protection of the rights of Indigenous Peoples and promotes good practices, including new laws, government programs, and constructive agreements between Indigenous Peoples and states, to implement international standards concerning the rights of Indigenous People.[130] The Special Rapporteur visited Botswana in 2010 and provided their report on the status of the San in Botswana. The observations of the Special Rapporteur are discussed in Chapter 5. It is however important to note that this visit to Botswana underscore their role as an independent structure that can observe and present Indigenous Peoples experiences within the nation state. This is a necessary checks and balance mechanism that will ensure that the actual status of Indigenous Peoples is publicised at the UN.

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is a subsidiary body of the United Nations' Human Rights Council (HRC). In 2007, the EMRIP replaced the Working Group as the body responsible for providing thematic assistance on indigenous issues to the Human Rights Council; this group's contribution may prove important in the post-Declaration era.[131] The EMRIP provides the Human Rights Council with expertise and advice on the rights of Indigenous Peoples as set out in the UNDRIP. It further assists Member States, upon request, in achieving the ends of the UNDRIP through the promotion, protection and fulfilment of the rights of Indigenous Peoples. The EMRIP adopts a specified methodology in discharging its mandate.

The United Nations Permanent Forum on Indigenous Issues (UNPFII) is yet another institutional mechanism. It has sixteen members, eight nominated by governments and another eight nominated by Indigenous Peoples. Even though UNPFII is not a human right monitoring body in the strict sense, it plays an important role in this area and has much greater potential.[132] The UNPFII is a result of the long and systematic efforts of the international movement of Indigenous Peoples since the 1970s, a movement born and bred in the human rights movement.[133] Thus, human rights have been an integral part of the UNPFII since its inception and UNPFII remains the supreme UN authority for indigenous issues.[134] Mandate of the UNPFII include discussion of indigenous issues within the ECOSOC's mandate, including economic and social development, culture, environment, education, health and human rights;

[130] UN Handbook, Supra.
[131] Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last ten Years and Future Developments' (2009) Mel'Journal of Int'L 1.
[132] Marjo Lindroth, 'Paradoxes of power: Indigenous Peoples in the Permanent Forum' (2011) Cooperation and Conflict 543.
[133] Ibid.
[134] Ibid.

provision of expert advice and recommendations to the Council and to programmes, funds and agencies of the UN; raising awareness about indigenous issues; integrating and coordinating activities in the UN system and producing materials on indigenous issues.[135] Consequent to the UNPFII, Indigenous Peoples can engage both in resistance that is a reaction to states' exercise of power or the creative use of its tools and in indirect resistance that 'stretches' the UN system and constitutes action on its own terms.[136]

According to the interviews, the San have interacted extensively with the UN Mechanisms. The San activists recalled that the San began their interaction with the UN in the late 1980s following a specific decision taken by a group of San to seek audience elsewhere and expose the transgressions committed against them by the GoB. Beyond bringing the internal affairs to the world, the San had hoped their participation would provide perspective on the contentious issues of Indigenous Peoples rights. The respondents credited the support of the International Working Group for Indigenous Affairs for their activism within the UN. At one point, the San appeared before the UN to observe the procedures then after some time, they made representative before some institutional mechanisms such as the UNPFII. The San activists observe that the key issues that recur in their representation before UN structures are, forced relocations, ownership, and occupation of the CKGR and abuse in the name of development. Some San activists raised their non-participation in the making of the UNDRIP as a cause for concern and as indicative of a possible marginalisation of some Indigenous Peoples within the international Indigenous Peoples system. However, they were quick to indicate that even with such concerns they have no question about the legitimacy of the UNDRIP as it reflects to a larger extent what they consider crucial for their protection and survival against state bullying and third parties' interferences.

The following discussion focuses on the UNDRIP cardinal principles on the development of Indigenous Peoples and their application to the San.

[135] Lindroth Supra.
[136] Ibid.

4.3 Cardinal Principles on State's Development of Indigenous Peoples and the Safeguards of Indigenous Peoples Rights

The UNDRIP is a crucial regulatory instrument in ensuring the balance between states' developmental interest and the promotion and protection of Indigenous Peoples' rights. The rights conferred by the UNDRIP seek to ensure that states prioritise the respect for Indigenous Peoples rights whilst pursuing developmental pathways. The following discussion focuses on specific rights in the UNDRIP that may be useful in striking a balance between GoB developmental aspirations and the promotion of the San's rights.

The specific rights under consideration include Indigenous Peoples' right to self-determination; the right to be consulted and give free, prior and informed consent before any administrative or legislative measures that affect Indigenous Peoples are effected; the right to maintain and strengthen distinct relationship over ancestral land; and prohibition against Indigenous Peoples' forcible removal. These rights are some of the many rights and a selection of these does not necessarily mean they are more important that the others. The choice of these specific rights was made based on the recurrence of issues relating to them amongst the San at the preliminary stage of the thesis. These rights may also be termed cardinal principles on the development of Indigenous Peoples because they provide a yard stick of what states ought to do prior to embarking on any development that directly or indirectly affect Indigenous Peoples.

The competing interests between the MDA and the promotion and protection of Indigenous Peoples rights agenda necessitated a yardstick and parameters within which States and Indigenous Peoples can relate and more relevant for this discourse, how States can develop Indigenous Peoples respectfully and without repeating the colonial cycle of dispossession and abuse in development. This has come in the form of the UNDRIP which is intended to ensure that there is a balance in the attainment of the MDA and the promotion and protection of Indigenous Peoples rights.[137] Notably, the yardstick has potential to ensure the desired balance. These cardinal rules, although cast in the language of rights, in theory reflect some of the values

[137] Different scholars view the potential of International Law in striking a balance between the MDA and the promotion and protection of Indigenous Peoples Rights in different ways. Whilst some Scholars believe International Law is the saving grace others see International Law as a tool used to continue the colonial legacy, even more so where Indigenous Peoples are concerned.

that make the cornerstone of the majority of Indigenous Peoples' social, economic, and political life.[138]

4.3.1 The Right to Self-determination

Enshrined within the UNDRIP is the Indigenous Peoples right to self-determination. In terms of *Article 3*, Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. Furthermore, *Article 4* provides that Indigenous Peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. Self-determination features prominently in contemporary policy making on Indigenous affairs and has become the dominant motif in the articulation of Indigenous claims and rights.[139] The quest for international recognition of the rights of Indigenous Peoples to self-determination is driven by the illegitimacy of rule by an alien power, regardless of the extent to which such rule is benevolent, efficient, and stable.[140] It is illegitimate because it is imposed upon those with unextinguished rights to self-determination and under these circumstances cannot ever be fully consistent with the expectations and identities of the colonised.[141]

Self-determination may mean different things for different stakeholders hence it remains one of the many contested concepts in the understanding of Indigenous Peoples rights. Self-determination refers to a choice, not a particular institutional relationship, it is dynamic and not fixed on particular arrangements.[142] Self-determination may be generally defined as the right of people to determine their own political status and control their economic, social, and cultural development without external compulsion.[143] Indigenous Peoples see self-determination as the right to control their destiny.[144] Through self-determination, there may be room for tribal self-governance using customs and practices, and the end to the assimilation of Indigenous Peoples to dominant groups. Self-determination also presents an opportunity for communal coherence,

[138] James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (205) 22 Ariz. J. Int'l & Comp. L. 7.
[139] Benjamin J. Richardson, Shin Imai & Kent McNeil, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart 2009).
[140] Niezen, Supra.
[141] Niezen, Supra.
[142] Richardson et al, Supra.
[143] Ibid.
[144] Andrew Gray, *Indigenous Rights and Development: Self-determination in an Amazonian Community* (Berghahn 1997).

prosperity, identity and lifestyle vitality, independence, and overall ability to wade off invaders that Indigenous Peoples are prone to. Moreover, self-determination is the real chance Indigenous Peoples have at sustainable equity and equality by comparison with the dominant tribes, an opportunity to counter policies targeted at destroying Indigenous Peoples' culture and address land dispossessions. Self-determination may take different ways.

By way of example, in the context of Indigenous Peoples found in Canada, New Zealand, United States of America, self-determination has been exercised through sovereignty and self-government; self-management and self-administration; co-management and joint management; and the participation in public government options.[145] Sovereignty and self-government are characterised by the Indigenous Peoples' inherent authority to make laws over a defined territory which leads to more autonomy for the Indigenous Peoples to control their own economic, social and political development.[146] In fact, the exercise of sovereignty begin with the freedom of Indigenous Peoples self-identification as indigenous and such indigeneity being respected and afforded the rights that flow from indigeneity.

Within the Self-administration and self-management, Indigenous Peoples do not exercise inherent authority, but rather do have powers to make by-laws over local matters within the national government legislations and policies.[147] Indigenous Peoples may make decisions over implementation of governmental programmes, funding, or service delivery.[148] The exercise of delegated authority is inherently limited as it must be done within the parameters defined by the delegating authority. In the context of Botswana, given the ongoing power struggle between the San and the GoB generally, this may present an avenue for the GoB to frustrate the San's efforts to exercise self-determination by curtailing indigenous authority to insignificant issues.

The co-management and joint management model institutionalise Indigenous Peoples' participation in the management of lands and resources.[149] Given the dispossessive colonial history of the encounter between Indigenous Peoples and external forces, Indigenous Peoples may find themselves managing just a fraction of land and resources. The land and resources that remain for Indigenous Peoples may not be large enough to ensure that Indigenous Peoples practise their rituals, sustenance activities and participate in the modern economic activities

[145] Shin Imai, 'Indigenous Sel-Determination and the State' in Benjamin J. Richardson, Shin Imai & Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart 2009) 289.
[146] Imai, Supra.
[147] Ibid.
[148] Ibid.
[149] Ibid.

hence they require access to larger land and resource base that they traditionally accessed for survival.[150] The participation in government options gives Indigenous Peoples a platform to influence policies through indigenous specific institutions.[151] This entails participation in the mainstream political system through guaranteed seats in parliament; creation of an indigenous public government that is territorial and exercising powers delegated by national government; and establishing elected Indigenous parliament which serve to advise government on issues of concern to Indigenous Peoples.[152]

In all its manifestations, self-determination posits itself as a key to unlocking social, economic, and political benefits amongst others for Indigenous Peoples. The Special Rapporteur on the Rights of Indigenous Peoples underscores the importance of self-determination and particularly note that it is essential to provide Indigenous Peoples with the capacity to have autonomy over decision-making with regard to natural resources as it is a critical step in developing effective self-determination.[153] On the economic benefit of self-determination, Imai opines thus;

> It is now clear that there are sound economic and social reasons for promoting self-determination. The Harvard Project on American Indian Economic Development Conducted a series of studies beginning in 1987, which culminated in the publication of The State of the Native Nations. They show that self-determination and economic prosperity are inextricably linked. They reveal that the levels dropped on United States reservations exercising self-government powers, at a greater rate than poverty levels dropped in the general population. The studies also found that with greater self-government, leaders are more likely in tune with the cultural values of the community.[154]

As illustrated by the following discussion, the economic benefits of self-determination seemed to be the dominant focus in an engagement with the San respondents, both activists and San at grassroot level and other respondents.[155] Satau said he could vouch for self-determination and its economic benefits for Indigenous Peoples.[156] Satau has travelled extensively and engaged with Indigenous Peoples from various regions in the world and that has convinced him that Indigenous Peoples with a semblance of self-determination tend to thrive better

[150] Imai, Supra.
[151] Ibid.
[152] Ibid.
[153] Human Rights Council Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya A/HRC/15/37 (2010) at 11; and Human Rights Council Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen A/HRC/4/32 (2007) at 6
[154]Imai, Supra.
[155] Interviews, Supra.
[156] Ibid.

economically.[157] Through the use of their resources, communities are able to advance their informal education, infuse it with their indigenous knowledge and put it to good use for their immediate personal economic benefit and long-term communal benefit.[158] In Mogodu's view, self-determination is so central to the alleviation of the San from abject poverty and the GOB is aware of its great potential that the GOB has chosen to ensure that it renders it impossible for the San to make decisions on the use of their resources as a way of ensuring that the San remain in the economic periphery.[159] Roy Sesana was forthright in his view:

> As the San, we yearn for self-determination because we know that it would allow us to control all facets of our lives as communities. It is the real chance at making decisions for us about our resources without external forces and interference. Through self-determination, we tend to decide who our leaders should be, what their mandate should be and how their mandate should be exercised. If we decide all these, we have a final say on how our resources are to be used and can hold our leaders accountable for failing to discharge their mandate in line with our will as communities. If we decide on how our resources are to be used, we chart a personalised economic trajectory that is consistent with our beliefs, culture, and values. Self-determination will build our communities. It will give us a sense of confidence in ourselves and of pride in our capabilities. As we determine our fate, the young generation is watching and learning that leadership is not a purview for the privileged Tswana only. Our self-determination and capabilities will be passed to the unborn generations throughout. We deserve the chance to decide for ourselves.[160]

On the social benefit of self-determination, Imai argues that self-determination policy is also socially sound and references a study conducted by Michael Chandler trying to understand why some suicide rates on Indian reserves in British Colombia, Canada were 800 times the national average, and on others, suicide was practically unknown and concluded that suicide rates are lower in communities that have retained their own language but high amongst youth when they lack measures of self-government over areas such as health, education, child protection, policing, access to traditional lands and the construction of facilities for preserving cultural artefacts and traditions.[161]

For Shrinkhal, self-determination is still a derivative right within the state (geographical) sovereignty.[162] The implication of the foregoing is that the enjoyment of the right to self-determination may be limited at the will of the sovereign state within which the Indigenous

[157] Interviews, Supra.
[158] Interviews, Supra. The Respondent uses their name with consent.
[159] Ibid.
[160] Ibid.
[161] Imai, Supra 289.
[162] Rashwet Shrinkhal, 'Indigenous Sovereignty and Right to Self-determination in International Law: A Critical Appraisal' (2021) 17 AlterNative 3.

Peoples reside. This is precisely why Niezen argues that Indigenous self-determination as the recognition of the moral and political agency of nations within states intrudes upon state sovereignty, the brick and mortar of the UN system.[163] Charters underscores the controversies and limitations of the right to self-determination in the following way:

> Self-determination is a controversial subject in its own right, with a long history and much academic commentary. It becomes more volatile when associated with Indigenous Peoples living within the borders of independent states…Some argued that Indigenous Peoples' right to self-determination is qualitatively different from other peoples' right to self-determination and should be explicitly confined to concepts of self-management and constrained by states' territorial integrity.[164]

To a certain extent, Charters' argument reflects how self-determination is exercised by Indigenous Peoples. The San for example, are not advocating for an independent state from Botswana, but require freedom to internally deal with the communities' economic, social, and political issues and work with the state through their preferred representatives. There is an illusion peddled by some anti-self-determination right that Indigenous Peoples are looking to cause rebellion and disintegrate, and destabilise states, the observations are without evidence and merit. The evidence from the San in Botswana, Namibia and South Africa, Ogiek in Kenya, Ogoni in Nigeria, Maasai in Kenya attest to Indigenous Peoples willingness to exercise their right to self determination within the national boarders of their states.

States and global/regional forums have framed self-determination rights that deemphasise the responsibilities and relationships that Indigenous Peoples have with their families and the natural world (homelands, plant life, animal life, etc.) that are critical for the health and well-being of future generations.[165] For self-determination to deliver for Indigenous Peoples, it ought to be holistic and dynamic and for that reason, Corntassel proposes sustainable self-determination as a benchmark in the indigenous political mobilisation.[166] Corntassel's views find favour with Coulthard who perceives the framing of self-determination as state-driven, rights-based recognition that entrench the colonial status quo as opposed to utilising an

[163] Niezen, Supra.
[164] Claire Charters, 'Indigenous Peoples and International Law and Policy' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law Comparative and Critical Per*spectives (Hart 2009) 163-164.
[165] Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous Rights Discourse' (2008) 33 Alternatives 105.
[166] Corntassel, Supra.

approach founded on Indigenous and community values.[167] The self-determination without external compulsion is critical as the power dynamics between Indigenous Peoples and development policy drivers is unequal against Indigenous Peoples. This disadvantage Indigenous Peoples as it renders them susceptible to coercion, compulsion and influence which compromises their role and free will in the developmental process.

4.3.2 The Rights to Free, Prior and Informed Consent

As an amplification of Indigenous Peoples' participation in decision making about issues of concern to them, they have the right of free, prior, and informed consent (FPIC) as Indigenous Peoples. This right features in at least four provisions of the UNDRIP thus emphasising the centrality of Indigenous Peoples' consultation and participation in the national development dialogue. *Article 10* provides that Indigenous Peoples shall not be forcibly removed from their land and territories. No relocation shall take place without the free, prior and informed consent of the Indigenous Peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Moreover, *Article 19* of the UNDRIP provides that States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Similarly, *Article 29(2)* provides that states shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous Peoples without their free, prior, and informed consent. Furthermore, *Article 32(2)* provides that states shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

Barelli categorises these provisions into two. The first category contains those provisions that expressly prevent states from undertaking a specific action in the absence of the consent of

[167] Glen Coulthard "Place Against Empire: The Dene Nation, Land Claims and Politics of Recognition in the North" in Avigail Eisenberg, Jeremy Webber, Glen Coulthard, and Andree Boisselle (eds) Recognition versus Self-Determination: Dilemmas of Emancipatory Politics (UBC Press, Vancouver, 2014) 147 at 169

Indigenous Peoples examples being Articles 10 and 29(2).[168] The second category includes those provisions that request States to consult Indigenous Peoples in order to obtain their consent before taking certain actions, such as Articles 19 and 32(2).[169] A further distinction is drawn on to the type of duties these provisions impose on states in the following way:

> It was suggested that these two sets of provisions establish two different types of duty for States: in the first case, States would have a 'mandatory' duty to obtain the consent of Indigenous Peoples while, in the second, that duty becomes 'contexualised'.Although such a dimension seems coherent in light of the wording of the relevant provisions, it should not be implied that two different models of FPIC co-exist within the normative framework of the Declaration.[170]

FPIC in summary means that consent must be obtained without any coercion of Indigenous Peoples, in advance of the commencement of the project (be it relocation, legislative/administrative measures, storage of hazardous materials in their land or development/utilisation of Indigenous Peoples resources).[171] In that process, Indigenous Peoples must be allowed to consult amongst themselves and seek clarity, if need be, on the proposed project. Indigenous Peoples must also be furnished with sufficient and accurate information on the intended project to allow them to conclude on its impact on their livelihoods, lands, and overall being.[172] The basic notion of FPIC is that states should seek Indigenous Peoples' consent before taking actions that will have an impact on them, their territories, or their livelihoods. FPIC is an important provision for Indigenous peoples, their advocates, and supporters because one might assume that, where states recognise it, Indigenous peoples will have the ability to control how non-Indigenous laws and actions will affect them.[173]

FPIC applies on development projects of any nature taking place on Indigenous Peoples land and equally extends to projects that may affect their customary lands. Moreover, FPIC obliges States to involve Indigenous Peoples when seeking to formulate and implement development policies that will either directly or indirectly impact Indigenous Peoples lives. The right may

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[168] Mauro Barelli, 'Free, Prior and Informed Consent in the UNDRIP: Articles 10,19,29(2) and 32(2)' in Jessica Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018).
[169] Ibid.
[170] Ibid.
[171] Nqobizitha Ndlovu and Enyinna Nwauche, 'Free, Prior and Informed Consent in Kenyan Law and Policy After Endorois and Ogiek' (2022) 66 Journal of African Law 201; Alexandra Xanthaki, Rights of Indigenous Peoples under the Light of Energy Exploitation (German Yearbook of International Law 2013); Stefania Errico, *The rights of Indigenous Peoples in Asia Human Rights-Based Overview of National Legal and Policy Frameworks against the Backdrop of Country Strategies for Development and Poverty Reduction* (ILO 2017).
[172] Ibid and Corrine Lennox and Damien Short, (eds) Handbook of Indigenous Peoples Rights (Routledge 2016)
[173] Stephen Young, *Indigenous Peoples, Consent and Rights* (Routledge 2019).

be interpreted as accompanied by a reciprocating responsibility for the State or Corporates to respect the Indigenous Peoples right to give or withhold their consent to development projects in their land or that are targeted at them. At the root of this right, is an understanding that Indigenous Peoples land serve the past, the present and the future and their use of the land is interested in ensuring that the land remains fit for purposes and underscores the conflict between the indigenous use and the global economic model that promotes the constant exploitation of natural resources and expansion of infrastructures.[174]

FPIC is crucial in its entirety as it can mitigate the abuse of Indigenous Peoples which often manifest through the interference with their land, territories and resources and marginalisation in key decision making. For example, the conflict on the use of traditional lands to harvest natural resources to meet the market demands and national developmental plans have often been resolved using state or corporate powers. The use of state or corporate power entails disregard of Indigenous Peoples input because decisions are often made by structures that Indigenous Peoples have no representation in.

The question of development projects epitomises challenges faced by Indigenous Peoples of the world and curtailed their ability to enjoy their rights.[175] Thus FPIC directly addresses this issue and creates some state obligations towards Indigenous Peoples to avert the continued exclusion of Indigenous Peoples in developmental projects that affect them, directly or indirectly. FPIC arises from self-determination rights, but self-determination must be central to FPIC. In fact, FPIC is one of safeguards to the right to self-determination over lands and resources.[176] Whilst Barelli posits that FPIC may not be mandatory in other aspects (given that the second of FPIC should be contexualised), Anaya perceives FPIC as mandatory so much that the FPIC should not merely be the signing of a contract but should instead be a process over which Indigenous societies must have substantial control over matters within or affecting Indigenous peoples or Indigenous territories.[177]

Barelli argues that if one considers the drafting history of the UNDRIP, *Article 32 (2)* cannot be interpreted in such a way that States ought to seek and obtain consent from Indigenous

[174] Lennox & Short, Supra.
[175] Anaya, Supra.
[176] Jeffrey Warnock, Interpreting UNDRIP: Exploring the Relationship Between FPIC, Consultation, Consent and Indigenous Legal Traditions (Masters Thesis, University of West Ontario 2012) available at https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=10670&context=etd accessed on 14 June 2023; Nathan Yaffe, 'Indigenous Consent: A Self-determination Perspective' (2018) 19 Melbourne Journal of International Law 1;and UN Special Rapporteur on the rights of Indigenous Peoples James Anaya.
[177] Anaya, Supra and Barelli, Supra.

Peoples failing which States cannot proceed with development projects.[178] This view may be correct but for different reasons, the basis for curtailing Indigenous Peoples' powers within the FPIC framework may be understood from the prevailing world order and the power balance between Indigenous Peoples and States.[179] The disparity of power between the State and Indigenous Peoples does not allow Indigenous Peoples the leverage to have veto power against States.[180]

An argument however may be made as to why it is important to consider FPIC as a right that states are bound to honour without reservations and without using the admittedly skewed historical context to abdicate states of their responsibility.[181] Firstly, if FPIC is an essential component of self-determination, this means states are compelled to grant Indigenous Peoples a platform to decide what they consider suitable for their communities, and in that instance, the state must obtain consent before it proceeds with projects.[182] The opposite of the preceding argument would render the UNDRIP and the rights of no force and effect. Secondly, states had ample time to negotiate and renegotiate the content of the UNDRIP, even more so, were the only negotiating stakeholders that had the ultimate power to decide the actual content. Consequently, the interpretation of the UNDRIP must adopt the basic tenets of legal interpretation.[183] Consistent with the rules of interpretation, the use of the word *shall* in all the provisions relating to FPIC in the UNDRIP mean that FPIC is mandatory, and states cannot move forward on any projects unless Indigenous Peoples have given their consent.[184] The foregoing is more especially sensible against the argument that the UNDRIP will live up to promise if states deploy sustainability as an essential component of the rights conferred.[185]

Imani addresses FPIC as it relates to Indigenous Peoples inherent right over their territories, land, and resources, coupled with the states obligation to consult Indigenous Peoples about their resources and underscores the constraints in consultation as follows:

> On the other hand, this is the area where Indigenous People encounter the greatest pressure to assimilate. Mining, gas, and oil, forestry, agriculture, hydro-electric power generation, settlement: they can all

[178] Lennox and Short, Supra.
[179] Lesego Stone et al (eds) *Protected Areas and Tourism in Southern Africa Conservation Goals and Community Livelihood*s (London 2022) 87.
[180] Stone, Supra.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Corntassel, Supra.

> combine to create a rationale for pursuing a 'public good' that results in the transfer of the ownership and management of lands from the Indigenous inhabitants to the settler governments.[186]

The foregoing observation justifies FPIC as crucial in the continued existence of Indigenous Peoples. FPIC would mitigate the occurrence of the challenges Shin Imai allude to. If states invoked FPIC, Indigenous Peoples would benefit greatly through making representation of their thoughts on projects, participating in decision making and determining their pathways as communities.

The respondents observe the importance of FPIC in the context of the San's relationship with the GoB. Satau observes that FPIC is crucial as an expansion of the San's right to determination, however, the GoB had not figured the essential elements of FPIC as often any engagement with the San is often marred with intimidation.[187] Roy Sesana notes that FPIC constitutes elements that are inherent in their lives as First Peoples with custodian powers over land, territories and resources and that the GoB had an obligation to consult them on any matters affecting them and their land, territories and resources.[188] Celia is of the view that FPIC does not necessarily have to be provided for in any legal instrument as it is a moral law that any owner must be consulted and their decision awaited before any steps are taken with the potential to affect their ownership and rights over the commodity in question.[189] Majority of the San at grassroot level seem to subscribe to their inherent moral right to give FPIC to the GoB as it relates to the CKGR.[190]

4.3.3 Rights Relating to Territories, Land and Resources

The UNDRIP further seek to protect Indigenous Peoples rights over their territories, land and resources and recognise the special relationship Indigenous Peoples have with their ancestral land. The UNDRIP 's protective mechanism over land, natural resources and territories is two-fold. In the first instance, the UNDRIP guarantees Indigenous Peoples access to their land, natural resources, and territories.

Article 10 states that Indigenous Peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior, and informed consent of the Indigenous Peoples concerned and after agreement on just and fair compensation and, where

[186] Imai, Supra 301.
[187] Interviews, Supra.
[188] Ibid.
[189] Ibid.
[190] Ibid.

possible, with the option of return. Furthermore, *Article 26 (1)-(3)* provides that, Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous Peoples have the right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories, and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous Peoples concerned.

In the second instance, the UNDRIP recognises and protects the Indigenous Peoples' special relationship with their land, natural resources, and territories. Land as discussed in Chapter 3 is an important feature of the San's indigeneity. *Article 25* states that Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard. Whilst *Article 27* provides that States shall establish and implement, in conjunction with Indigenous Peoples concerned, a fair, independent, impartial, open, and transparent process, giving due recognition to Indigenous Peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of Indigenous Peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous Peoples shall have the right to participate in this process.

Ivison argues that the rights securing Indigenous Peoples land, resources and territories are critical now more than ever as settler colonialism persist, and its consequent dispossession of Indigenous Peoples' lands is not only something that happened in the past but is ongoing.[191] Gray illuminate the perils Indigenous Peoples have encountered and why rights relating to land is so important to them in the following way:

> For a people who are so oppressed that they cannot resist an invasion against their territory, the main hope is the implementation of their territorial rights. Should these be recognised legally, the people have some grounds for asserting their ownership.[192]

Natural resources and land use and control form the anchor of Indigenous Peoples' quest for self-determination and demand for their free, prior, and informed consent in the decision-

[191] Duncan Ivison Can Liberal States Accommodate Indigenous Peoples? (2020, Polity Press) 6.
[192] Gray, Supra.

making process. Consequently, it is near impossible to perceive all these rights as provided for in the UNDRIP in isolation. They are indivisible, interdependent and bring together wholesomeness if promoted and protected as a package. The idea of taking charge in decision making processes in Indigenous Peoples natural resources and land is so crucial such that it recurs in the UNDRIP to emphasise its centrality. Where the UNDRIP refers to land and natural resources, self-determination and free, prior, and informed consent are highlighted as the only recognised processes in making decisions relating to Indigenous Peoples. The protection of Indigenous Peoples Natural resources and land is now as equally important as it was in the colonial period, but more urgent as there are more entities interested in dispossessing Indigenous Peoples. Laltaika and Askew underscore the importance of land and resources for Indigenous Peoples in Africa in the following way:

> These peoples require access to land and water resources in their ancestral territories to pursue their legally protected ways of life per the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). However, powerful transnational corporations and conservation organizations—both typically aligned with local political and economic elites—were already identified in the 2003 WGIP report as a threat to indigenous lands, resources and livelihoods.[193]

Lewis argues that Indigenous Peoples around the world are increasingly threatened by eviction from their lands and other violations of their rights because of private sector development and extractive projects such as mining, oil and gas, and logging activities.[194] Whilst this is not a new phenomenon, the world is now experiencing shortage of resources which were never treated as finite in the past years, now with the realisation that resources are limited there is a new form of scramble for Indigenous Peoples resources. Development presents another dimension to the debate on Indigenous Peoples natural resources and land. In fact, the MDA is at the helm of why states require international standards on the development of Indigenous Peoples. The problematic nature of Indigenous Peoples development is articulated by Lewis in the following way:

> Governments and Indigenous Peoples may have different views of such development and extractive projects. Governments may tend to regard them as opportunities to contribute to national economic development and bring benefits to the country, such as employment, infrastructure investment and increased tax revenues. However, Indigenous Peoples often view

[193] Laltaika and Askew Modes of Dispossession of Indigenous Lands and Territories in Africa available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/01/Laltaika-and-Askew_UN-paper_rev3.pdf accessed on 17 August 2022

[194] Corinne Lewis Indigenous Peoples and the Corporate Responsibility to Respect Human Rights in Corinne Lennox and Damien Short (eds) Handbook of Indigenous Peoples' Rights (Routledge 2016).

> such projects from another perspective. For them, the land to be developed is an integral part of their lives and culture; the forest, mountains, plains and water resources are not only crucial to the sustenance of their communities, but they also have cultural and religious meaning. The negative impacts of development projects-loss of land and livelihoods, environmental and labour issues, and security implications-often far outweigh any positive benefits from development and extractive projects such as employment opportunities or new roads.[195]

The inevitable conflict between states and Indigenous Peoples as alluded to above posits Articles 10, 26, 25 and 27 of the UNDRIP as a potential equaliser. From the point of view of the San, land rights and resource rights may be understood as proprietary rights, an expression of cultural, identity, religious rights, indigenous livelihood, and a representation of Indigenous Peoples exercise of self-determination in their territories and in their resource use.[196] For Wiessner, key to the effective protection of Indigenous Peoples is the safeguarding of their land because being 'indigenous' literally means to live within one's roots.[197] In fact, in their own words Indigenous Peoples around the world are often consistent in revering their land and natural resource and equating them to their entire existence.[198]

Whilst Articles 10, 26, 25 and 27 protect different facets of Indigenous Peoples lives, they are intended to mitigate the prevalent conflict based on divergent outlook on land and natural resources between Indigenous Peoples and states. The conflict, which has become complex and more sophisticated, still has historical genealogy of domination, discrimination, and dispossession of Indigenous. This happens by firstly classifying their way of being, doing and owning land and natural resources as non-existent or inadequate in the evolving world. Whilst Article 10 and 26 are intended to facilitate access to lands and territories. Whilst Articles 25 and 27 are designed to protect Indigenous Peoples' homelands, particularly from conservation movements and national governments.[199] The protection of Indigenous Peoples' homelands is necessary because of the cultural differences and assumptions about the natural world, the place of humans within it and the demands for natural resources.[200]

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[195] Lewis, Supra 201.
[196] Interviews, Supra.
[197] Siegfried Wiessner, 'Indigenous Self-determination, culture, and land: A Reassessment in Light of the 2007 UB Declaration on the Rights of Indigenous Peoples' in Elvira Pulito(ed) *Indigenous Rights in the Age of UN Declaration* (CUP 2012) 31.
[198] Rauna Kuokkanen, 'From Indigenous Private Property to Full Dispossession–The Peculiar Case of Sápmi Comparative Legal History' (2023) 1 23.
[199] Kathleen Martin, 'Traditional Responsibility and Spiritual Relatives: Protection of Indigenous Rights to Land and Sacred Places' in Elvira Pulitano (ed) *Indigenous Rights in the Age of the UN Declaration* (CUP 2014) 198.
[200] Martins, Supra.

On the relevance of Article 10 and 25 of the UNDRIP, Sesana observed that he perceived the two provisions to be central to the San's cause for their recognition as Indigenous Peoples and as constitutive of an extension of their right to self-determination and consultation. Sesana observed thus:

> The Declaration gives an opportunity for a dialogue between us and the GOB. I see it as a very important legal instrument that seeks to protect our land and natural resources which are constantly under threat from the GOB. Perhaps if the GOB took time to understand us and what we are about as San communities, there would be a productive way forward. The CKGR remains more than just a home to us, whilst it is a hunting and mining site for the GOB. As San communities, we would under no circumstances hurt our land, for if we do so we upset our ancestors, and we suffer the most. We thrive only if we take care of our land and our resources. How are we discharge our moral obligation to our land if they evicted us? The San in Kaudwane, New Xade and Xere are long overdue to return to the CKGR. Then we will know what the UNDRIP speaks to is a lived reality.

Indigenous Peoples' rights over their land, natural resources and territories are so important that *Article 10* makes FPIC mandatory.[201] The foregoing view is supported by Phillips who observes that the UNDRIP generally requires only consultation and not consent of Indigenous Peoples with the exception of decisions relating to relocations.[202] Gilbert draws an indispensable relationship between Indigenous Peoples' rights over land, natural resources and territories and rights relating to self-determination and free, prior and informed consent under the consultation banner and argue that:

> Within the Declaration it is clear that the part relating to land and territorial rights (Articles 25-30) considers Indigenous Peoples' land rights as rights to be exercised within the State based on the recognition of indigenous institutions and customs relating to the management of their territories; thus, they could be considered a form of autonomous management.[203]

Barelli weaves a golden thread between the various provisions of the UNDRIP, highlights their interconnectedness, underscores the sacrosanctity of Indigenous Peoples land rights and observes that the UNDRIP is intentional about preserving the rights to own and control land, natural resources and territories.[204] According to Barelli, Indigenous Peoples have a distinct

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[201] Jessika Eichler, *Reconciling Indigenous Peoples' Individual and Collective Rights Participation, Prior Consultation and Self-determination in Latin America* (Routledge 2020)

[202] James S Philli, 'The Rights of Indigenous Peoples under International Law' (2015)26 Global Ethics 120.

[203] Jeremie Gilbert, *Indigenous Peoples' Land Rights Under International Law From Victims to Actors* (2006 Transnational Publishers) 229.

[204] Mauro Barelli, 'The United Nations Declaration on the Rights of Indigenous Peoples: A Human Rights Framework for Intellectual Property Rights' in M Rimmer (ed) *A Research Handbook on Indigenous Intellectual Property* (Edward Eglar, 2014).

and profound relationship with their lands, which relationship is at the core of their societies, and encompass social, cultural, spiritual, economic, and political dimensions.[205] The collective implication of Articles 10, 26, 25 and 27 is to bestow access to and ownership of indigenous land, natural resources and territories on Indigenous Peoples and preserve the sacrosanct relationship Indigenous Peoples have with their land, natural resources and territories. For Prasad the Declaration's land mandate recognises the inherent connection between land rights and the most basic requirements for sustaining indigenous cultures.[206] Land rights may be essential to maintaining traditions based on spiritual connections to certain land as much as land and resources are critical to development of indigenous community-based economies.[207] The UNDRIP goes beyond protecting Indigenous Peoples rights over their land, natural resources and territories but stipulates modes of engagement between states and Indigenous Peoples to find productive ways of engagement with a view to promotion and protecting Indigenous Peoples rights generally and land rights specifically. Prasad observes that:

> The Declaration seeks to create an open discussion between indigenous peoples and national governments considering the particular needs of the groups involved. The drafters did not intend to create a straitjacket under which remedies are mandated regardless of the needs or agreements of the parties involved. This becomes apparent when the Declaration is read as a whole.[208]

The preceding observation underscores what this thesis considers an essential element of Indigenous Peoples rights regime, namely that although the Indigenous Peoples of the world have similar experiences with nation states, ethnic majorities, and capitalist entities, their individual needs vary and should be a paramount consideration in the implementation of the UNDRIP. For example, while some Indigenous Peoples are not interested in interacting with outsiders, the San are keen on interacting with outsiders, willing to collaborate on projects with outsiders and even share the CKGR with the GoB. Consequently, the UNDRIP must respond to the geopolitical, historical, and divergent cultural factors. This is especially underscored by the UNDRIP provisions relating to land and territorial rights. At the face of it the Articles relating to land and territorial may seem to be repetitive if one does not pay attention to their nuances as they are intended to protect different aspects of Indigenous Peoples land and territorial rights as well as Indigenous Peoples in different contexts.

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[205] Barelli, Supra.
[206] Viniyanka Prasad, 'The UN Declaration on the Rights of Indigenous Peoples: A Flexible Appr Flexible Approach to Addressing the Unique Needs of Addressing the Unique Needs of Varying Populations' (2008) 9 Chicago Journal of International Law 297.
[207] Ibid.
[208] Ibid, 316.

The salient features of *Article* 10 are the prohibition against forced removals of Indigenous Peoples; the mandatory requirement that their free, prior, and informed consent be obtain if any relocations are to even occur; the right to just and fair compensation and the right to return where the Indigenous Peoples agree to relocations. In theory, Article 10 should grant protection of Indigenous Peoples against the recurring relocations for the MDA or conservation. This is because *Article 10* creates an unprecedented higher threshold of protection in that if the Indigenous Peoples refuse to grant their consent, no relocations will take place. However, in practice, states often find ways to mitigate the protective nature of international law. For example, some Respondents affiliated with the ruling party asserted that the UNDRIP has no bearing on the protection of Indigenous Peoples in Botswana because it constitutes soft law and has no binding effect.

The San at grassroot level and the San activists recognise the protection against forced removal and other ingredients alluded to above as important and possible mitigation against their recurring forced relocations.[209] Interestingly, whilst the San at grassroot level observe that their quest to stay in their ancestral land is absolute and should not be a subject of negotiation with the GoB, these respondents state that there was a window of opportunity for negotiations to open the CKGR for sharing with the GoB and third parties subject to stringent conditions that their communities would stipulate.[210] One of the notable conditions include compensation to the San communities for the use of the CKGR by the GoB.[211] Their justification for compensation is that when the San agree to share the CKGR with any third party, their rights are curtailed, and they are constrained and forced to relocate their livelihood, religious and other activities elsewhere to give space to the third party.[212] The proposition for compensation to the San in the event they share the CKGR with others is justifiable, as legitimate owners they have the right to decide conditions for accessing their resources and third parties have the legal and moral obligation to respect such conditions. The San activists like lawyers, academics and development officers articulate the right in international law parlance and observed that it is intended to ensure that the 'CKGR mass relocations' cease.[213]

Article 26 recognises Indigenous Peoples rights over land, territories, and resources (LTR). This article recognises the LTR rights through traditional ownership, usage, occupation,

[209] Interviews, Supra.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.

acquisition, possession. The article further obligates states to give legal recognition and protection of the LTRs and such recognition must be done with due respect to the Indigenous Peoples customs, traditions, and land tenures systems. According to Yap, the wording of the UNDRIP stresses that the rights of Indigenous Peoples to the lands, territories and resources are not given by the state but are recognised for indigenous Peoples because of their traditional use and utilisation.[214] Yap argues that:

> The declaration distinguishes two types of rights over LTR: those that are applied over LTR under their possession and those that are exercised over the lands that they have traditionally owned, occupied or otherwise used or acquired. The criteria used for defining the type of rights applied over LTR are the current or past occupation. Thus, Indigenous Peoples have more rights over LTR currently occupied than over LTR occupied in the past. [215]

Article 25 on Indigenous Peoples rights over land, resources and territories is twofold. It recognises the Indigenous Peoples spiritual relationship with their owned, occupied, used land territories, costal seas, and other resources, and places an obligation on the Indigenous Peoples to ensure that they discharge their responsibilities to maintain and strengthen their distinctive relationship with their lands in the present and in the interest of future generations. The UNDRIP does not distinguish between rights over lands and territories occupied in the present or in the past therefore Indigenous Peoples also have the right to maintain and strengthen their spiritual relationship with lands that are no longer under their control.[216] The aspect of protecting Indigenous Peoples spiritual relationship in resources they held in the past is important to give them access to land they cannot get back but can access for ritual purposes. Yap articulates the essence of this provision in the following way:

> Article 25 of UNDRIP acknowledges the right of Indigenous Peoples to maintain and strengthen their spiritual relationship. This implies an active role of Indigenous Peoples, considering the possibility of improving and reinforcing this relationship. Moreover, article 25 of the UNDRIP refers to the special relationship with their territories, including water, coastal seas, and other resources, linking this relationship to their preservation and sustainable use; this implies that the special relationship between Indigenous Peoples and their territories contributes to their sustainable use.[217]

[214] Siu Lang Carrillo Yap, *Land and Forest Rights of Amazonian Indigenous Peoples from a National and International Perspective: A Legal Comparison of the National Norms of Bolivia, Brazil, Ecuador, and Peru* (BRILL 2022).
[215] Ibid.
[216] Ibid.
[217] Yap, Supra 38.

Without necessarily referencing the UNDRIP, the San at grassroot level have interesting views on their right to maintain and strengthen their spiritual relationship with their land. Majority of the respondents observe that the CKGR is not just their ancestral land but is a shrine for their religious rituals.[218] Both the San in the CKGR and outside the CKGR note that the recognition of their spiritual relationship with their land is often a complicated for outsiders to understand which is the genesis of the forced relocations in Botswana.[219] The San at grassroot level were generally fascinated that international law was more progressive than national law in understanding their complex relationship with their land, resources, and territories.[220] For example Goonamo observes that:

> My umbilical cord was cut in what was later called CKGR, and that of three generations before me. All my children, grandchildren and great grandchildren's' umbilical cords were cut in the CKGR. I had my first son as soon as the CKGR was established. After the forceful removal, I have stayed in this village since 1997 following the tragedy you know about. I can tell you that since my arrival here, I have not known peace. I am half blind, diabetic, and have an array of medical conditions that will take me a lifetime to list to you. What o you know? They all started in 1997 on my arrival here. I have no doubt in my mind that all these are ancestral wrath for turning my back on our land, for failing to nurture my spirituality and neglecting the spirit of my forefathers in Molapo. It is a breath of fresh air to learn that someone out there care so much about our spiritual relationship with our land to a point they want the GoB to respect that.[221]

Majority of the San activists note that often in their representation to the GOB, they emphasise the San's spiritual relationship with the CKGR and submit that if not for anything, those who are relocated should be allowed to access the CKGR to fill their spiritual void which is inherent in continued absence from the CKGR. The San activists like Satau perceive Article 10 as providing another dynamic to Indigenous Peoples rights and reinforcing the peculiarity of being indigenous in the following way:

> A spiritual relationship with the CKGR is formed as soon as one is born. There are some San who were born outside the CKGR and who yearn to retreat to the CKGR for spiritual purposes. The CKGR is not just a bare land, it has some spiritual complexities that only San can understand.[222]

[218] Interviews, Supra.
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Ibid.

Majority of the respondents perceive *Articles 10, 25, 26,* and *27* to be pivotal in the promotion and protection of the San's rights in Botswana.[223] In his understanding of *Articles 10, 25, 26, 27*, Sesana observe that:

> I am aware of all the provisions you are referring to and I do not think I need international law to tell you what we need as the San. International law as you call it has merely formalised what we have been saying about what we require to thrive as communities. We need the CKGR, and the resources found therein. I like however that international law recognises our rights over land and resources that we no longer own, and we can maintain our special relationship with such. There are people in Xere for example, who with a painful heart accepted the relocations because now in their 90s they are staring death with their eyes but would want to return to the CKGR for spiritual rituals which include burial with their forefathers and mothers. International law serves us better than your nation state law can ever do.[224]

For Satau, the collective reading of the Articles 10, 25, 26 and 27 present a formidable ground for different Indigenous Peoples of the world to ascertain their rights.[225] Land, territories and resources constitute the foundation for other aspects of Indigenous Peoples lives so the essence of the provisions cited is to secure by extension all other rights.[226] The views expressed by Satau are shared by Mogodu who as a San activist with a law degree deems the content of the UNDRIP satisfactory in promoting and protecting the San's LTR rights.[227] Tsebe observes that the LTR rights in the UNDRIP are captured in such a way that states would not be able to denounce their existence for Indigenous Peoples, in that some aspects of the UNDRIP tend to directly state that Indigenous Peoples have those rights, and the States have an obligation to ensure such rights are enjoyed by Indigenous Peoples.[228] For Development Officers, the LTR rights as captured in the UNDRIP provide the bare minimum and can address what the San are constantly complaining about if implemented by the GoB.[229] The San at grassroot level observe that the provisions on LTR are impressive but merely an enforcement of their gifts bestowed by destiny. Interestingly, Oneone observes that:

> If there are laws that are written in the diaspora about our LTR, then it must mean that the drafters speak directly with our ancestors. You call them laws, we call them moral code. Mother earth gifted us the CKGR, with the wild berries, all the wild animals, that you have seen for yourself in your long drive here, and the minerals. The CKGR is beautiful, isn't it? With that beauty comes the right to enjoy

[223] Interviews, Supra.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid.

> responsibly. LRT are finite and we do all we can to protect what we have as is our duty. All I am saying is, we do not necessarily need anyone in Geneva to tell us we have 'rights' over the CKGR.[230]

As discussed above there are notable glaring challenges on the implementation of the cardinal principles on the development of Indigenous Peoples, however their great potential must be acknowledged. In interviews with various stakeholders on Indigenous Peoples in Botswana, majority of the respondents who identified as San at grassroot level reported being oblivious of the existence of the specific cardinal principles on the development of Indigenous Peoples within regional and international frameworks.[231] However, San respondents generally acknowledge that what they deem consultation from the GOB about issues that directly or indirectly affect them was a requirement for a functional relationship between them as citizens and the state.[232] Moreover, the San respondents perceive themselves as possessing ancestor bestowed right to determine the trajectory of their lives as communities.[233] In doing so, traditional practices and values are crucial and should remain unadulterated. Further San respondents allude to an inherent right to own and occupy their ancestral land which is coupled with the right to have a final say in the resources found in their ancestral land.[234] Expressions of what the San respondents at grassroot level deem central to their communities tied neatly with what international law provides through the UNDRIP, although expressed in different ways.[235]

The respondents that report awareness of the existence of the UNDRIP and cardinal principles on the development of Indigenous Peoples observe that the GoB was a perennial transgressor of all the principles discussed herein[236]. This position is supported by the San activists who generally observe that international law on Indigenous Peoples is not so detached from the expectations of the San as far as the cardinal principles on the development of Indigenous Peoples are concerned.[237] The San activists posit that, that which international law on Indigenous Peoples provides as crucial in the promotion and protection of Indigenous Peoples may find expression in the San terminology.[238] Satau for example highlights that international

[230] Interviews, Supra.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Ibid.
[238] Ibid.

law reference land as ancestral land whilst the San call it the land of our forefathers and foremothers or our ancestor's land or the land we hold in custody for our unborn children.[239] Both the San and international law acknowledge and accept the communal ownership of Indigenous Peoples' land and the ability of such a land to transfer ownership from one generation to another without 'the common law documentation' for example.[240] Roy Sesana underscores that the San value the land and the resources found therein and would not be able to consider themselves as rightful owners of their ancestors' land without the unhindered benefit and enjoyment of the resources.[241] Roy Sesana found that the San's expressions of how crucial natural resources are to their overall being resonates with international law on Indigenous Peoples which confers Indigenous Peoples the right to enjoy the benefit of their natural resources.[242] Mogodu is of the view that, whilst the terminology within the UNDRIP and the San's expressions of what they consider their nature given entitlements may be different, the spirit and purpose of both expressions resonate with each other.[243] For Mogodu, both the San and international law on Indigenous Peoples are interested in ensuring that the San do not lose their valued possession and that in retaining their valued possession, the GOB deals with the San within defined and reasonable parameters that do not diminish the San's enjoyment of their nature given entitlements.[244]

4.4 Conclusion

Indigenous Peoples issues are contentious. The promotion and protection of Indigenous Peoples compounds the contended aspects of these issues as demonstrated by the regional and international mechanisms on the promotion and protection of Indigenous Peoples. The regional and international mechanism on Indigenous Peoples evolved to address Indigenous Peoples concern as they relate to their exclusion in key decision making, misuse and abuse of their land, territories and natural resources, discrimination, assimilation, and erasure of Indigenous Peoples ways of doing and being. The evolution of the international Indigenous Peoples rights

[239] Interviews, Supra.
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] Ibid.

regime is credited to the Indigenous Peoples' proactiveness. Indigenous Peoples played a pivotal role in the articulation of regulatory and institutional frameworks targeted at their agency and activism and participated in the making of the UNDRIP.

At a theoretical level, both the regional and international institutions and regulatory frameworks appear best placed to address the ongoing injustices against Indigenous Peoples. The existing mechanisms: prohibit states from engaging in repugnant conduct against Indigenous Peoples, are instructive on processes and procedures states ought to follow prior to making decisions affecting Indigenous Peoples and provide redress platforms and extend Indigenous Peoples' agency and representation in dialogues directly or indirectly affecting them. The rights conferred by the UNDRIP such as participation, access to land, self-determination what Indigenous Peoples deem crucial for their survival in a rapidly changing world and even consider it a reflection of the basic minimum for them to thrive as communities. Against this backdrop, the UNDRIP with all its flaws can become a language, discourse, process, means and platform through which contestations on international law can be reframed and rearticulated. Through the UNDRIP, Indigenous Peoples posit themselves as not mere recipients of international law, but authors of same in their own rights.

The fundamental ideologies behind the UNDRIP and Indigenous Peoples' rights are deceptively simple. The practicalities of the promotion and protection of Indigenous Peoples rights are however complex. Many factors contribute to the many complex facets of implementation of Indigenous Peoples' rights, at the helm of such factors include the singular fact that crucial stakeholders like states are not willing to create a conducive environment for Indigenous Peoples rights to thrive. In fact, states as key stakeholders are not willing to instantaneously address inherent hurdles in the implementation of the UNDRIP because that might threaten the essence of their power held within their territories and beyond. This is no wonder the promotion and protection of Indigenous Peoples rights progresses painstakingly slow. The recognition and performativity of Indigenous Peoples rights as provided for in the UNDRIP present the pinnacle of the 'dilemmas of the Indigenous Peoples emancipatory politics' of the 21st century. Whilst many aspects of the UNDRIP have greater potential to unlock the Indigenous Peoples activism quest; recognition, redress, reconciliation, and inclusivity, concerted efforts are required.

The promise of the UNDRIP require that the Indigenous Peoples' power be acknowledged performatively by states. This would be a turnaround from the norm where States simply use

their sovereignty to perpetuate national policies that subjugate Indigenous Peoples thus overriding international law. The deployment of states' sovereign right over people and resources in their territories has been one of the key challenges to the performativity of international law. Thus, the inherent limitations in the international legal system diminish the greater potential presented by some international legal frameworks such as the UNDRIP. Other notable challenges evident in the practical application of the international legal system include the non-traditional activism of Indigenous Peoples within the international plane which has effectively rendered their budding activism quite slow paced in securing Indigenous Peoples' interest as rights bearers. Similarly, the UNDRIP's non-binding nature curtails the greater potential in harnessing Indigenous Peoples rights. Whilst an argument may be made that the overwhelming support the UNDRIP received at its adoption render it customary international law, patterns within states show that states have not operationalised the UNDRIP, in fact some states that supported the adoption of the UNDRIP engage in conduct that contradict the UNDRIP. An example here is Kenya and Botswana. Moreover, the dualist and monist nature of international law in states delay the implementation of the crucial principles embodied in the UNDRIP and render the promotion and protection of Indigenous Peoples rights a mirage. Whilst the UNDRIP should catalyse the promotion and protection of Indigenous Peoples rights, its influence has not reached many states in Africa.

To say that the UNDRIP has been slow in securing Indigenous Peoples rights should not be misconstrued as suggesting that Indigenous Peoples status within the international plane remains static or that international law has not had any positive impact in the promotion and protection of Indigenous Peoples' rights. Generally, Indigenous Peoples found their platform, voices, and activism through international law. Within domestic courts, where the UNDRIP may not automatically apply by virtue of dualism, Indigenous Peoples may couch their claims within the classic international law and in the process set precedents that may compel a state to rethink its position on Indigenous Peoples or confer obligations on a state to promote and protect Indigenous Peoples rights. Furthermore, dialogues at international law on Indigenous Peoples have been crucial in contributing to the recognition of Indigenous Peoples as rights bearers and to the adoption of the UNDRIP. The UNDRIP has great potential as it is one of the few international instruments that resulted from the participation of various stakeholders including Indigenous Peoples. The UNDRIP is equally relatable to Indigenous Peoples who may have not been active participants in its making like the San as demonstrated by the findings of the interviews.

Like many other legislative frameworks, the UNDRIP requires some application to give effect to its aspirations. The implementation may be complicated. Consequently, Indigenous Peoples have a daunting task to intensify their advocacy at regional and international level with the hope that such efforts will trickle down and impact their lives positively within the nation state. Indigenous Peoples would be required to find innovative ways to compel states to implement the UNDRIP nationally. Courts have generally proved to be Indigenous Peoples allies in ensuring that states conform to the basic expectations when dealing with Indigenous Peoples.[245] Thus, Indigenous Peoples may seek the court's interventions in 'compelling' states to implement the UNDRIP. The *Sesana case* discussed in Chapter 1, 2 and 3 serves as an example of the proactive role Indigenous Peoples play in giving effect to international law. There lies the greater potential of international law.

[245] Joseph Letuya and Others v Attorney General and Others [2014] eKLR; Ogiek case, Supra; Sesana case, Supra.

CHAPTER 5
THE IMPACT OF THE MDA ON THE RIGHTS OF THE SAN

5.1 Introduction

Across the globe, Indigenous Peoples contend with national development models dependent on the extraction and exploitation of natural resources such as mining and tourism. Mining and tourism are often designated as economic development activities that are sanctioned by the norms and values popularised by International Organisations (IOs) such as International Monetary Fund (IMF) and World Bank (WB).[1] These institutions are critical in the shaping of national MDA policies, and they somewhat constitute the 'invisible hand' that controls national focus and what internal governments such as the GoB prioritise in their MDA aspirations.[2] As indicated in Chapter 1, the thesis is confined to the interaction between the GoB and the San.

The economic development activities that are popularised by the Ios are central to the Modern Development Agenda (MDA) as development prioritises economic growth and market openness.[3] Eslava argues that prioritising economic growth and market openness, instead of promoting self-sufficiency is problematic because embarking on development does not necessarily have a positive impact on the subjects of development.[4] Despite the fact that there may be no value added from MDA, states still promulgate and implement MDA laws and policies because there are 'rewards' for advancing the MDA such as global recognition for the strides a state makes in its developmental endeavours.[5] Through economic activities like mining and tourism, states strive for social progress as development is continually reiterated as a space of hope.[6] Mining and tourism are important economic development activities and underpin the developmental plans adopted by the Government of Botswana (GoB).[7]

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[1] Julien Chaisse and Georgios Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order' (2023) 22 Cambridge University Press World Trade Review 1.
[2] Emmanuel Botlhale (2017) Sustaining the developmental state and moving towards a developed state in Botswana, Development Southern Africa, 34:1, 90; African Journal of Political Science and International Relations Vol. 4(7), pp. 249-262.
[3] Atul Kohli, 'Politics of Economic Growth in India, 1980-2005: Part I: The 1980s' (2006) 41 Economic and Political Weekly 1251.
[4] Luis Eslava, *Local Space, Global life: The Everyday Operation of International Law and Development* (CUP 2015).
[5] Ibid.
[6] Sundhya Pahuja, *Decolonising International Law, Development, Economic Growth and The Politics of Universality* (CUP 2011).
[7] See National Development Plan which ran from 1st April 2009 to 31st March 2016 available at CHAPTER 13 (who.int) at 42 accessed on 2nd March 2023. Also see National Development Plan 11 Volume 1 April 2017 – March 2023 available at • (un.org) at 8 accessed on 3rd March 2023.

The designation of mining and tourism as crucial economic development activities in Botswana is evidenced in the fieldwork underpinning this thesis research. Mining and tourism activities were taking place in the Central Kalahari Game Reserve (CKGR) at the time of the field work. The San in Botswana have thus been affected by developmental policies premised on the GoB's need to access the land and the natural resources found in the CKGR, the San's ancestral land. Whilst the San would prefer to live in their ancestral land harmoniously, the development goals of newly independent states like Botswana have proven to be at odds with the subsistence viability and cultural survival of those living in frontier environments like the San.[8]

The San respondents cite a myriad of abuses by the GoB including forced relocations, dispossession of their land and continued denial to access natural resources and ancestral land.[9] Other forms of abuse allegedly perpetrated by the GoB were physical abuse, denial of water and structural hurdles in accessing opportunities available easily to other citizens. The San also note that they were excluded from participation in legal, social and economic platforms.[10] The San respondents further indicate that the GoB is generally condescending and treats them with utmost contempt, an example being making decisions concerning the San without their representation.[11] The San respondents assert that the process followed by the GoB in relocating them was contemptuous.[12] The general view amongst other respondents is that the San in Botswana are the measure of true deprivation and discrimination.[13] The field work buttressed further that death, dehumanisation, displacement, dispossession and disintegration characterise the lives of the San in both the resettlement villages and in the CKGR.[14] As discussed in Chapters 1 and 2, majority of the respondents attribute all these experiences to the MDA.

From the field work findings, Setobadiphuduhudu shares a dreadful experience of being transported in a truck transporting hundreds of dogs from the CKGR as a punishment for resisting relocation whilst leaving behind family members.[15] Throughout this trip, the dogs vomited all over the respondent and she was instructed to remain still.[16] Goonamo indicates

[8] Ronald Niezen, *The Origins of Indigenism; Human Rights and the Politics of Identity* (UCP 2003).
[9] Interviews were conducted in Xere, Kaudwane, New Xade and Central Kalahari Game Reserve between May 2022 and August 2022 amongst the San at grassroot level, civil servants and politicians; and virtual Virtual interviews were conducted between June 2021 and June 2022 amongst San activists, activists, academics, civil servants, lawyers, and politicians.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.

that he was forcefully relocated from CKGR and had not seen his siblings in the CKGR for two decades.[17] Extra who was in Junior school at the time of the forced relocations is not allowed back into the CKGR since he left for school prior to the relocations, he is barred from visiting the CKGR.[18]

An illustration of the community disintegration occasioned by the forced relocations became clearer when I arrived in Mothomelo, a settelemnt in the CKGR. Two young men ran towards our research vehicle perhaps to welcome us. Our research interpreter stepped out of the car when the two young men landed by his door. The two young men screamed in shock, hugged the research interpreter, and said at once 'Mureu ke wena! O a tshela?O a tshela tota?' which translated to 'Mureu is that you? You are alive? You indeed are alive!' Time stood still, love was shared, and tears of joy shed by the trio. As if realising that the community was missing out on a precious moment, the two young men at once released the group hug and bolted towards a shade where the community awaited the social services screaming 'batho tang le boneng Mureu, Wa tshela!' which loosely translates to 'People come and see Mureu, He is alive!' Reacting to the announcement, multitudes ran towards our research vehicle and a community broke in song, tears, and poems to welcome the son of the soil who has been separated with his people because of the forced relocations. This was a bittersweet sight, exemplifying how one man had not seen his family for decades because of forced relocations. I watched as the impact of the MDA amongst the San unfolded, in front of me.

This predominantly field work-based chapter focuses on how the MDA impacts on the San's rights. This chapter makes several claims. The fieldwork findings demonstrate that the San have not been able to exercise their right to self-determination as it relates to the MDA adopted by the GoB, nor have they been able to make decisions about the fate of their LTR in the formulation and implementation of MDA policies in Botswana. Moreover, the GoB has neglected its duty to consult the San and allow them space and time to give their free, prior, and informed consent before making MDA decisions affecting their lives and LTR. Similarly, the GoB has persistently denied the San their rights over LTR. The exclusion of the San in decision making and denial of their LTR has resulted in the adoption of MDA policies that are harmful to individuals and communities.

[17] Interviews, Supra.
[18] Ibid.

MDA thus affect the San adversely in the following ways; Firstly, MDA rendered the San among the poorest in Botswana; Secondly, that the GoB has deployed the MDA as a dispossessory tool against the San; Thirdly, that the GoB makes policies intended to present hurdles for the San in accessing natural resources, consequently leaving the San in a perilous state; Fourthly, the GoB's relocation of the San from the CKGR resulted in high levels of imposition of 'others' way of life on the San which has exacerbated the San's social, legal, and economic vulnerabilities; Fifthly, that to the extent that the deployment of the MDA in Botswana is dependent on forced relocations, the intended development has no value to the San as their livelihood, lifestyle, culture, identity, and religion are dependent on their ancestral land. Thus, the MDA has a negative effect on San's rights as articulated in international law.

This chapter begins with this introduction, then an analysis of how the MDA impacts the San's rights which will focus on the right to self-determination, the right to give free, prior and informed consent before decisions affecting them and their Land, Territories and Resources (LTR) are made and the rights relating to possession, use, ownership of LTR and a conclusion.

5.2 The San, The MDA, and Indigenous Peoples Rights

Prompted by the 'Pitseng Burial Saga' litigation before the Court of Botswana between 2022 and 2023, debates concerning the MDA and Indigenous Peoples rights in Botswana have gained increased traction.[19] The refusal by the GoB for the family of Pitseng to bury him in the CKGR despite being born in the CKGR, proof that he was forcefully removed from the CKGR and that his final wish was to be buried in the CKGR serves to buttress the indictment of bullying the San perpetrated by the GoB.[20] The last time MDA and Indigenous Peoples rights issues in Botswana received so much attention was during the forced relocations of the San from the CKGR to the resettlement villages and during the resultant litigation case, the *Sesana case*.[21] The *Sesana case* began a conversation on the construction of MDA and Indigenous Peoples rights in Botswana. The *Pitseng case* serves to underscore the lifelong implications of the dispossession through MDA and to buttress that the MDA interferes with the San's rights to maintenance of lifestyle, culture, religion, and livelihood.

[19] *Lesiame Vice Pitseng V Attorney General and Kabelo Jacob Senyatso Case NO:UAHGB-000064-22; Lesiame Vice Pitseng V Attorney General and Kabelo Jacob Senyatso Case NO: CACGB-086-22.*
[20] Ibid.
[21] *Roy Sesana and Others v Attorney General [2006] 2 BLR 633.*

Horrid experiences of Indigenous Peoples are attributable to various factors and actors bound together by MDA. The implications of the MDA on Indigenous Peoples present the ideological, political, and practical controversy of development. The case of the San in Botswana demonstrates that there are undoubtedly inherent tensions between the MDA and the promotion and protection of Indigenous Peoples rights. Ideally, the MDA was posited to advance the promotion and protection of Indigenous Peoples rights. However various implementation variables in the context of Botswana render the MDA and the promotion and protection of Indigenous Peoples rights *mutually exclusive*. Some notable variables in the MDA policies in MDA adopted by the GoB include its integrationist approach which seeks to integrate the San into the Tswana economic, social, and legal system; and using MDA policies as a nation building tool which anchors the nation on Tswana ethos, values, culture, and identity amongst others.

While the GoB argues that it embarks on developmental pathways intended to improve the lives of the San with the end goal of safeguarding the San's rights, the processes followed undermine international law cardinal principles in the development of the San therefore trampling upon the San's rights. While international law dictates the minimum standards the GoB must adhere to in its development of the San and the use of the San's LTR, the GoB granted lodging, exploration, mining, and tourism licences to third parties and relocated the San from the CKGR without consultations with, and the consent of the San.[22] In both instances, the GoB used the MDA as a justification and warranting its action, though detrimental to the San. This attests to the assertion that states will go to great heights to pursue development despite the mountain of evidence of the violence, dislocation and misery brought in its name.[23]

In 2010, the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples visited Botswana and observed that the current problems faced by Indigenous Peoples in the country were associated with three underlying, interrelated issues: respect for cultural diversity/identity, political participation and consultation, and redress for historical wrongs.[24] The respondents corroborate the findings of the Special Rapporteur. For these respondents, there was cultural genocide against the San, exclusion from all decision-making platforms, and constant pain from the past experiences which has culminated into real fear of what the GoB is planning next. The respondents were in consensus that the San's forced

[22] Niezen, Supra.
[23] Pahuja, Supra.
[24] See UN expert on indigenous people concludes visit to Botswana | OHCHR accessed on 20th January 2023.

relocations was the genesis of all the negative experiences the San had and that it presents a classical execution of the MDA the *GoB way*. In analysing the impact of MDA on Indigenous Peoples rights, Wiessner posits that:

> Empirically and historically speaking, virtually all Indigenous Peoples share a common set of problems resulting from the tortured relationship between the conqueror and the conquered. First, the conqueror took away the land that indigenous peoples, in line with their cosmovision, had freely shared. Second, the conqueror's way of life was imposed. Third, political autonomy was drastically curtailed. Fourth, indigenous peoples have often been relegated to a status of extreme poverty, disease, and despair.[25]

The above underscore the impact of the MDA on the San. The demand or need for adaptation is one of the rationales by which power is exercised over Indigenous Peoples and indigeneity today.[26] The San suffer emotional, and physical abuse, dispossession, displacement, exploitation by dominant groups, marginalisation, are forced to adopt the dominant groups' ways of life, suffer political repression, and now represent Botswana's face of deprivation. On the other hand, some respondents have highlighted that the MDA has a positive impact on the rights of the San. Some notable arguments include that the interaction with 'civilised nations' is a gateway to the San's empowerment, that it provides an opportunity to participate in the money economy and a chance for the San communities to expand their horizons. The San respondents who posited the MDA as revolutionary and positive perceive it from an ideological point as opposed to lived experiences of the majority of the San.

5.2.1 Self Determination and Free, Prior, and Informed Consent

As discussed in Chapter 4, the UNDRIP recognises Indigenous Peoples right to self-determination and creates an obligation on states to consult with Indigenous Peoples and obtain their free, prior, and informed consent before any decisions that affect them are made. The thesis considered the foregoing provisions as procedural rights that are intended to ensure that Indigenous Peoples enjoy their substantive rights such as the right to occupy ancestral land. The struggle of Indigenous Peoples to be recognised as "peoples" in true sense was at the forefront of their journey from an object to subject of international law.[27] One of the most

[25] Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 EJIL 121 @ 243.
[26] Marjo Lindroth & Heidi Sinevaara-Niskanen, 'Adapt or Die? The Biopolitics of Indigeneity—From the Civilising Mission to the Need for Adaptation' (2014) 28 Global Society 180.
[27] Rashwet Shrinkhal, '"Indigenous Sovereignty" and Right to Self-determination in International Law: A Critical Appraisal' (2021) 17 AlterNative: An International Journal of Indigenous Peoples 71.

pressing concerns in their struggle was crafting their own sovereign space.[28] The sovereign space is a source from which the right to self-determination stems out and challenges the political and moral authority of States controlling indigenous population within their territory.[29] The practice of self-determination dictates that the San be at the forefront of decision making in relation to the CKGR or the trajectory their lives take generally. In exercise of their right to self-determination, the San ought to be consulted, and be allowed space and time to constitute as communities in deliberating on the proposed cause of action and decide on the suitable cause for themselves and their LTR. However, the respondents observe that the exercise of their right to self-determination and the consultation was a mirage in their relationship with the GoB.

The respondents observe that generally the MDA impacted on the San's right to self-determination negatively. Moreover, the respondents note that GoB closed all avenues for consultation with the San thus making decisions without the San's free, prior, or informed consent. The respondents attribute the negative impact of MDA on the San's self-determination and their free, prior, and informed consent to numerous factors, chief amongst them being that the GoB prioritises MDA and holds itself as law unto itself in formulating and implementing MDA policies. The breach of the San's rights is said to manifest in the GoB's habitual practice of making unilateral decisions on matters affecting the San. Some respondents enumerate the steps followed by the GoB in relocation the San from CKGR to the resettlement villages and the subsequent licensing of corporations for prospecting diamonds in the land previously occupied by the San within the CKGR as a testament to the non-existence of the right to self-determination and consultation.[30] According to the San at grassroot level when the GoB sought to relocate them numerous meetings were held in CKGR where only GoB representatives made presentations about the intention to relocate them to resettlement villages.[31] Respondents observe that the presentations made by the GoB was 'matter of fact' giving an impression that a decision had already been made about their fate in the CKGR.[32] Oneone notes that whilst the GoB sought to make it seem like the San had a say on what should happen to them, it was clear that the GoB had already made that decision.[33] To sum up experiences of the San with the MDA policies at grassroot level, Selelelalehatshe states that:

[28] Shrinkal, Supra.
[29] Ibid.
[30] Interviews, Supra.
[31] Ibid.
[32] Ibid.
[33] Ibid.

> The GoB held a couple of meetings in the CKGR where they told us their decision. At the first meeting, the presentation was literally 'the GoB has decided to relocate you from the CKGR, you will get to choose whether you want to move to Xere, New Xade or Kaudwane.'We were all shocked. Villagers sought to comment and they were dismissed with the explanation that the Minister did not have time as he had other important engagements. I still think about that first meeting and feel like one nightmare.[34]

In subsequent meetings, the GoB officials arrived in the CKGR to inform residents that the decision had been taken in clearer terms. Voices of dissent were raised by the majority of the San but the GoB indicated that the matter was not negotiable. Gooinamo who experienced the perils of the MDA policies from the CKGR relocations and still lives in the resettlement villages recalls that:

> We were advised that the GoB had been kind enough to give us time to digest the news they gave us. In subsequent weeks, GoB officials came to threaten and intimidate us, informing us that there would be consequences for those who sought to make it difficult for the government to implement the relocations. I was one of the many people who objected vehemently to the relocations, but the officials threatened my family, so when the day came, I ran into the wilderness but eventually the officials caught up with me and as they say, the rest is history.[35]

Roy Sesana adds to the foregoing in the following way:

> Even without the aid of international law, our customs guide processes on sensitive issues that relate to our overall well-being as communities. Relocations are not a light matter. Due process ought to have been followed. Not to say that it would have been a given that we would not resist the relocations if we were consulted and be given space to make the decisions as communities but that would have gone a long way for us. So, the GoB chose to ambush us, on a regular day and tell us, you are all moving. We will send trucks to get your personal effects. I swear by my father who rests in the CKGR, there is not a single person who agreed to the GoB's decision to relocate us from the CKGR. The mere fact that we were informed of a decision taken speaks volume of the nature of relationship we have with the GoB. It also attests to the GoB's priorities and the San are definitely the least in the scheme of things.[36]

MDA is the basis of the GoB's decision to violate the San's right to self-determination in three ways. Firstly, the GoB felt the international pressure to redirect the use of the CKGR towards productive use in the form of tourism and mining. There was probable evidence that tourism and mining took place in some parts of the CKGR after the San were relocated, for example, the first relocations from Old Xade were followed by mineral prospecting by some corporate

[34] Interviews, Supra. The respondent uses a pseudo name.
[35] Ibid.
[36] Interviews, Supra. The respondent uses their name with consent.

giants.[37] Furthermore, some corporations were given licences to operate lodges within the CKGR.[38] Secondly, if the GoB consulted the San and allowed them a platform to exercise their self-determination, the process might have taken longer and delayed the 'required productive use of the land'.[39] Lastly, given that the real reasons for relocating the San was not the noble conservation pursuits but diamond prospecting, the processes of self-determination and consultation with the San would require full disclosure and that would have jeopardised the 'deals with the devils' that the GoB had with some world-renowned corporations. This was a likelihood that the GoB must have anticipated and thought to maintain secrecy inherent in the diamond mining industry the world over. In an interesting turn of events though, activists established that there was mining/prospecting going on in the CKGR where the San had been relocated recently and that caused a stir with the Botswana diamonds dubbed 'blood diamond.'[40]

The breach of the San's right to self-determination and their right to be consulted is still ongoing.[41] In the resettlement and in the CKGR the San are constantly excluded. The GoB is indicted for excluding the San in the policy promulgation platforms. This effectively means that the San get to encounter policies at implementation as benefactors. The respondents pulled from public services stated that even at the implementation stage, there were no platforms for the San to interact with policy makers to give feedback or make representation on the policies. The barriers include extensive distance between the San and policy makers, structural exclusion of policy feedback platforms, and language barrier. DOs for example observe that decision making was decentralised to bureaucrats who constitute policy makers and implementers.[42] The San have no role to play except that they are the subjects of the policies. This practice is consistent with development as peddled by international law, in terms of which they are key players and key decision makers who are charged with the responsibility of ensuring that states embark on development. Interestingly, international law provides self-determination and consultation as central in decision making on the development of Indigenous Peoples, however, international law prioritises development and even retains the colonial oriented development that is the bedrock of the disregard of Indigenous Peoples' rights. Development is prioritised because the authors of international law namely developed

[37] Interviews, Supra.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.

countries benefit more from development as it is a profit-oriented agenda by comparison with the enforcement of Indigenous Peoples rights which may serve as an obstacle to neo-colonial capital monopolies.

5.2.2 Dispossession

> *…They come and ask where your home is they come with papers and say this belongs to nobody this is government land everything belongs to the State What shall I say sister what shall I say brother […] All of this is my home and I carry it in my heart*.[43]

As discussed in Chapters 1 and 2, in Botswana, before the state deployed MDA tactics to dispossess Indigenous Peoples, other tribes were using violent means to dispossess and displace the San.[44] Sister alludes to this historical account in the following way:

> We were told by our great grandparents that the forceful removal from the CKGR is not the start of violence and power display by outsiders. In the past, Tswana groups recognising that our people are wary of violence deployed violent tactics to force us out of our land. Using violence, the Tswana drove us out of our land, dispossessed us and left us displaced. The Tswana now simply use their laws to dispossess and displace us.[45]

The dispossession of Indigenous Peoples is not peculiar to Botswana. The Working Group on Indigenous Populations/Communities (WGIP) of the African Commission on Human and Peoples' Rights sums Indigenous Peoples dispossession in Africa thus:

> Dispossession of land and natural resources is a major human rights problem for Indigenous Peoples. They have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation...[46]

States still treat Indigenous Peoples land as *terra nullius*. Effectively, the land occupied by Indigenous Peoples is deemed vacant to justify the states' dispossession. The designation of land as unoccupied despite the factual display of occupation and ownership is a colonial trait that has fuelled dispossession of Indigenous Peoples across the world. There is no difference

[43] Nils Aslak Valkeapaa *Trekways of the Wind* (Univ of Arizona 1994).
[44] Niezen, Supra.
[45] Ibid.
[46] Report of the Working Group on Indigenous Populations/Communities (WGIP) of the African Commission on Human and Peoples' Rights (ACHPR), p. 11. Available at http://www.achpr.org/mechanisms/indigenouspopulations/report-working-group/ (accessed 12th January 2023).

between colonial and post-colonial governments' attitudes towards Indigenous Peoples' practices of owning and occupying land.

The dispossession of the San because of the MDA manifests in two ways which are interlinked and interrelated. Firstly, there is refusal to recognise the San's ways of owning and occupying their ancestral land. The way of owning and occupying land as practised in Botswana is an integral part of modernisation which started with colonialism. The colonial government introduced various land classification. The new classification excluded the San and their land ownership practices. Secondly, there are forced relocations from ancestral land to resettlement villages where the San are forced to learn new ways of owning and occupying land, i.e., certification, titled individual ownership. Both these means of dispossessions are against international law and discounts the uniqueness of Indigenous Peoples communal land ownership practices. Indigenous Peoples ownership of land as communities is recognised by international law and is acknowledged as central to their overall welfare and wellbeing. For example, the San value their land so much that they were willing to forgo all benefits from the GoB in exchange of their right to remain in the CKGR. Justice Dow (as she then was) highlighted how sacrosanct the CKGR is to the San in the following way:

> When the case started, Mr. Pilane was full of talk about how the services belonged to the Respondent and how the Respondent had a right to do what it wished with them. This prompted some Applicants to say that in that case, the Government could take the services and leave them in their land.[47]

Indigenous Peoples land rights are *sui generis*, they are different from other interests in land under the common law.[48] It is because of their unique way of holding their land that Indigenous Peoples rights ought to be protected. Paradoxically, it is the uniqueness of Indigenous Peoples land rights that has rendered them susceptible to dispossession. The modern way of land holding is individualistic, requires legal formalisation and title allocation by authorities. This system run counter to Indigenous Peoples ways of communal owning and occupying ancestral land. Molebatsi underscores endeavours to do away with Indigenous Peoples' way of land owning and occupation through undermining its informal nature as meaning non-existent ownership.[49] Molebatsi contextualises the ongoing dispossession in Botswana as land grabbing

[47] Sesana case, Supra.
[48] Benjamin J Richardson, Shin Imai and Kent McNeil (eds) Indigenous Peoples and the Law (Hart Publishing 2009).
[49] Chadzimula Molebatsi, Land grabbing in Botswana: Modern era dispossession. Town and Regional Planning, 2019(75) 44.

and a phenomenon that should be understood within the context of social injustice in the following way:

> Land grabbing in Botswana results from successive land-tenure and policy reforms initially introduced in the colonial period and further entrenched in the post-independence period. The story of land-tenure and policy reforms in Botswana has been one of relentless appropriation of the communal land by the country's elite. The elitist land-tenure reforms, carried out in the name of development, involve the gradual replacement of the endogenous communal land-holding system with individualistic land-holding models. The reigning logic that drives these reforms is founded on economic models that portray communal land holding as inhibiting investment in agriculture.[50]

For many years in Botswana, land remained at the heart of indigenous-state conflict. Respondents generally state that the GoB used MDA to dispossess the San of their ancestral land, the CKGR. The San respondents highlight the sacrosanctity of the CKGR and demonstrate that they had been relocated from their ancestral land because of the MDA. The relocations from the CKGR were articulated as dispossessive in nature by majority of the respondents. Interestingly, San respondents who stay in CKGR, Kaudwane, New Xade and Xere perceive the MDA as a tool that has been used by the GoB to take away their land. Whilst those who live outside the CKGR speak of being forcefully removed from their ancestral land as epitomising dispossession, San respondents who reside in the CKGR cite constructive dispossession which is characterised by the GoB's continued interference in the way the San enjoy their stay in the CKGR. The dispossession of the San in the CKGR takes the form of non-recognition of the San's way of owning and occupying their ancestral land whilst the dispossession of the San in resettlement is constituted in the of forced relocations.

At the time of conducting the field research in the CKGR, there were allegedly mining and tourism activities taking place within the reserve. Private companies were allegedly granted mining licences whilst both Private companies and Individuals were granted tourism licences. The San were not beneficiaries to such dispensations. Notably, as Helga recalls the San were informed that their ways of occupying and owning the CKGR has no value add and plays no role in the Botswana economy. Helga notes:

> We were told that there was no value add in our land usage. The GoB forced us out and gave our land to businesses whose use of our land would be profitable. I recall that we were told that we had to leave our land because we were a threat to our land. Big words like conservation were thrown around. We wondered how we could be a threat to a land that we have only served as custodians of and benefited

[50]Molebatsi, Supra.

> greatly from. As the officers dismantled our huts, they indicated that the land would be used for mining and lodges, and we would have no benefit in the said activities. You should have seen the grin on their faces. Now on my return to the CKGR, there is that lodge at the far east of my compound and that mine at the southern side of my compound. They bring money for the GoB. What can I possibly bring for the GOB with my subsistence hunting and gathering?[51]

The San respondents in the CKGR argue that the GoB has numerous unwritten rules on how they must live in the CKGR.[52] The unwritten rules include restricted movement in search of food, restrictions on hunting even where San have hunting licences amongst others.[53] The San respondents are often denied these crucial livelihood activities by Wildlife Officers and the Military. The officers have a blank cheque to do as they please in the event they suspect that the San are disregarding the unwritten laws. The San respondents within the CKGR further note that the GoB continually reminds them that the forced relocation business remains unfinished for as long as some San still reside in the CKGR. The San respondents observe that the dispossession disintegrates them as communities.[54] According to the respondents, those for and against the MDA, the CKGR and the natural resources abound there have fundamental spiritual, social, cultural, economic, and political significance that is integrally linked to both their identity and continued survival as communities.[55]

The actual or constructive dispossession is a brutal attack to their very existence as communities[56]. The San respondents see dispossession through the violence they experienced during the forced relocations and argue that conflict with the GoB will remain constant for as long as there are looming threats of relocations for the San in the CKGR and disregard of allowing 'victims of forced relocations' safe return to their ancestral land the CKGR.[57] The San understand the *Sesana Case* ruling as discussed in Chapters 1 to 4 to be a dawn of hope that has the potential to neutralise the negative impact of the MDA as it places the singular most important commodity, land, in their hands and obligates the GoB to respect the special relationship the San have with their land.[58] However, the GoB chose to interpret the ruling in a manner that confers the right to return to the CKGR only on some of the litigants, to the exclusion of other litigants and those who were not parties to the litigation.

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[51] Interviews, Supra. The respondent uses a pseudo name.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid.

Dispossessing the San of their ancestral land is a vicious cycle that has no end in sight. The forced relocations and the non-recognition of the San's cultural practices on occupying and owning land has resulted in grave injustice, exacerbated their marginalisation, and increased their vulnerability. As it stands today, the San in Botswana have nowhere to call home and no land in their name as a community. The San respondents and other stakeholders have equally buttressed the above assertion in drawing a causal link between the San's dispossession and their traumatic life post dispossession.

5.2.3 Interference with Livelihood

The natural consequence of loss of ancestral land for all Indigenous Peoples is loss of livelihood as the land is the traditional source of livelihood. This is because of Indigenous Peoples unique relationship with the land and dependence upon the land and the resources thereon.[59] Ancestral land provides Indigenous Peoples with a diverse range of natural resources which support their survival and development as communities. In fact, the survival of Indigenous Peoples and their livelihood are anchored on their land.[60] The name San as used by this research is said to mean gatherers thus underscoring how their livelihood is dependent on land and natural resources.[61] In articulating the importance of land and natural resources on the San's livelihoods, Cook and Sarkin observe thus:

> The San have based their livelihoods for centuries on hunting and gathering, which is both a form of subsistence and an intricate part of San culture and tradition. As such, hunting and gathering are basic cultural and subsistence rights that warrant protection.[62]

For Satau, ancestral land is the San's sole provider.[63] The land provides livelihood which is tied to many other facets of the San's overall lives.[64] In Roy Sesana's views, policy makers may find it difficult to understand the relationship between the San and their ancestral land.[65] Sesana asserts that:

[59] Michael Teodoro et al, 'Modernity vs. Culture: Protecting the Indigenous Peoples of the Philippines' (2008) 1 EJEPS 77.
[60]Interviews, Supra.
[61] Ibid.
[62] Amelia Cook and Jeremy Sarkin, 'Who Is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana' (2009) 18 Tulane J. of Int'L & Com. Law 93.
[63] Interviews, Supra.
[64] Ibid.
[65] Ibid.

> The San's livelihood is an integral part of their culture and vice-versa. Livelihood from ancestral land is guaranteed, no questions and no reservations. Ancestral land knows our needs and provides enough for all of us. In turn, we take care of our ancestral land as we are merely custodians of the land, for our unborn grandchildren.[66]

The MDA further exacerbates the San's vulnerability and interferes with livelihoods as it brings about the promulgation of policies that encroach on the San's ability to practise traditional economic and sustenance. The GoB intensified hunting regulation within the CKGR in the name of conservation and rendered it impossible for the San to hunt for survival.[67] In addition to the 1979 Fauna Conservation Act requirements of hunting licences to bar the San from hunting, the GoB introduced layers of administrative obstacles in the forms of channels of applying for hunting licences amongst the San. These new requirements escalated illegal hunting which has exacerbated arrests, mistreatment, and even torture.[68]

San respondents acknowledge interference with their livelihood as a direct implication of the MDA in Botswana.[69] For the San respondents within the CKGR, modern economic activities into their traditional territories hamper the practice of traditional livelihood, as the land is designated to mining and tourism entities. For these San, they are currently in occupation of the CKGR but endure arm's length restrictions on what they can do within their land. The restrictions are particularly intended to frustrate their livelihoods. Sister notes that even though he returned to the CKGR following the court victory, surviving in the CKGR has been difficult because the GoB interferes with their livelihood activities.[70] Roy Sesana supports the preceding experience and states that the security, comfort, and livelihood offered by the CKGR was now a historical account, at the face of the MDA the San in the CKGR ought to survive like other Batswana or face extinction in their own land.[71] Sesana observes thus:

> The CKGR was in the first place established to secure the San's livelihood. The desire to deny our people their natural resources camouflaged as interest in developing our people has made the government lose sight of why the CKGR was established. When Silberbauer set up the CKGR in the first place, he wanted to protect the San's livelihood in the land they call home with no interference from others. Now we live in a world where such livelihood is trampled upon with impunity, by the government.[72]

[66] Interviews, Supra.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.

For the San in resettlement villages, the relocation from their land has a dual implication.[73] Loss of land equates to loss of the sole source of livelihood. The San respondents in the resettlement villages argue that the CKGR provided sustainable livelihoods to them and many generations before them.[74] The San respondents in resettlement villages further reference their inability to adapt to Tswana livelihoods which is anchored on the money economy.[75] Majority of the respondents assert that even after staying in the resettlement villages for over two decades, they could not build economically viable livelihoods for the only reliable source of livelihood they know is their land.[76] Understandably so, money economy is not part of the San's lifestyles, however the only way to survive in Kaudwane, New Xade and Xere is through actively participating in the money economy by finding a job, or engaging in entrepreneurship. As stated in the Chapter 1, there are no job opportunities in the resettlement villages let alone in CKGR.

The San respondents further observe that the GoB failed to provide sustainable livelihoods in the resettlement villages and that any attempt on their end to engage with the GoB on that issue has been disregarded.[77] DOs highlight that Indigenous Peoples livelihood strategies were elusive as they were not well thought from the beginning of the relocation exercise.[78] The GoB is said to have been too keen on relocating the San and failed to address itself to the implications of the relocations on the San's livelihoods which have been known to be dependent solely on their land.[79] For the San respondents the GoB deliberately named New Xade to give them the impression that opportunities will be abundant as New Xade loosely translates to 'beautiful new life of abundance and opportunities.'[80]

DOs further buttress the shortcomings of Westernised welfare structures which were a copy and paste from other parts of the country.[81] Given that the livelihoods programmes were mainly copy and paste, there was minimal chance such would provide sustainable livelihoods for the San.[82] In some instances, it seems that the GoB did not apply itself to the sustainable livelihoods of the San after the relocation, there also seem to be a misunderstanding of compensation

[73] Interviews, Supra.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.

monies given to some San as a springboard to finance livelihood. If relocation compensation was to be used to fund livelihood in their new home, it was an inadequate measure primarily because prior to their relocations, the San were not part of the monetary system.[83] There were other notable shortcomings. Firstly, not everyone was compensated. Some people were denied compensation to teach them a lesson for resisting the relocations in the first place. Secondly, compensation was only given to the male figures supposedly as custodians for women and children and the male figures often appropriated the money for their own use. Thirdly, money as a foreign economic commodity eluded the San who misused it. Sapignoli et al., elucidate the challenges of livelihood in resettlement villages and highlighted that the main conclusion about the compensation program for those people who were resettled in 1997 was that it failed to restore the livelihoods of people affected by the resettlement, and in several cases, people were worse off after the relocation than they were before. Where compensation was given, recipients expended it quickly and there were investments opportunities.[84]

Zips-Mairitsch explains the underlying basis of the failures of the livelihood projects as implemented by the GoB among the San as follows:

> Most resettlement projects in variously similar ways failed to re-establish the more or less independent livelihood of those concerned. Lots of relocated inhabitants found themselves in even worse conditions because these projects primarily seek to balance the loss of living environment but neglect to compensate for means of production, such as land, grazing grounds and wild resources. Therefore, their former basis of social existence and individual income disappears without compensation.[85]

Xaukeng a San at grassroot level observe that when the GoB relocated the San from the CKGR it offered some people compensation whilst some people were told their compensation was delayed but never to receive it.[86] The GoB also introduced livelihood programmes that did not have a criterion.[87] Some people benefited whilst others did not benefit. The livelihood programmes did not make much of a difference to the beneficiaries and now the poverty and deprivation amongst those who benefited and those who did not benefit is the same. Legakolotswe a San at grassroot level who now resides outside the CKGR is of the view that

[83] Interviews, Supra.
[84] Maria Sapignoli, Robert K. Hitchcock, Renè Kuppe, (2016) Alexandra Tomaselli San and Bakgalagadi peoples' land rights and the cases of the Central Kalahari Game Reserve in Botswana Report Prepared for the International Law Association – Implementation of the Rights of Indigenous Peoples— Johannesburg Conference.
[85] Manuela Zips-Mairitsch Lost Lands? (Land) Rights of the San in Botswana and the Legal Concept of Indigeneity in Africa at 316.
[86] Interviews, Supra. Respondent uses a pseudo name.
[87] Ibid.

it was easy and natural to navigate life in the CKGR and no government interventions were required as the ancestral land provided sufficiently for everyone.[88] The relocations meant that their livelihood was now dependent on the GoB which failed dismally to meet the San's basic livelihood needs. Ithuteng a San activist who resides outside the CKGR notes that the livelihood programmes failed the continuity test as the GoB trained people and left them in limbo without resources to establish enterprises let alone mentorship programmes that would assist in the establishment of sustainable livelihood projects.[89] Makhatau a San at grassroot level who resides in one of the resettlement villages states that he was a beneficiary of the GoB backyard gardening and grew tomatoes but did not know what to do with them when they were ripe. He saw tomatoes for the first time at sixty-eight.[90] On the second cycle, Makhatau was made to grow other 'foreign vegetables' that required a lot of water and the GoB did not provide water for 'their project'.

The GoB rolled out the Community Based Natural Resource Management Trusts for purposes of making livelihood through tourism. In Kaundwane, New Xade and Xere, the Community Trusts were set up, had land and in some instances had begun some infrastructure development from a decade ago which were all incomplete.[91] None of the three Community Trust had never been operational to provide livelihood for the San as at the time of the interviews. However, in 2023 September, the Xere Community Trust hosted the inaugural Xere Festival which the Acting President of Botswana officiated at.[92] In CKGR, a Community Trust was set up without consultation with the San.[93] The San were shown a Memorandum of Agreement and were asked to bring representatives to a fully established trust. The CKGR Community trust did not engage in any livelihood activities. In fact, there were inferences that the San respondents in CKGR sort to challenge the establishment of this trust.[94]

The San respondents note that the failure of the Community pilot project to take off after more than two decades is a clear indication that the GoB did not think through of how the Community Trust would run and how their activities would make profit for the San.[95] A trust being a creation of English Law may not necessarily be suited in the context of the San. Imposing trusts

[88] Interviews, Supra. The respondent uses a pseudo name.
[89] Interviews, Supra.The respondent uses their real name with consent.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.

on the San is undoubtedly an extension of colonialism and undermines the San's way of owning and occupying their ancestral land. This is because when these Trusts are granted rights over a piece of land, they would hold it on behalf of ascertainable beneficiaries within the defined geographic location. This causes disintegration and confusion as the practice of the San in land ownership recognises ownership for the benefit of everyone in the community extending to unborn generations. This on its own is an indication that the MDA and its promises of prosperity were all false and set up MDA on the highest pedestal of dispossession tools.

5.2.4 Interference with Lifestyle, Culture, and Identity

The MDA interferes with the San's lifestyle and by extension freedom of culture and identity. At the core of MDA policies as adopted and implemented by the GoB, the San must shed their cultural practices and identity, move on with the times and embrace what the rest of the world has embraced.[96] Even without MDA, the GoB generally adopted a homogenising policy in terms of which the various tribes must disregard their different ethnic identity and unite as a way of mitigating possible conflict fuelled by ethnicity.[97] Undoubtedly, the emphasis on homogenised ethnicity policy has served to assimilate minority groups such as the San into majority groups such as the various Tswana groups. Werbner argues that the GOB made an assimilationist appeal for the unity of the nation in one blended culture beyond ethnic difference.[98] In terms of this policy, ethnic groups like the San are expected to discard their culture, identity, traditional social, political, and economic ethos and assume the Tswana ethnic groups. It is minority groups simply becoming Tswana and mimicking the Tswana's ways of doing things. The GoB policy is exactly that for the harmony of the country only Tswana lifestyle, culture and identity must prevail to the exclusion and detriment of all other tribes.

The MDA is used as a tool by the GoB to suppress the San's integral lifestyle, culture, and identity.[99] The San's worldview, language, knowledge, and identity differ markedly with that held by policy makers and that has been the basis for the MDA policies. With the GOB perceiving the San's lifestyle, culture, and identity as inferior to the Tswana's, the MDA has

[96] Interviews, Supra. These were shared by the President of Botswana Festus Mogae in 'We would all be concerned that any tribe should remain in the bush communing with flora and fauna.' Botswana Minister of Foreign Affairs; 'How can you have a stone-age creature continue to exist in the age of computers?' President of Botswana, Festus Gontebanye Mogae.
[97] Edwin N. Wilmsen, 'Mutable Identities: Moving beyond Ethnicity in Botswana' (2002) 28 Journal of Southern African Studies 825.
[98] Richard Werbner, 'Introduction: Challenging Minorities, Difference and Tribal Citizenship in Botswana' (2002) 28 Journal of Southern African Studies 671.
[99] Interviews, Supra.

been deployed to bring 'transformation to the life' of the San.[100] This highlights the racist nature of the MDA, and it is termed cultural racism. Cultural racism is the imposition of one worldview on a people who have an alternative worldview, with the implication that the imposed worldview is superior to the alternative worldview.[101]

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has defined culture as:

> the distinctive traits, including the total spiritual, material, intellectual and emotional traits that characterize a society or social group, and that include, in addition to arts and literature, their ways of life, the manner in which they live together, their value systems, and their traditions and beliefs.[102]

The San respondents note the alteration to their lifestyle, culture, and identity as a natural consequence of the MDA. In articulating their loss, the San respondents draw a close relationship between lifestyle, culture and identity and note that the golden thread that connected these three was inhabiting their ancestral land. According to the San respondents, before the MDA the CKGR was essential in nurturing their unique lifestyle, practising their culture, and maintaining their identity as communities. For the San respondents, the CKGR serve as a vessel where their spirituality was preserved. The San were able to speak to their ancestors who rest in the CKGR to seek protection of the people, the land and ask for provision of daily needs.[103] Such requests were favourably considered as the ancestors were delighted with the San's continuation of lifestyle, culture, and identity within the CKGR. Within the CKGR the San's lifestyle was purely traditional.[104] The San depended on the land and the natural resources to practise their culture and religious initiations. Intellectual property was anchored on indigenous knowledge and was freely shared amongst communities especially the younger generations, so they understand the economic, social, and political dynamics of the communities.

The land and natural resources are a source of indigenous knowledge as nature speaks fluently to the San and they understand. Contentment within the CKGR was a normal occurrence by virtue of being in your land, one is at peace. The singular basis for contentment within the CKGR was knowing that the land would provide whatever needs communities had even in

[100] Interviews, Supra.
[101] Marie Ann Battiste, (ed) *Reclaiming Indigenous Voice and Vision* (UBLP 2000) 1.
[102] Preamble to UNESCO's Universal Declaration on Cultural Diversity (2001).
[103] Interviews, Supra.
[104] Ibid.

times of crisis. The land also provided healing.[105] In the event of any turmoil, the San looked to their land for calm and obtained that. In the CKGR, communities knew how to co-exist, different genders and ages knew their roles based on cultural dictates.[106] The San's identity was multifaceted and extended to the way they dress, their languages, what they ate, how they celebrated or mourned their loved ones and many other activities that sought to enhance their value systems, traditions, and beliefs.[107] Lifestyle, culture, and identity were woven neatly together.[108]

What is interesting about the San's account on their lifestyle, culture and identity is how closely they conceptualise the characteristics of lifestyle, culture, and identity in very similar ways to the UNESCO definition of culture.[109] This shows how all-encompassing culture is for the San and underscores the interlink between many facets of their lives. The departing point however is that the San emphasise three elements as very crucial in their lifestyle, culture, and identity namely the land, natural resources, and their livelihood activities.[110] The San respondents underscore the sacrosanctity of these and in some instances some respondents termed them the holy trinity.[111]

Both the San in the CKGR and in the resettlement villages indicate that due to the MDA they experienced excessive stress that affected their overall wellbeing.[112] The stress is caused by anxiety from the relocations and the expectations imposed by MDA on them. For these respondents, MDA led to a permanent change in their lifestyle as the GoB had not done anything to mitigate the alterations to their lifestyle resulting from the forced relocations.[113] Particularly, for the San in the CKGR, as discussed above the MDA interferes with their lifestyle as the GoB has introduced numerous unwritten rules on how they ought to conduct themselves within the reserve.[114] Most of the said rules, run counter with the San's natural and cultural lifestyle.[115] The respondents in the CKGR note that their traditional lifestyle allowed them to roam the CKGR, gather wild fruits and in some instances practise some cultural initiations in certain places around the CKGR. In the MDA era, the GoB restricts the traditional

[105] Interviews, Supra.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.

lifestyle and some San who have roamed the CKGR to do some cultural rituals have found themselves in holding cells. The MDA has therefore seen loss of culture and the urgent need for the San to adjust to new cultures which alters their sense of identity as individuals and as communities.

For the San in the resettlement villages, the loss of culture is eminent in their children who are forcibly taught in English and Setswana languages.[116] In cultural studies, little is taught about the history of the San, who they are and why they are in limbo because it would be too embarrassing for the GoB.[117] If any San history or current affirs is taught, there is greater distortion.[118] The San have their own values, cultural practices and historical account that they teach their children in their informal set up. However, such does not make part of the formal syllabus and there is little interest to teach the San's historical account, cultural practices and value system as captured by the San. Where any subject incorporates any aspects of the San's lives, there is a misconception that it would be best delivered by those with formal education, who effectively distort the account of the San's lives.

Gooinamo represents the views of some San at grassroot level in his observations that part of the reason San students are not doing well in mainstream education is attributable to language barriers but chief was the undertone message that they do not matter, that's why their way of life does not form part of mainstream education syllabus.[119] Roy Sesana is of the view that excluding content on the San's lifestyle from mainstream education demoralised San children in school as they were not represented.[120] Sesana indicates that there were numerous efforts made by the FPK to advocate for revision of syllabus to incorporate aspects of the San's lifestyle, historical account, and cultural values and to introduce some languages as medium of communication. The process is still ongoing, and GoB is taking time in effecting the proposal on languages.[121] From a practical experience point of view, Extra highlights that as a student he wondered why he was forced to learn about other tribes in their language whilst he had many interesting things about his cultural life which were not taught to other students.[122]

[116] Interviews, Supra.
[117] Sidsel Saugestad The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance, and the First People of the Kalahari.
[118] Ibid.
[119] Interviews, Supra.
[120] Ibid.
[121] Ibid.
[122] Ibid.

During the MDA necessitated forced evictions, the San's traditional homes were dismantled.[123] The San who resisted relocations vigorously watched as what used to constitute traditional houses was destroyed with impunity.[124] For the San who towed the line, they were allowed to take the material of their traditional huts to their resettlement villages to erect new traditional houses.[125] The San's traditional houses anchor their lifestyle, culture, and identity. Their traditional hut also epitomises their pristine art and, in some communities, may have some religious meanings.[126] The act of dismantling San houses in the CKGR was destructive, figuratively, and literally. Mokwepa Kgaleng a San at grassroot level who resides in the CKGR narrates the horrifying experiences during the destruction of the San houses in the CKGR in the following way:

> Many times, government officers did come to our house to tell us of the social and economic benefits of relocations, primarily that relocation from the bush to the 'lights' was development. In all the times that they sought to convince us we made it clear that we would not trade the CKGR for anything. We would rather be here and have nothing as they said than leave everything we so value behind. When the relocations happened, my guard was down. When I saw government officials and trucks, I genuinely thought there were people who agreed to be relocated though I doubted it. I sat in front of my hut where I was still performing some rituals. The next thing I know, men wearing military regalia entered my yard and went behind my hut and began tearing it apart. I have never cried like I did that day. With every piece they dismantled, they tore my soul up. I can never heal from that encounter. I was left in the open space. I lived with the lions in the wilderness until my people returned to find me here. When the government tells us now, that the relocation agenda is not over and that it will never be for as long as we are still here, I know more heartache awaits my people.[127]

Kebopela Moipolai a San activist who resides in the resettlement villages perceives the dismantling of the huts as calculated and intentional to ensure that the San understood the message that the CKGR was no longer their home.[128]For Selelelalehatshe Gaexohoro a San at grassroot level who is a resident in the resettlement village, the destruction of the huts in the CKGR was intended to destroy the San's spirits as the GoB was aware what the huts represent for the majority of the San.[129] The huts represent the San's humble and simple lifestyle, it is the cornerstone of their culture and identity.[130] For Ntwayakgomo a member of the opposition

[123] Interviews, Supra.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Interviews, Supra. The Respondent uses a pseudo name.
[128] Interviews, Supra. The respondent uses their name with consent.
[129] Interviews, Supra. The respondent uses a pseudo name.
[130] Ibid.

party, the GoB was aware that it would disarm the San and force them out of the CKGR if it destroyed their sense of security.[131] The roof over the San's head represented some security and once that was destroyed, vulnerability was heightened and there was a sense of helplessness.[132] For Kelojetse, destruction of property was an intimidation tactic which had the effect of dismantling the San's confidence as an attack on one's culture brutalises self-esteem.[133]

The above observations were supported by the DOs.[134] The MDA's interference with lifestyle and by extension culture and identity was inevitable and quite intentional. Given that the San were forcefully removed from their ancestral land, homes, myths, rituals, graves, and their ancestral land the GoB intended for the San to lose the important features of their being as the end goal of the developmental policy. A broken community leads to broken individuals hence the majority of the San live in sadness and are continually depressed.[135] DOs agree that the breakdown of the entire society is a direct consequence of cultural and identity erosion that was caused by lumping up the San into Tswana groups.[136] In the resettlement villages, minimal to no efforts have been made to ensure that there is restoration of the San's culture let alone that their lifestyle and identity are preserved.

5.2.5 Interference with Freedom of Religion

Religion is part of San's lifestyle, culture, and identity. The San's religion is dependent on their ancestral land because of the spiritual connection they have with the land.[137] For the majority of the San respondents, the CKGR is a spiritual sanctuary and denial to access the land interferes with their religion.[138] The San's religion, like most Indigenous Peoples of the world, is nature based.[139] Beyond the land, some natural resources found in the ancestral land have spiritual meaning and are central to the San's religious practices. The San respondents state

[131] Interviews, Supra. The respondent uses a pseudo name.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] A/77/514: Interim report of the Special Rapporteur on freedom of religion or belief the report presented to the General Assembly by the UN Special Rapporteur on freedom of religion available at A/77/514: Interim report of the Special Rapporteur on freedom of religion or belief | OHCHR accessed on 28 January 2023.

that the majority of the trees, shrubs and plants found within the CKGR have a spiritual importance and some can only be found within the CKGR.

The MDA interferes with the San's religion in three ways. Firstly, the San who remained or returned to the CKGR are restricted to move about the CKGR because the GoB perceives them as potential poachers and a threat to the flora and fauna. Secondly, the forced relocations to Kaudwane, New Xade and Xere cut ties between the San and their spiritual sanctuary. While the restricted access into the CKGR deny the San access into their spiritual shrines to perform religious rituals. Thirdly, in resettlement villages, the San are forcefully integrated into 'foreign religion'. The San children particularly learn other religions in school to the exclusion of their own as the GoB seeks to blemish San religious practices as barbaric. The MDA compels the San to continually reframe their identity and embrace new identities that are not shunned in the 'developed world', this causes loss of religion as by reframing their identity, they equally assume 'others religion'. The UN Special Rapporteur on freedom of religion reported on how Indigenous Peoples' religion is regularly and systematically violated in the following way:

> Severe, systematic, and systemic discrimination and marginalisation affect indigenous peoples' ability to survive, let alone thrive—by exercising their innermost religious or belief convictions….Given their inextricable relationship between the land and the sacred, many indigenous peoples believe that restricting access to and use of ancestral territories is tantamount to prohibiting spiritual experiences.[140]

The San respondents underscore the UN Special Rapporteur's observations in their interviews.[141] Gooinamo notes that apart from experiencing emptiness because of leaving the CKGR, he had difficulties relating to any other religion shoved on their faces in the resettlement villages.[142] Notably, people from different churches and religious denominations frequented resettlement villages as if they were in competition to win the San over. Moreover, the vulnerable position that majority of the San he interacted with rendered them susceptible to religious manipulation and brainwashing into believing others' religion was better than that of the San and that the San's ancestors were evil spirits.[143] For Setobadiphuduhudu, refusing her the right to return to the CKGR for religious purposes causes serious spiritual turmoil and unimaginable difficulties.[144] Setobadiphuduhudu more poignantly asserts that given that the

[140] A/77/514: Interim report of the Special Rapporteur on freedom of religion or belief the report presented to the General Assembly by the UN Special Rapporteur on freedom of religion available at A/77/514: Interim report of the Special Rapporteur on freedom of religion or belief | OHCHR accessed on 28 January 2023.
[141] Interviews, Supra.
[142] Ibid.
[143] Ibid.
[144] Ibid.

San have a spiritual right to occupy and use the resources in the CKGR, the San's absence in the land is tantamount to them turning their back on their ancestors.[145] The consequences for turning their back on the ancestors has catastrophic implications as characterised by the San's miserable lives in the resettlement villages.[146] For Satau, religion is quite difficult to practise when disconnected from the spiritual vessel in the form of the CKGR, and its natural resources.[147]

Satau underscores the brokenness that emanates from being unable to communicate with one's ancestors especially during times of adversity as the forced relocations brought incredible challenges. Satau observes that:

> The developmental policies on the San adopted by the GOB professed improvement in the San's lives but have destroyed our people's overall lives. The San's land is their entire lives. You force them out of their source of life, you might as well have killed them. When you have a special relationship with land like the San do, they retreat to the land for healing, regularly. Now the San's sense of spirituality has been broken. This all began with forcing them out of their only know place of worship, a place they 'neatly tucked' their ancestors. Through the MDA as you call it, the San culture has been eradicated, replaced with the Tswana's economy, religion, and value system. The GOB has been very intentional in eliminating the San and their entire value system and at a personal level it left reeling hearts. In Kaudwane, New Xade and Xere there is clear acculturation and that is the GOB coming at the San's religion.[148]

5.2.5 Interference with the Right to Free Movement

Majority of the respondents speak emphatically of how the MDA affected and continues to affect their freedom of movement. San respondents who were forcefully relocated from the CKGR have not been able to return into the CKGR to check their loved ones whilst those who returned to the CKGR after judgement are not allowed to leave the CKGR except for prescribed reasons and visiting relatives elsewhere is not one of them. Even when they leave the CKGR for prescribed reasons, the San are subjected to rigorous security searches at the gate upon return. OneOne an adult male residing in the CKGR within Molapo narrates various occasions when he alongside other elders residing in the CKGR were held over twenty-four hours at the

[145] Interviews, Supra.
[146] Ibid.
[147] Ibid.
[148] Ibid.

Xade gate upon returning from Ghanzi to collect their old age pension.[149] In highlighting the restricted movement experiences OneOne states that:

> Since the relocations, some of us have never enjoyed the freedom to leave the CKGR and return at will. Often than not, those reside in the CKGR and leave for whatever reasons do so at their own risk. One might never be allowed back in, if allowed back, one is often put through harassment and an ordeal of spending the night at the gate, whatever the weather conditions and without explanation as to why you cannot simply walk back in as you simply walked out of the CKGR a few hours ago.[150]

Those who have been forcefully relocated, like Extra, have their own testimonies about the abuse perpetrated against them for attempting to re-enter the CKGR. The freedom of movement into the CKGR is interfered with especially because the relocations occurred when the said respondents were in school and had not consented or agreed to such relocations. Extra expresses his experiences in the following ways:

> Given that during the relocations I was in school, not in the CKGR which at the material time was my only know permanent address for all purposes, I assumed I would be allowed back into the CKGR. It was only fair that I be allowed back in the CKGR as I did not participate in any consultations resulting in the relocations, if there were any. Any attempt from my end to enter the CKGR has resulted in brutal physical attacks, derogatory utterances, and arrests by the forces. One that is recurring is that the GOB has a responsibility to curb the San's freedom to enter the CKGR as we enter the CKGR to destroy. Youth who were not in the CKGR during the relocations have been arrested for attempting to enter the CKGR. Arresting us is intended to scare all of us off. Our elders who have left the CKGR and are ordinarily resident in the CKGR have been thoroughly brutalised, arrested, and left in the holding cell to experience a lifetime ordeal. We remain consistent and persistent in our quest to return to the CKGR to stay or visit relatives and graves of our ancestors.[151]

The restrictions on the freedom of movement are equally exerted on the San who have been forcefully relocated from the CKGR to the resettlement villages within the resettlement villages. San respondents in Kaudwane, New Xade and Xere gave an account of abuse perpetrated because of officials hearing about their intention to re-enter the CKGR or their walking towards the CKGR even if it is to harvest wild fruits or gather firewood, a predominant source of energy in the resettlement villages. Roselyn shares her experiences in the following way:

> Once I went to gather firewood and, in the evening, officials arrived at my house and started beating me up, to show me what would happen if I ever dared attempted to return to the CKGR. I was told that

[149] Interviews, Supra.
[150] Ibid.
[151] Ibid.

> gathering woods closer to the CKGR gate meant that I was just checking the coast and would soon implement a return home plan. Whenever, I want to gather firewood, I remember the brutal attacks, and I would rather beg from my close relatives than dare go into the bush. If they come for me again, my children will remain orphans. I know three other people who have been through such an ordeal. They will not talk to you as they may just be inviting death. I am only sharing because you said you would not state my name or my village. I am also hopeful that whoever reads your books sees the horrible life development has brought to us, unprovoked.[152]

Gooinamo highlights these experiences in the following way:

> Our people have been beaten up because their movement around these villages was interpreted by authorities as indicative of their intention to re-enter the CKGR. What is heart wrenching is that those people would have left the villages to harvest wild berries or gather firewood. The beatings happen first, then they are asked why their movement was suspicious because they moved like they wanted to re-enter the CKGR. Which other Motswana do you know who get beaten for moving in a certain way. If this is not abuse of our people, then nothing is.[153]

Freedom of movement in entering the CKGR, within the CKGR and around the CKGR is restricted as a matter of law. The Wildlife Conservation and National Parks Act is often used to restrict access into and movement within the CKGR. The restrictions and stringency of civil servants has been experienced by the Research team. Efforts to enter the CKGR proved a daunting task. Administrative hurdles were placed by low-ranking officers who often pull rank. I was able to enter the CKGR following prolonged negotiations with high-ranking officers.

5.3 Conclusion

For the past decades, the San's activism focused on the MDA policies adopted and implemented by the GoB. Scholars generally focused on the MDA policies as they relate to the San's right to own and occupy the CKGR. In both instances, rightly so because as demonstrated in this chapter and the previous chapters ancestral land is the singular resource on which every aspect of Indigenous Peoples' lives is anchored. The preceding chapter, providing testimonies from a representative pool of respondents has amplified the impact of the MDA on the San's rights beyond their land rights. The MDA disproportionately harm other aspects of the San's lives.

[152] Interviews, Supra.
[153] Ibid.

The MDA policies breach the UNDRIP cardinal principles on self-determination as the San were not consulted, given an opportunity to decide their fate as communities and a platform to make a representation of what they wanted. Similarly, the MDA policies did not comply with the free, prior, and informed consent requirements. The San were informed of a decision that was taken by the incumbent bureaucrats and the next encounter they had with the GoB was when some military personnel were in CKGR to oversee the relocations. The disregard of the rights to self-determination and free, prior, and informed consent requirements consent coupled with the use of military forces during the relocations render the said relocation forced relocations. Consequent to the forced relocations, other aspects of the UNDRIP have been breached. The San's physical absence from the CKGR interferes with their occupation and use rights over the CKGR land, resources, and territories. The San's constrained presence in the CKGR equally has the same effect. Denying the San access to their land, resources and territories is the genesis to other breaches which all compound the adverse effects of the MDA on the San's rights.

A one size fit all approach in MDA policies posit the project as a totalising tool, that takes no cognisance of the subject's prevailing circumstances and most importantly that sets out targets that must be met, no matter what. In both the CKGR and the resettlement villages, the San's experiences attest to the 'toxic' impact of the MDA. The San exist in abject poverty, politically, socially, and economically marginalised their concerns disregarded, and the promotion, protection and fulfilment of their rights is neglected. All these experiences are attributed to the MDA policies.

Beyond the occupation, ownership and possession of their land, the MDA interferes with an array of the San's rights. The San's right to self-determination and other consultation and representation related rights are continuously breached. In an MDA set up, the San's traditional institutions have no place. The Tswana and British cloned institutions make all decisions, and the San will only engage with them on implementation. This breach is ongoing. The dispossession is equally ongoing for both San inside the CKGR and resettlement villages. At the time of conducting the field work for example, some mining and tourism companies were doing business in the CKGR. Against the allegations that these companies entered CKGR after the first relocations, it means they have been using the San's land territories and resources for almost two decades. Every single day that these companies are in the CKGR is a direct loss to the San as communities. This loss directly affects the San's livelihood in two ways, the

communities lose the profits obtained from their resources and their access to the life sustaining resources for their livelihood.

The loss of the CKGR equally has a direct bearing on the San's indigeneity. As discussed in Chapter 3, an integral part of indigeneity is the ties the San have with their ancestral land and what the land, resources and territories represent. The San in resettlement villages now have children and grandchildren born outside the CKGR and who have never set foot in the CKGR. The GoB is succeeding in its operation 'Kill the San' because in the not-so distant future, the San will have a generation who have never entered the CKGR. The MDA constrain the San's right to movement. Those in the CKGR are not allowed to roam their ancestral land in search of food, medicines or for religious rituals nor can they use the resources for their sustenance. The San in resettlement have been denied access to the CKGR all together as they is legal requirement to obtain an access permit from the Ministry of Wildlife and National Parks and such permits do not come easy for anyone associated in anyway with the San, i.e. if you intend doing research on the San or if you are a San looking to access the CKGR for ritual purposes. However, the permits come easy for tourists. The fact that the San cannot access the CKGR means they cannot perform their religious rituals which should ordinarily take place in their ancestral land.

The following discussion provides key conclusions of the thesis and focuses on the recommendations for different stakeholders.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Implications and Reflections

The thesis explored the impact of the MDA on the promotion and protection of Indigenous Peoples' rights in Botswana and used the San as a case study. The interest in doing research on how Indigenous Peoples interact with development was prompted by the reinvigoration of the MDA policies in Botswana which resulted in the relocation of the San from the CKGR to modernised resettlement villages. The experiences of the San illustrate that the MDA end goal affects Indigenous Peoples in two ways. Firstly, Indigenous Peoples inhabit land and own natural resources required by the states to operationalise the MDA. Secondly, given that the MDA is internationalised and represented as a standardising tool, it is in other instances interested in creating uniformity in societies, adopting dominant tribes' or societies ways of doing and being and imposing the same on Indigenous Peoples. In both above instances, Indigenous Peoples lose what matters to them like the ancestral land, natural resources, access to traditional livelihoods, identity, culture amongst others.

In Botswana, the MDA was a long time in the making. The MDA has a long historical basis which dates to colonialism but has over the years taken different shapes with a similar end goal of standardising development in the Westphalian state. Colonial rule spanned over 80 years and left a legacy of discrimination, inequality, and dispossession for the San. The marginalisation and discrimination of the San is socially and legally constructed. In the social context, Tswana groups invaded present day Botswana, dispossessed the San, and dominated them. The Tswana used the land previously owned by the San to establish their agricultural enterprise, rendered some of the San their serfs whilst some San fled to further parts of Botswana. In the colonial period, the government was not interested in the San's welfare, inclusion, protection from dominant groups or participation in decision making. The colonial government elevated Tswana groups to a position of prominence by involving them in decision making processes, taking consideration of their representation, and ensuring that their pre-colonial structures remain intact and respected. The colonial government recognised Tswana leadership as legitimate and allowed them to reign throughout the colonial period with no interference except where Tswana leadership encroached on white supremacy. Moreover, the colonial government gave only Tswana leaders an opportunity to lay claim on land on behalf

of their tribes before declaring the remaining land freehold and state land. This exclusion of the San in these exercises attest to the colonial government's policy intent to marginalise, discriminate against the San, and exacerbate the precarious position the group was already in. The post-colonial government, dominated by the Tswana reinforced the colonial policies and ensured that the political, economic, and social status of the San remained consistent if not far worse.

The central argument advanced in the thesis is that the post-colonial development paradigm consists of internationalised, standardised developmental aspirations that some states (termed underdeveloped and developing) who are positioned as objects and subjects of international law are expected to aspire to attain. The expectations emanate from the purported authors of the MDA in the form of developed countries and IOs serving as imposers and facilitators of such policies. The thesis terms such developmental aspirations the Modern Development Agenda. In Botswana, the question of what the MDA is unravels the existing conflict of political power and power players. The understanding of MDA as characterised by Tswana lifestyle demonstrates the historical social and power relationship between the Tswana tribes and the San. The lifestyle, customs, laws, and knowledge of Tswana tribes are considered correct ways of being, whilst the San are treated as peoples without legitimate customs, laws, and knowledge. This arguably illustrates that from the point of view of the San, MDA is socially constructed and reflects existing systems of power. The developmental trajectory adopted by the GoB does not factor in the San preferred developmental pathways, but it is dominated by the Tswana political elites. It is these characteristics of the MDA that renders the MDA toxic and dominant.

MDA is posited as an extension of colonialism and globalisation. The same brutality, heartlessness, and desire to control is identified in pursuit of the MDA. The observations have been made by Eslava in scrutinising the MDA in motion in Bogota.[154] Whilst Eslava argued that the MDA resembled the colonial era, with the brutality of conquerors replaced with pursuit of financial gain and glorification of post development Bogota,[155] in Botswana the end goal of MDA is to erase the different economic, social and political existence and constitute an identical mainstream society, display power exercised by the dominant Tswana and ensure capital monopoly access and use indigenous land for mainstream economic activities.

[154] Luis Eslava, *Local Space, Global life: The everyday operation of international law and development* (CUP 2015).
[155] Ibid.

To present evidence-based conclusions on how the MDA impacts on the rights of the San in Botswana, the thesis adopted desk top research and socio-legal methods. The use of this hybrid methodology serves to demonstrate how in its operationalisation MDA interacts with the promotion and protection of Indigenous Peoples rights. In this context, the term Indigenous Peoples rights proved to be a controversial term on the one hand and an alien term on another. For example, whilst respondents who were affiliated to the ruling party 'demonised' Indigenous Peoples rights as 'unnecessary control mechanism', San activists, academics, lawyers, and development officers perceived Indigenous Peoples rights as necessary in a fast-paced world that tends to pursue profits ruthlessly at the expense of the vulnerable and marginalised like Indigenous Peoples. On the other hand, the San at grassroot level were oblivious to the existence of rights generally or 'specialised rights' that are intended to protect them against the tyrant GOB. However, in their articulation of their expectations in a democratic Botswana, the San expressed the bare minimum of equal treatment, access to their ancestral land, space to live their traditional lives without interference from the GoB and dominant tribes amongst others. In their expressions of the bare minimum, the San tend to regurgitate the provisions of the UNDRIP, only in vernacular.

The engagement with TWAIL enabled me to assess the operations of the MDA and Indigenous Peoples rights as creations of international law in the context of Botswana. The thesis concludes that the San in Botswana make an interesting example to use in contributing to the TWAIL's ongoing dialogue on the decolonisation of international law in two ways. Firstly, given that the making of the UNDRIP diverted from the norm in the making of declarations at the UN by including Indigenous Peoples and other stakeholders during the prolonged negotiations stage, the draft that was adopted has a semblance of what Indigenous Peoples consider important for their protection against states and the dominant developmental policies. The San who were not active or direct participants in the making of the UNDRIP recite in vernacular the cardinal principles found in the UNDRIP as crucial for their protection against the abuse by the GoB, capitalist monopolies and dominant tribes and further as essential for them to thrive as communities. This attest to the importance of inclusion and representation of all stakeholders beyond the states at the UN negotiation and decision-making tables in the decolonisation process. This is because States have an inherent colonial outlook and leaving the law-making process to them exclusively will result in recurring colonial ethos ridden frameworks.

Secondly, the fact that the San at grassroot level have no knowledge of the existence of the UNDRIP and are oblivious to its relevance to them makes the TWAIL's call for decolonisation urgent. Whilst the promotion and protection of Indigenous Peoples is a potential tool to mitigate the toxic effect of the MDA, subjects intended to benefit from the said rights have no knowledge of what rights are and how they are supposed to improve their lives. This demonstrates the lacuna in the international rights framework and contextualisation of such instruments in the everyday life of benefactors. In a colonial sense, the understanding and use of law is a privilege of the few, no attempts are made to publicise the laws and empower benefactors on how they can use the laws to their advantage. Colonialism requires that law be passed and there be little to no attempt at implementation especially if such laws have the potential to upset the status quo that is beneficial to governments.

An examination of the contestations and politics of indigeneity presented me an opportunity to reflect on their applicability in the context of the San in Botswana. Indigeneity remains a contested concept so is the implication of indigeneity. There is no universally accepted definition so much that its meaning depends on whose interest they seek to serve. The thesis argues that indigeneity can be understood from the point of view of structures, activists, and Indigenous Peoples. All these forms of indigeneity may complement each other but may equally be far apart and intended to protect divergent interests. The contentions over the definition of indigeneity may serve as one of the many serious hurdles to the realisation of the promise of indigeneity. Another notable challenge to indigeneity in practice is the ultimate power of recognition of indigeneity bestowed on states. The GoB is cited as a classic example given its indigeneity recognition policy. The thesis addresses the contention that indigeneity in the post-colonial period is equally associated with colonialism with an insinuation that Indigenous Peoples are a creation of colonialism. The importance of colonialism as the genesis of Indigenous Peoples' abuse, discrimination and marginalisation is an integral part of why Indigenous Peoples need protection. However, Indigenous Peoples are not a creation of colonialism. Particularly in the context of Botswana, when the Tswana invaded modern day Botswana, they found the San who were the First Peoples of Botswana. The colonial government contributed to the legally constructed marginalisation and discrimination of the San.

In contributing to the decolonisation discourse, the thesis adopts the postcolonial meaning of indigeneity. As a politically charged concepts in the post-colonial international law dialogue, indigeneity raises questions like, who can claim indigeneity and who has authority to recognise

indigeneity. All these questions require answers to enable those who are entitled to benefit from indigeneity to lay their claim. In the context of Botswana, indigeneity is perceived as a self-constituting identity of tribal communities, who possess peculiar characteristics that can only be attributed to them. Some notable characteristics include First Peoples status, special relationship with ancestral land, distinct culture, identity, livelihood, and determination to remain in the ancestral land and maintain traditional lifestyles, livelihood. In Botswana, self-identification seemed to be favoured by majority of the respondents except for ruling party-political affiliated respondents. The controversy on indigeneity in Botswana is further compounded by the GoB's policy position. The GoB favours the colonial characterisation of indigeneity as extending to all tribes within the national borders. The thesis argues that the indigeneity policy adopted by the GoB is ambiguous and open ended. The decision to retain the policy consistent with colonial Bechuanaland is deliberate and intended to ensure that Indigenous Peoples in Botswana do not enjoy any protection inherent in the post-colonial criteria of indigeneity. The effect of the indigeneity policy adopted by the GoB is the San's marginalisation, dispossession, and discrimination amongst others.

To provide another dimension to the contestations and politics of indigeneity, the thesis scrutinises the regional and international law construction of indigeneity. The thesis acknowledges indigeneity as an internationally renowned identity tool. Both the AU and UN have adopted various definitions and characterisation of indigeneity at different points. Indigeneity construction at regional and international level found expression through the criteria and working definition on Indigenous Peoples. The Cobo definition of Indigenous Peoples introduced the group to the legal dialogue and chart a trajectory for the promotion and protection of their rights. Equally important was the definition of Indigenous Peoples adopted by Erica-Irene Daes. Both definitions underscore the central argument in the thesis definition of indigeneity, that Indigenous Peoples existed before colonialism and any sort of invasion by the now dominant tribes and structures. Furthermore, the thesis highlighted the importance of priority in time when defining Indigenous Peoples for the San in Botswana as they consider their First Peoples status as important to the indigeneity.

Consistent with TWAIL, the thesis argues that indigeneity should be framed by Indigenous Peoples. The implications of invoking indigeneity from below and indigeneity as constructed by structures will effectively harmonise the two definitions. The implication of harmonising indigeneity at national and international level will close the existing window of opportunity that has seen many states abdicating their responsibility to promote and protect Indigenous

Peoples rights under the guise of 'politics and contestations of definitions of indigeneity'. Lastly, on indigeneity, the thesis characterised the relationship between land and indigeneity as twofold, firstly, the Indigenous Peoples' unique relationship with their ancestral land is an indispensable characteristic of indigeneity;[156] and secondly, indigeneity as constructed in the post-colonial period is necessary for the promotion and protection of Indigenous Peoples rights over their ancestral land.

The thesis asserts that the UNDRIP is a key instrument in the promotion and protection of Indigenous Peoples rights and traced the making of the said instrument. With experiences that historically affected and continue to impact Indigenous Peoples' lives the world over, Indigenous Peoples movement was founded on the quest to counter colonialism. Even without saying so verbatim, the prevalent logic that can be deduced from Indigenous Peoples is that the harmful effect of colonialism requires concerted efforts and targeted action from all stakeholders. This is however of little interest to states like Botswana that maintain colonial administrative structures that effectively continue to colonise Indigenous Peoples even in the post-colonial period. The evolution of the international law Indigenous Peoples framework has been met by resistance from some crucial stakeholders such as states. The drafting of the UDRIP was not an exception. Often than not states express concerns about the potential threats emanating from the adopting of certain frameworks within their nation states. The unfounded concerns raised by States when negotiating treaties and legal instruments on the promotion and protection of Indigenous Peoples rights are without a doubt delay tactics to frustrate the benefactors of the rights in question. For example, during the negotiation of the UNDRIP, The African Group was concerned that the right of Indigenous People, as peoples and as individuals, to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation was a threat and could endanger the inviolability of African borders whilst there exist collaborations between Indigenous Peoples across borders, for example the San in Botswana, Namibia, Zimbabwe and South Africa.

Despite the disputation during the negotiation of the UNDRIP, the legal framework did come into effect. The thesis argues that the UNDRIP is a crucial regulatory instrument in ensuring a balance between the state's MDA policies and the promotion and protection of Indigenous Peoples rights. The thesis concludes that as a declaration, the UNDRIP has some weight and that is advantageous for Indigenous Peoples' activism. This is because declarations are a

[156] Corinne Lennox and Damien Short (eds) *Handbook of Indigenous Peoples' Rights* (Routledge 2016).

special category of recommendations that the UNGA adopted.[157] Declarations have a unique importance because they reflect significant values that the international community recognises as worthy of safeguarding as was the case with the UDHR.[158] Moreover the significance of the UNDRIP emanates from the fact that, the stakeholders within the UN fora, through a near-unanimous decision, crafted the text of the UNDRIPS, which displays legally binding language.[159]

The thesis engages with four of what are termed the cardinal principles of the UNDRIP in the development of Indigenous Peoples to elucidate the stakes engaged when analysed from the ground up, and with reference to the San's lived experience and articulated concerns as expressed through rights. The thesis argues that as it relates to development, Indigenous Peoples' right to self-determination allows them to make choices about their economic, social, and political development with no external pressures and influences. An extension of Indigenous Peoples right to make decisions rests in their right to give free, prior, and informed consent before any decisions are made affecting them. This means Indigenous Peoples can take an active part in the making and implementation of developmental policies targeted at them. Rights as they relate to land, territories and resources reiterate the importance of ancestral land in the indigenous identity. Furthermore, reiterating self-determination and free, prior, and informed consents is an acknowledgement of the importance of Indigenous Peoples involvement in decision making about issues that directly or indirectly affect them. The thesis concluded that the cardinal principles have economic, social, and political benefits for Indigenous Peoples.

The thesis traces the impact of the MDA on the rights of Indigenous Peoples and argues that the adverse impact of the MDA on Indigenous Peoples rights is apparent. In fact, the MDA is nothing short of toxic as it is inherently totalising, disregarding divergent pre-existing circumstances, values and overhauls life as known to Indigenous Peoples in favour of the life lived and known by mainstream societies. The thesis uses the experiences of the San in Botswana to demonstrate the perils of MDA when interacting with Indigenous Peoples. The San exist in the margins of power, have no access to their ancestral land and natural resources, have lost their fabric as communities and are barely surviving in *the land of the others/land of*

[157] Lagrange et al. (eds.), *Cultural Heritage and International Law* (Springer 2018).
[158] Ibid.
[159] Ibid.

their oppressors[160] following forced relocations from their ancestral land the CKGR. The thesis further used the case study of the San in Botswana to underscore the MDA tensions, conflicts and issues that cut across Indigenous Peoples in the rapidly developing world. The San's experiences are like that of the majority of Indigenous Peoples of the world, and such similarities are striking. The upshot is that even though Botswana was ostensibly founded on the constitutional principles of equality, justice and human rights, the promise to promote and protect the same for the San is frequently broken with impunity. The GoB's three-pronged approach in dealing with the San, namely denying the existence of Indigenous Peoples in Botswana, declaring that all tribes in Botswana are Indigenous Peoples, and classifying the San in distinctive ways than any other tribe whilst denying that the San may have any special needs is intended to frustrate any advocacy geared towards the emancipation of the San. Furthermore, this approach has ensured consistency in the discrimination, marginalisation, and domination of the San from colonial period to post-colonial period.

The thesis uses the experiences of the San as an account of the adverse impact of the MDA on their rights and underscore dispossession, interference with religion, livelihood, freedom of movement as some notable manifestations of toxicity in the MDA policies. There is ample evidence to demonstrate that the GoB forcefully relocated the San from the CKGR which was a direct breach of the San exercise's right to self-determination and without their free, prior, and informed consent. The GoB made a unilateral call that the San's way of life in the CKGR was unsustainable, unacceptable, and uncivilised, and decided to establish modernised resettlement as their relocation destinations. At the resettlement villages and within the CKGR, the San experience an array of interference with their rights and emotional distress. The GoB does not put much effort into rebutting the allegations that were made by the San pertaining to the forceful nature of the MDA policies because there seems to be a general attitude amongst bureaucrats that as the ultimate authority in the land, what the San think is immaterial and inconsequential.

The *Sesana case* demonstrates that the implications of the MDA on the San's rights are acute. In the *Sesana case* an otherwise presumed to be docile community, rose to the occasion, forged forces with international stakeholders and instituted legal proceedings against the GoB challenging their forced relocation. The High Court addressed issues relating to indigeneity,

[160] This is a common expression amongst the San at grassroot level as they perceive the resettlement as belonging to Tswana tribes. The San also perceived the land to be foreign land because it does not support their livelihood activities.

the importance of land to Indigenous Peoples, Indigenous Peoples development, Indigenous Peoples rights amongst others. Amongst others, the Court ordered that the San were in possession of the CKGR which they lawful occupied; that the San were forcibly or wrongfully deprived of their possession; that the GoB's refusal to issue gaming licenses was unlawful; that the GoB's refusal to issue gaming license was unconstitutional. The *Sesana case* provides the practical dimensions to the thesis. Although the High Court found in favour of the San, the GoB is in contempt of the court order. The GoB seems to think that it has the prerogative to decide whether to comply with the order and on what terms. This has resulted in some litigants denied the benefits accruing from the judgment. The case and the outcome thereof highlight the fact that Indigenous Peoples' engagement with State agents is unlikely to yield immediate positive outcomes as such engagement begin on an unequal footing. The GoB wields enormous power and has used that to legalise its persecution of the San. No matter the challenges of the aftermath of the litigation, the 'audacity' of the San to take the mighty GoB to court over the relocations, the outcome of the *Sesana case* and the potential it bears for Indigenous Peoples of the world were nothing short of monumental. Equally, the jurisprudential value of the *Sesana case* should not be taken for granted. The *Sesana case* is used to highlight some of the challenges faced by Indigenous Peoples in Africa as it equally highlights the resistance modes adopted by Indigenous Peoples in their effort to mitigate the pressure presented by MDA.

The following discussion provides summaries of the thesis from the San's point of view.

6.2 From the San's Perspectives

The thesis reached numerous conclusions on how the MDA impacted the rights of Indigenous Peoples generally and the San specifically. Furthermore, other conclusions pertain to related thematic issues in the thesis like status of the San in Botswana, the relationship between the San and other tribes and structures in Botswana, indigeneity, international Indigenous Peoples rights, decolonisation of Indigenous Peoples' rights and decolonisation of development amongst others. The following discussion reflects the San's views on these important issues.

The political, social, and economic status of the San in Botswana remains the same since colonial times. Since the colonial government's construction of legally entrenched discrimination against the San, the law has been used to alienate the San further. The law is not responsive to the San's needs. The law is thus understood as a tool used solely to perpetrate inequality and prejudice against the San. In a constitutional liberal democracy like Botswana,

human rights and by extension Indigenous Peoples rights take precedence over customary laws. However, these rights are not extended to the San who feel failed by the GoB. The failure to acknowledge the historically constructed marginalisation and vulnerability of the San is a springboard for the continued violation of their rights by the state actors, investors, and other ethnic groups.

The contemporary MDA policies adopted by the GoB retains colonial traits. It is inherent in the system to perpetuate inequalities and discrimination especially against historical victims of the same system. The current experiences of the San including the forced relocations flag the inherent and systemic hurdles existing in a system that was deliberately created to exclude, abuse, discriminate and dispossess in the first place. A case of old wine in a new bottle. Equally colonial, is the GoB's characterisation of indigeneity. The construction of indigeneity in a colonial sense diminishes the value add of the regional and international mechanisms on Indigenous Peoples and their potential impact in the promotion and protection of Indigenous Peoples rights. There are shades of indigeneity. Indigeneity is diverse and is represented in different factors for different ethnic groups. Any effort that seeks to homogenise indigeneity may result in the exclusion of some Indigenous Peoples in the criteria is problematic. Definitional parameters and characteristics of definition of indigeneity will thus have to be left as open as practical. Moreover, there is need to acknowledge that indigeneity like any identity marker is not diminished by time and certain happenings. For example, there exist an argument in Botswana that suggests that some San should not claim their indigeneity because there is a constant expectation on those who identify as Indigenous Peoples to maintain certain lifestyles and not associate with the outside world, for example as soon as one acquires a passport and travels extensively, their indigenous credentials are put into disrepute and they are deemed to have shed their indigeneity merely by exposure and openness. It is an absurd analogy.

The promotion and protection of the San's rights is dependent on the recognition of their indigeneity and the implication thereon.[161] Unless the GoB acknowledges experiences of discrimination, fragility, abuse against the San and the systemic nature of such treatment, there is no avenue for the GoB to promulgate protective policies. This becomes clearer with the relocation policies and how inept they are to a point that they failed to improve the lives of the

[161] Goemeone E.J Mogomotsi, and Patricia K. Mogomotsi (2020) 'Recognition of The Indigeneity of the Basarwa In Botswana: Panacea Against Their Marginalisation and Realisation of Land Rights?' *African Journal of International and Comparative Law*, 28(4), 555.

San. The relocation policy itself is an indictment of the GoB's inability to acknowledge the San and their experiences as communities.

The MDA policies that effectively dispossess the San of their ancestral land on the one hand and resistance from the San against such policies on the other are a central figure in the discussion of the relationship between indigeneity and land as they highlight how both nation states and Indigenous Peoples perceive land. The forced relocations and dispossession policies are in themselves a clear indication that nation states are far from acknowledging even in the least that Indigenous Peoples exist in their midst, that they have the right to own and occupy their land even without qualifying such land as 'ancestral or communal land' and deserve protection against dominant groups and *trigger-happy* state machineries. In fact, states now preside over policies that are intended to dispossess Indigenous Peoples, disintegrate their communities, and force them to participate in the social, economic, and political mainstream as 'new creatures' and their traditional lives treated as 'the former things that passed away'. Often when states adopt MDA policies either of two factors or both prevail. The state is interested in the land for purposes of deploying it to 'productive use', and the Indigenous Peoples are in the way, or the state is interested in modernising the Indigenous Peoples way of life. Both factors were present in the San's case study. However, the GoB moved from these two and introduced a third justification, namely relocations for conservation of the CKGR and the natural resources therein. However, evidence suggests that the relocations were solely intended to give way to mining and tourism in the CKGR which were both taking place during the field work.

The debates pertaining to the use of the CKGR post the San's forced relocations were spearheaded by the San activists. The San were relentless in their advocacy against their forced relocations and were even more stern when they observed that the CKGR had become home to mining entities and several hotels. This attest to the fact that in the Twenty First Century, the San are constantly proving that they are autonomous beings with agency. The San's advocacy and resistance has focused on neoliberal developmental policies used by the GoB as vehicles to dispossess and marginalise them further. The *Sesana case* show another dynamic to the San's resistance strategy. The San's capacity to resist and speak against the GoB's decision to forcefully relocation them has been credited to their affiliation to a strong Indigenous Peoples' rights international and regional network and stakeholders.

As part of the activism and proactive approach in asserting themselves, the San activists made a representation to the High-ranking officials within the government structure as to their position about sharing the resources in the CKGR. Interestingly, the San are not opposed to sharing the resources in the CKGR with the GoB or third parties and are open to allowing some capitalist oriented business to take place in their ancestral land. The San require that they give free, prior and informed consent to the GoB; that the communities decide on how their resources should be used; if the GoB contracts third parties to run any business in the CKGR that they be consulted so they have a say and determine how such businesses would be conducted; that they are benefactors of the profits obtained through the use of their resources; and that their role is not reduced to that of stakeholders but of active partners who have a say on how their resources are used.

The San's expectations of the basic standards to be adhered to in their development by the GoB are backed up by the UNDRIP. Whilst classical international law was responsible for the erasure of indigenous land ownership through the application of the principle of *terra nullius* and Western conceptions of identity, property, and property ownership, it has now through the UNDRIP assumed a restorative role for Indigenous Peoples to recover what they lost through the deployment of indigeneity. In this instance, indigeneity is a social-corporeal positioning within socially differentiated fields of power, history and relations with land and earth.[162] For the San, their ability to own, occupy and make decisions about their ancestral land is an integral aspect of their indigeneity.

The UNDRIP must be acknowledged for what it is, a mitigatory tool that still requires some groundwork from various stakeholders to give effect to its promises. It is not necessarily the UNDRIP that is problematic, but the inherent and systematic hurdles present with the international legal system. Even if Indigenous Peoples were presented an opportunity to draft what they consider the perfect and idealist framework, the enforcement would still be a greater challenge. At the helm of the problematic implementation hurdles is the power imbalance between states and Indigenous Peoples which manifests in their roles in the making of implementation of the UNDRIP. State sovereignty, described as the brick and mortar of international law remains the greatest vice against the success of international Indigenous Peoples rights regulatory frameworks as states retain the ultimate power to decide their implementation trajectories. Consistent international law implementation absconders like

[162] S.A. Radcliffe, 'Geography and indigeneity II: Critical geographies of indigenous bodily politics' (2018) 42 Progress in Human Geography 436.

Botswana are shielded by their sovereign right to decide what area of international law to domesticate and when.

The UNDRIP and the AU Charter have proved that they are not guaranteed safeguard measures, they are rather highly dependent on the national political will to advance Indigenous Peoples' rights. The disturbingly similar experiences of Indigenous Peoples characterised by forceful integration, cultural genocide, dispossession of land and development without consultation and consent at the face of growing regulatory and institutional mechanism at regional and international level remain a concern for Indigenous Peoples. In the context of Africa, the preliminary issue that has beset Indigenous Peoples is the continued refusal of states to recognise the existence of Indigenous Peoples in their midst.[163] The experiences of the San in Botswana are a testament to that. Botswana as a dualist state lags in the domestication of a very pertinent international human rights and Indigenous Peoples rights framework that can facilitate and fast track the promotion and protection of Indigenous Peoples' rights nationally. The case of the San in Botswana demonstrates that experiences of deprivation and disadvantage continue despite the existence of a comprehensive legislative and policy framework on the promotion and protection of Indigenous Peoples' rights at regional and international level. It is apparent that states still fall short on implementation. Arguably, the implementation lacuna is attributable to several factors including the complexities inherent in issues of indigenousness, outright unwillingness of states to discharge their obligations and most importantly the inherent systemic hurdles that exist in the international legal system. This is a tell-tale of the difficult way ahead for Indigenous Peoples in their efforts to vindicate themselves as rights holders and as peoples whose independence ought to be respected by the *mightier* State.

While regional and international Indigenous Peoples rights frameworks are an increasingly common language of advocacy for many other stakeholders, the San at grassroot have not jumped into this bandwagon. The San deem these frameworks inapplicable to their communities. The language of rights as espoused by regional and international law is treated as complex whilst the enjoyment of rights is perceived as a privilege for some citizens in Botswana to the exclusion of the San. The San respondents believe that the exclusion of the San from enjoying rights including those provided for in the regional and international frameworks is a policy position that is premised on the attitude of the Tswana on the San. The Tswana attitudes towards the San translate into policy because key decision makers are

[163] Mulu Bzayene Lemma, 'The Palatability of the Concept Indigenous Peoples in Ethiopian Constitutional System' (2020) 95 J.L. Pol & Globalisation 1.

predominantly Tswana. This is symptomatic of historical inequalities that have rendered the San second fiddle to Tswana groups. Both San activists and at grassroot level noted that human rights and Indigenous Peoples rights are constructed in platforms such as Constitutional Review Commission, Parliament, Council sitting, the AU and UN that the San at grassroot level have no space in.

6.3 Recommendations

The following discussion will provide recommendations to the San, the GoB and other stakeholders on how to balance the competing interest between the promotion of the San's rights and MDA policies.

6.3.1 The San and the GOB

The GOB should review the Constitution and provide for the promotion and protection of Indigenous Peoples rights. The process of the Constitutional review for the purpose of introducing a chapter on the rights of Indigenous Peoples must be done with the full participation of Indigenous Peoples at grassroot level, activists, experts, academics, lawyers, and development officers amongst others. The process of election of the members of the committee to steer the process of review must be transparent. The terms of references of the review committee must be co-authored by all stakeholders. Before the commencement of the review process, there must be a Constitutional sensitisation project targeted at Indigenous Peoples and the public. This exercise must teach Indigenous Peoples and the public about human rights, the constitution and its significance in a liberal democracy, constitutional review processes and its importance and processes involved in the constitutional review. After the appointment of the Review Committee, its members must undergo rigorous training on Constitutional law and Indigenous Peoples rights. The Committee must embark on benchmarking from countries with ideal Indigenous Peoples protective constitutional mechanisms.

In Botswana, the MDA is a matter of public policy. In MDA policies, the GoB adopts a top-down approach, which inordinately affects the San as they generally do not have adequate representation in government. The GOB should therefore promulgate provisional legislation on development. The development related legislation must provide protective clauses where Indigenous Peoples are the subject of development. Given that the Constitutional review exercises are inherently prolonged because of the sensitivity of the process and outcome of the

exercise, the GOB must adopt the UNDRIP as a provisional guideline on the development of Indigenous Peoples in Botswana. After the coming into effect of the revised Constitution, the provisional guidelines would cease to apply. This is with the understanding that the bare minimum provided for in the UNDRIP would be surpassed by the home-grown legislation.

The GoB should promulgate specific legislation that restores ownership of the CKGR to the San. Given the fact that in the *Sesana case*, the court declared that the San owned the CKGR, the GoB has a legal obligation to regularise that ownership by conferring the title of ownership over the CKGR on the San communities. The San can register a community trust in which the land would be registered. In facilitating for the San Community land title conferment, the GOB should ensure that the land board confers some certificate in the name of the community trust. After receiving the certificate, the San should ensure a survey on the property and apply for a title deed with the Deeds Registry office. Title deed as a secure title is ideal for the San as the surveying of the to be titled property provides certainty which mitigates any encroachment by third parties. Given the precarious position the San are in, their dispossession may be attempted in future and to avoid the recurrence a secure title is necessary. Ownership of ancestral land is crucial for the overall wellbeing of the Indigenous Peoples and should be understood from the point of view of the San.

After the coming into effect of all legislation and regulatory framework dealing with Indigenous Peoples, service providers and those charged with the implementation must undergo training. The new legislation and regulatory framework must be translated into native languages including Indigenous Peoples' various native languages to facilitate accessibility.

The enforcement of the Sesana case is an important step in the promotion and protection of the San's rights. This may be done voluntarily by the GoB to cultivate a constructive and productive relationship between itself and the San going forward. In the alternative, the San may approach the High Court of Botswana to seek to enforce the order, particularly seeking clarity from the Court on how the implementation should be effected and the time lines of implementation. Given that the San's lawyer is a prohibited immigrant in Botswana, the San may seek the assistance of national Nongovernmental human rights organisation such as Ditshwanelo-Centre for Human Rights, an organisation that has remained steadfast in its support for the advocacy of the promotion and protection of Indigenous Peoples in Botswana. The enforcement of the Sesana case will mean that the San have access to their ancestral land as inhabitants and enjoy the rights and privileges they have enjoyed for many years. Furthermore,

the GoB and the San would be compelled to commence negotiations on the way forward pertaining to the economic activities run by private entities with no benefit for the San that are taking place in the CKGR such as mining and tourism.

The emotional turmoil the San have suffered during the forced relocations and are suffering in the resettlement villages is overwhelming. To begin the process of healing these communities, there is a need for the GoB to publicly acknowledge the transgressions perpetrated against the San by both the incumbent government and the colonial government. This public acknowledgement must be coupled with a sincere apology. Furthermore, the GoB must work with the San and constitute the Truth and Reconciliation Commission. The Truth and Reconciliation Commissions have become acceptable as a stepping stone in addressing the historically rooted divisions by giving victims of past injustices platforms to articulate their experiences. In fact, Truth and Reconciliation Commissions have gained prominence as avenues to allow Indigenous Peoples to speak of their ongoing traumas. In Canada, the federal government established the Truth and Reconciliation Commission of Canada (TRC) to deal with the legacy of residential schools.[164] Its mandate was to accumulate, document, and commemorate the experiences of the 80,000 survivors of the residential school system in Canada, so the survivors could begin to heal from the trauma of these experiences and to teach all Canadians about what happened in the residential schools.[165] The Botswana Truth and Reconciliation Commission 's mandate could focus on providing a platform to the San to share their experiences with the GoB , provide suggestions on what they deem just compensation for them for what they have experienced and recommend a way forward for building a productive relationship between the communities and the GoB.

The GoB must make provision for two San representatives in the Specially elected vacancy in the Botswana Parliament. To fill the two vacancies, the San in Botswana must have preliminary elections to appoint their representatives to Parliament and recommend the names to the President. This would bridge the political representation gap and ensure that the San are represented at the highest law-making structure.

Given that the San are not opposed to sharing the CKGR and the resource therein with the GoB and other third parties, the GoB and the San must explore the benefit sharing avenue. The San in the CKGR are seemingly familiar with the practice of benefit sharing and perceive its

[164] Kory Wilson, *Pulling Together: Foundations Guide* (2018) available at Pulling-Together-Foundations-Guide-1660152716.pdf
[165]Ibid.

potential as highly advantageous to them as communities.[166] The San activists proposed benefit sharing as a middle ground between their preferred traditional developmental pathways anchored on their indigenous knowledge and the GoB's dominant MDA. The development officers noted that they were informed by high-ranking officers in government that some benefit sharing agreement had been signed between the San representatives and some European company (identified only as the patent holder) that was developing some treatment for weight loss using the San's indigenous knowledge on Hoodia, an indigenous fruit with appetite suppressing properties that the San use to survive life in the CKGR.[167] Other respondents noted that post the *Sesana case* litigation, the San engaged consultants who produced a benefit sharing agreement for consideration by the GoB.[168] In terms of the said agreement, the San proposed a demarcation of the CKGR into residential and business parts. The term benefit sharing emerged from the Convention on Biological Diversity (CBD) adopted in 1992. The CBD has three objectives namely: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits from the use of genetic resources.[169]

In the legal field, benefit sharing is a technical term used in the context of access to and use of human and non-human genetic resources. Non-human genetic resources include plants, animals, and microorganisms. The term describes an exchange between those who grant access to a particular resource and those who provide compensation or rewards for its use.[170] Benefit sharing may encompass taxation and revenue distribution, job creation, ownership of companies and shares, negotiated agreements and community development programmes and all the benefits that accrue to local, especially Indigenous, communities directly affected by resource development.[171] In his role as UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya identified a 'preferred model' of resource development in which Indigenous peoples have greater control over planning decisions and project implementation, and consequently a more meaningful share of the benefits of resource development.[172] Four models of benefits sharing from the Artic have been identified namely, (a) 'paternalistic mode' (a mode dominated by the state); (b) 'company centred social responsibility (CCSR) mode' (a

[166] Interviews, Supra.
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Emma Wilson, 'What Is Benefit Sharing? Respecting Indigenous Rights and Addressing Inequities in Arctic Resource Projects' (2019) 8 Resources 74.
[172] Ibid.

mode in which the company takes a more decisive role); (c) 'partnership mode' (bi-lateral partnerships between communities and companies, or tri-lateral partnerships involving government); and (d) 'shareholder mode' (a mode in which local communities own shares in mineral projects and in the companies exploiting the resources).[173] The shareholder model is proposed in Botswana as it is close to what the San proposed to the GOB post the *Sesana case*. The San proposed that the current villages maintain the status of their residences and parts of the CKGR where minerals were prospected should serve as the business side of CKGR which would house mines, hotels, and campsites.[174] The San wanted their Community Trust to have shares in the businesses that were to be conducted in the CKGR.[175] For the benefit sharing agreement to materialise, the GoB and the San must begin their reconciliation process to build trust. The San must be involved in the strategic planning of the agreement through their chosen representation from the beginning. The preliminary negotiations and subsequent agreements must delineate in clear terms how the relationship will work, which land and resources will be developed, for how long the agreement will be in place, what mitigation strategies will be put in place to ensure eco-friendly business and the specific benefits the San are entitled to as communities.

As a last resort, if the GoB fails to fully implement the order in the Sesana case within twenty-one days of being asked to do so, the San must take their case to the African Commission for adjudication. The GoB is a party to the African Charter and as such is bound to promote and protect the San's rights as Indigenous Peoples.

6.3.2 On International Law and Development

There is enormous pressure on the developing countries to 'catch up' with the developed world and to do so at whatever costs. The developing countries that are so ever reliant on the developed world easily give in to the demands and dictates of MDA because they perceive it as a space of hope as sold out. The developing countries do not perceive themselves in a position to renegotiate new terms favourable to them and their divergent, vulnerable populations. Yet it is impossible to successfully use mechanisms that were deliberately created

[173] Wilson, Supra.
[174] Interviews, Supra.
[175] Ibid.

to benefit the Global North unless an intentional reform that is inclusive of the developing countries' values, views and contribution is undertaken. What becomes of interest is the feasibility of the proposal for an all-inclusive deliberation that will lead to an internationally owned mechanism considering current treaty making processes. Developing countries are still dealing with the consequences of colonialism, that fact will forever disadvantage them and will continually impact on their capability to negotiate with the 'hegemonic Global North'.

The decolonisation of international law is an absolute necessity if the international law generally and the UNDRIP specifically is to attain the promotion and protection of Indigenous Peoples' rights. In the Eurocentric perspective, there are still constant attempts to define rights as 'illusions' that presumably exist in an ivory tower, in this instance the influence and implications of cultural, geopolitical, and historical factors are diminished. Decolonisation of international law and development entails going back to the drawing board and acknowledging the toxic traits of international law and the values that underpin the development project from their historical perspective first. Both international law and development are predicated on Eurocentric understanding of being and doing which have been successfully transported to various parts of the world including Botswana. This Eurocentric perspective has no place in the Twenty first century because it creates a certain genre of the human that Europe's geopolitical power universalised.[176] To make sense of international law and development and possibly get value from these 'projects' there is need to discern their injurious elements. As it relates to Indigenous Peoples, the MDA in its status quo has proved to be dominant, dispossessive and discriminatory. The decolonisation project begins with finding a place for indigenous knowledge in the current developmental pathways. Indigenous knowledge is one of the many contributions Indigenous Peoples can bring onboard to mitigate the toxic elements of the MDA and international law. Decolonisation as a way forward was recognised by the UN through the establishment of the United Nations Special Committee on Decolonisation in 1961 to oversee global decolonisation.[177]

Sovereignty of states may be used to counter the prevailing argument that the developed nations use international law to interfere with national policy framework to the detriment of Indigenous Peoples. The truth of the matter is that the sovereignty of the developing countries is eroded by some of the foundational principles of international organisations such as the weighted voting

[176] Yael Ben-zvi, *Native Land Talk Indigenous and Arrivant Rights Theories* (DCP 2018)
[177] Tracey Banivanua Mar Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire

system of the Bretton Woods Institutions. For example, this system allows wealthier nations to have a greater say in the affairs of the World Bank and the International Monetary Fund.[178] Consequently, the developing countries are relegated to a position of subordination, good only for receiving direction from the wealthiest nations and giving the developed world more access to their natural resources. The preceding argument equally applies to the UN. Whilst an argument may be made that the decision-making processes of the UN involve states on equal footing, in practice this argument is not true. For example, the outcome of the General Assembly which is accessible to all member states is just recommendations and have no binding effect, whilst decisions of the Security Council with no representative of the developing world are binding. Beyond the developed and developing world dichotomy, only the state remains the sole decision maker within the UN structures, others may participate but the state has the ultimate say on what goes. There is an urgent need to restructure the decision-making processes within the UN to allow other stakeholders to participate in the decision making of standard setting and regulatory frameworks. Stakeholders that may be allowed into these processes could be regional body representations that are appointed by voting by non-governmental organisations with status before regional structures. This will dethrone the Westphalian state as the sole decision makers within the UN structures, neutralise the prevalent abuse of power by states and provide checks and balances on the states.

[178] Pahuja, Supra.

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