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RETENG: STATEMENT NO.1

Discriminatory Laws of Botswana as identified and discussed at the Executive Meeting of RETENG: The Multicultural Coalition of Botswana (Monday June 20th, 2005 and approved on July 11, 2005.

Introduction

This document provides the legal context for the violation of the linguistic and cultural Rights of the Non-Tswana speaking ethnic groups in Botswana. The laws recognize and protect the rights of the eight Tswana speaking groups with regards to ethnic identity (which includes language and culture), land (which entails the economy and culture) and chieftaincy (which entails the governance and decision-making body). The constitution of Botswana and related laws is in violation of the International Convention on the Elimination of Racial Discrimination, the International Covenant of Civil and Political Rights, the Universal Declaration on Human Rights and the UN Declaration on the Rights of Persons belonging to Minorities, which Botswana has ratified.

All the Acts described in this report are in violation of the main spirit of Sections 3 and 15 of the Constitution. However, judgment on the Wayeyi case indicated that sections of the constitution cannot be declared unconstitutional. As a result of this judgment, the discrimination in the Chieftainship Act and all the other laws or Acts, relating to who is chief, tribe and who owns the territories (land) have been transferred into the constitution through Bill No. 34, in order to validate and protect such discrimination. This means that there are no domestic remedies the court can issue after the enactment of Bill No. 34. This is highly regrettable and clearly anti-human rights.

The discriminatory laws are as follows:

1. Chieftainship Act (CAP 41:01) (This Act has been repealed and Replaced by the Bogosi Act of 2008), However, the discrimination continues with all non-Tswana tribes and their chiefs still not recognised and not have collective land rights- only numbering of sections has changed)

Section 2

- This law predates independence (1933) and it defines the concepts of 'tribe' and 'chief' in section 2, and limits them to the eight Tswana speaking tribes at the exclusion of others. It states that the term tribe "*means the Bamangwato tribe, the Batawana tribe, the Bakgatla tribe, the Bakwena tribe, the Bangwaketse tribe, the Bamalete tribe, the Barolong tribe or the Batlokwa tribe". All*

these tribes speak Setswana as mothertongue'. This means only these tribes and their chiefs are recognised by law in Botswana.

- It further states, "*Tribal territory means respectively, the Bamangwato, Batawana, Bakgatla, Bakwena, Bangwaketse, Bamalete and the Batlokwa tribal territories, as defined in the Tribal Territories Act, the area known as the Barolong Farms as described in the Botswana Boundaries Act, and any other area which may be added to any such areas by any enactment*. This law provides group rights to land to the Tswana at the exclusion of the non-Tswana who are in fact the earliest arrivals on the land.

Sections 15 – 22

- The functions and powers provided for in these sections are exclusively enjoyed by the Tswana chiefs as a result of their recognition in the definition of 'chief' contained in Section 2 of this Act. These include the powers to recognise or terminate recognition of sub-chiefs and headmen.

Section 16: (no change here)

This section is worth highlighting because:

- It empowers the Tswana Chief to admit other tribes into his/her tribal territory.
- This assumes that all non-Tswana tribes are members of the Tswana tribes by this admission.
- In reality, no non-Tswana tribe, either individually or collectively, has ever made an application for membership into the Tswana tribe. The Tswana found all the non-Tswana in the country, hence it is not logical that such applications and in turn the admission could have been made or likely to be made.

Section 20 (2): (no change here, only numbering has changed)

- Empowers the chief to impose a headmen over the people without consultation with the people but only with the Minister. In practice this has happened only in non-Tswana speaking areas where the Tswana chiefs have imposed headmen onto the non-Tswana tribe. For example, Regent Kealetile and his brother Tawana of the Batawana tribe have imposed headmen onto the Wayeyi tribe in Seronga, Gumare and Tubu and Makalamabedi between 1997 and May 2005. The Bangwato chief imposed a headmen on the Batswapong tribe in 2004.
- In Tswana areas, headmen and other chief's representatives are designated by consensus in accordance with their custom.

Section 25:

- It reads *'Notwithstanding any provision of any enactment to the contrary, no court shall have the jurisdiction to hear and determine any cause or matter affecting chieftainship. 2) For purposes of this section ' cause or matter affecting chieftainship' means any cause, matter, question or dispute relating to any of the following: a) the designation of any person as a Chief or the claim of any person to be designated as a chief; or b) recognition, appointment or suspension of a person to be a Chief*' (page 14:10).
- This section bars the courts from hearing issues of chieftaincy. It closes all other legal forum other than the *kgotla*, where only the Tswana Chiefs preside over cases, from hearing disputes regarding chieftaincy. It is clear that the likely complainant would be the non-Tswana, as they attempt to assert their chieftaincy, and those to hear them should only be the Tswana chiefs in their *dikgotla*. This is not justifiable.
- In practice, the Magistrate and High Courts have heard such cases since section 81 of the Constitution provides them with the powers to hear any matter. This implies that the intention of section 25 of the Chieftainship Act remains unconstitutional.

In the Wayeyi court case (Misca 377/99), the Chieftainship Act was declared unconstitutional and discriminatory. A court order was issued to amend it to enable all tribes to enjoy all rights in this law on equal footing. The government has refused to implement the order from the High Court.

The flowing Acts have NOT been reviewed.

2. **Tribal Territories Act** (CAP 32:03) demarcates the country into territories as belonging to the eight Tswana speaking tribes and four crown lands. The Act is also a colonial law, predating independence. This law provides group rights to land to the Tswana speaking groups, while other tribes have no such right, but only individual rights derived from the Land Act of 1970 (revised in 1993 & 1999). As a result, the Tswana speaking tribes have both group rights (as sovereigns) and individual rights to land use. In theory, the non-Tswana have no land and it is often used as a reason why non-Tswana cannot have their own chiefs – 'where will they get the land, this is our land'. *We derive our supremacy over other tribes because we own the land*' asserted Kgosi Kwena Sebele of the Bakwena tribe, during an interview with Gabz FM radio **(**April 20, 2005).

3. **Tribal Land Act** (CAP.32:20 PP 17)

Section 2:

- Defines **Land Boards 'a**s any land board established under section 3 and in relation to any area of land, the land board of the area where the land is situated'. This means that if the land is situated in the Bangwato Territory, the land board would be the Ngwato land board. It assumes that all the people in the territory are Bamangwato and denies others the right to identity.
- It also defines the terms '**customary law'** in relation to land, meaning the customary law of the place where land is situated. That is to say, if it is in the Bangwato tribal area, then it will be custom of the Bangwato tribe.
- It defines **tribal area**, as the tribal territory defined in Section 2 of the Chieftainship Act as belonging to the eight Tswana speaking tribes.
- The term '**district council'** is also defined as a tribal area (which is a tribal territory of the eight Tswana speaking tribes).

Sections 3 - 7:

- Establishes the land boards. The Chief of the eight Tswana speaking tribes or his Deputy are Ex-Officio members of the land boards.
- It names land boards after eight Tswana speaking tribes according to Schedule 1 & 2- e.g. Bangwato Tribal Territory and Ngwato Land Board, Tawana Land Board etc.
- The former Crown Lands of Tati or (North East), Chobe, Kgalagadi, and Ghanzi, are the 9^{th}, 10^{th}, 11^{th} , and 12^{th} land boards, but without a tribe and therefore not defined as the eight Tswana land-boards, since the tribes in these areas are not recognized.
- Since the non-Tswana cannot be Ex-Officio members of the land boards, they may resign or may be forced to resign by the Minister while the Tswana are immune to these processes.
- Land board secretaries (Chief Executives) are appointed by the Minister and currently, nine of the twelve (75%) are Tswana speaking.

4. Administrative Districts Act (CAP.03:02

- It defines administrative districts along tribal lines and in conformity with the Tribal Territories Act.

- Local district/District councils Act defines these entities based on the Tribal Territories Act. It discriminates along along tribal lines, e.g. the four Crown Lands of North East, Chobe, Kgalagadi and Ghanzi districts which are inhabited by non-Tswana are not defined along tribal lines.
- In the Section 2 of the Chieftainship Act, these districts are defined as 'tribal communities' and not territories in order not to recognize the tribes that reside in these districts, and to distinguish them from the eight Tswana territories with recognized tribes.

5. Bamangwato Land Grant Act : CAP32:07

- This Act sets the parceling out of land occupied by the non-Tswana speaking tribes (Babirwa in Selebi-Phikwe area) and Wayeyi, Kalanga, Khoesan, Nambya, Herero and Kgalahari (in the Orapa Letlhakane area) to the Bamangwato Concession Limited (BCL) and the De Beers Mining Companies respectively, without consultation or the consent of these tribes.
- The royalties from these mines are used to develop Serowe village (capital of the Tswana speaking Bangwato tribe), while the areas of the non-Tswana remain undeveloped.

6. Customary Courts Act: (Cap 04:05)

- Section 2 – defines ' customary law' in relation to tribe as defined in Section 2 of the Chieftainship Act, meaning it is the law of the eight Tswana speaking tribes.
- The powers and functions provided by this law are enjoyed by the eight Tswana speaking tribes (as defined in Section 2 of the Chieftainship Act). Examples of such powers are in sections 6, 17 and 39, power to establish customary courts, power to pass sentence, and access to records of all courts in his/her area respectively.

7. **Sections 15(4) (d) of the Constitution:**

- Sections 3 and section 15 of the constitution are meant to provide fundamental freedoms and protection from discrimination on any grounds.
- However, Section 15 4 (d) makes such protection from discrimination not applicable '*to any law so far as that law makes provision for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not*' (page 00:17).
- This means that if other laws, such as the chieftainship Act etc, discriminate against particular races, tribes and tribal communities, protection from such discrimination is not applicable. This is a derogation permitting non-prohibition from discrimination.

8. **Section 15 (9) of the Constitution**:

- **It** reads: *'Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section – a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution'* (page 00:18).
- This section protects colonial laws such as the Chieftainship Act and the Tribal Territories Act, which pre-date independence are not only colonial but also discriminatory along linguistic and ethnic lines. This section permits discrimination as contained in these colonial laws.

9. **Sections 77 to 79 of the Constitution:**

- Refer to RETENG's detailed reaction, contained in RETENG STATEMENT NO. 2, to the discriminatory nature of Bill NO. 34 of 2004 passed by Parliament on April 14, 2005, which was meant to amend these sections. They remained discriminatory along ethnic lines.
- The transfer of the discriminatory effect of all Acts of Parliament cited above, with the regard to the concepts of tribe, chief and land, into these sections of the constitution, validates these Acts and legitimatizes the discrimination they carry.

Conclusions:

10. In practice the Chieftainship Act sets up the tribal administration system in which only chiefs of the eight Tswana speaking tribes are recognised and rule over all other tribes of different ethnic groups within the territory (district) and it is validated by section 77 and 78 of the Constitution..
11. The rest of the laws enforce, in more practical terms, the definitions contained in Section 2 of the Chieftainship Act, resulting in the following discriminatory practices on the ground.
    a. Only these tribes have group rights to land and are the sovereign of the soil on behalf of the Queen, and currently of the government.
    b. Only them can agitate as a group for their land rights.
    c. They can also be compensated for loss of land rights should it be necessary that they move to facilitate national development. While relocation has been prevalent among the non-Tswana, who are only compensated for the inconvenience to move, and not for the value of their land, it has not affected the Tswana.
    d. The non-Tswana only have sub-chiefs, chiefs' representatives and headmen, who have no authority but work under the Tswana Chief to implement his/her decisions. This means that consultations on issues that impact on their lives, are carried out with the Chief of the eight Tswana speaking groups, at the exclusion of the non-Tswana who normally are only informed of the decision at *kgotla* meetings.
    e. It is well known that when decisions are communicated to the general public in a *kgotla*, that is synonymous with consultation. Rarely will what people say change the already made decision.
    f. The customary laws, which are used to pass judgement in the traditional *kgotla* are of the ethnic Tswana laws.
    g. The exclusionary definitions contained in Section 2 of the Chieftainship Act therefore resulted in exclusionary and discriminatory practical chieftainship and local governance structures. These structures have continued to operate despite the High Court order of 2001 (Misca 377/99- Wayeyi case) and the recommendations of the Committee on the Elimination of all Forms of Racial Discrimination of 2002.
    h. It is on account of these laws that the Basarwa (Khoesan) are being relocated from the Central Kalahari Game Reserve against their will. They are not a tribe, have no collective land rights, and have no chief to be consulted and reach a decision, and therefore, are part of flora and fauna at the mercy of the government, and so are all the non-Tswana.

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