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ANDREW LE FLEUR,
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The Khoisan in contemporary South Africa

Challenges of recognition as an indigenous people

South Africa continues to deal with the legacy of apartheid as its indigenous peoples were dispossessed of their land and their communities and cultures were destroyed as part of that legacy.

Although indigenous peoples are still not officially recognized as such and official statistics do not reflect their presence in South Africa, the 1996 Constitution included a reference to “Khoen and San”¹ people. The Khoisan historically comprise five main groupings, namely San, Griqua, Nama, Koranna and the Cape Khoi. No clear data exist about the official number of Khoisan people that currently live in South Africa.² Khoisan are not constitutionally recognized as Indigenous communities³. The current legal institutions continue to classify them as “Coloureds” just like the apartheid regime did. Nor did the South African government ratify Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries (1989)⁴.

It is in this background this article hopes to describe the Khoisan peoples⁵ context as it relates to their modern day challenges. This article will aim to set out that the Khoisan people continue in post-apartheid South Africa, to struggle for the protection of their key collective and human rights as distinct ethnic communities as stipulated by standards set out by the United Nations about indigenous peoples. The article will refer to the Khoisan interchangeably as indigenous peoples. This will be an expression of their self-identification as being the aborigines or first peoples of South Africa. They are referred to as first peoples since they inhabited South Africa prior to the arrival of Europeans and other black groupings. It also denotes their identifying with the international movement of some 370 million indigenous people advocating for their rights across the world.

Towards an ethnical classification of the Khoisan

The term Khoisan generally refers to the two groupings Khoikhoi and San. It was coined during 1928 by an academic Leonard Schultz. He used the term to denote both Khoi and San groupings. Within the Khoisan revivalist movement today, they commonly refer to themselves as Khoisan or Khoesan.

These two groupings have a shared history as the aborigines of South Africa; shared languages, geography and cultural values for the most part, as well as similar genetic ancestry. Different people throughout history interpreted the Khoikhoi and San as separate due to

¹ Constitution of South Africa 108 of 1996, Section 6.

² UN: Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, 2005, p. 2.

³ Indigenous in this article refers to the Khoisan communities as the original inhabitants of South Africa.

⁴ This is the only international treaty dealing with indigenous peoples rights.

⁵ The term ‘people’ is used in the context of indigenous peoples denoting their collective nature.

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their differing forms of livelihoods. The San generally lived as hunter gatherers whereas the Khoikhoi at some point took on pastoralism as a form of economy.

Khoi are also spelled Khoekhoe (in terms of the Nama language spelling) or Khoikhoi. They are today mainly grouped under what would be the Nama, Koranna, Griqua and Cape Khoi groupings. During colonial times they were referred to as 'Hottentots'. The San which is grouped into Khomani, !Xun and !Khwe, prefer to be called San or Bushmen.⁶

The Khoisan hold the oldest known human DNA, which qualifies them as indigenous people. "Indigenous people are generally considered those peoples who inhabited a country or geographical region at the time when people of different cultures or ethnic origins arrive. The new arrivals later became dominant through conquest, occupation, settlement or other means." Indigenous people are estimated around 370 million worldwide.⁷ There has been increasing recognition by the United Nations around the rights of indigenous peoples through the last 25 years, roughly. However, indigenous peoples in Africa still face serious violations of their human rights.

Under apartheid, the Khoisan were socially and politically invisible, being forced into the racial category of "Coloured". The government enforced a policy whereby all Khoisan people who had not already been assimilated into other populations were forcibly registered as Coloured. Failure to register was illegal and unavoidable. Most Khoisan people describe this period as extraordinarily humiliating. This resulted in the Khoisan not being able to maintain their identity as an indigenous community with a distinct ethnic composition. In 2005 the UN Special Rapporteur, Rodolfo Stavenhagen recommended in his report on the situation of the human rights and fundamental freedoms of indigenous people "that indigenous communities be recognized as such constitutionally and that the legal institutions maintaining the stigma of their classification as "Coloureds" by the apartheid regime be removed."⁸ As a result, the term could be used interchangeably within the Khoisan context due to this continued historical legacy still continuing in post-apartheid. Official statistics in South Africa still reflect the apartheid typology of race and language and do not reflect the presence of Khoisan people in South Africa⁹. According to South Africa's 2011 Census, the country's 51 million people are comprised of 79.2% Black Africans; 8.9% Whites; 8.9% Coloureds; 2.5% Indians; and 0.5% Other.

Contemporary challenges and opportunities for the Khoisan

The two main challenges the Khoisan experience in post-apartheid South Africa, are firstly, that their existence is invisible as a people from within the current constitutional dispensation. Secondly, they continue to be forced into this "amorphous identity of being labelled Coloured". The implication of these two challenges goes to their indigenous institutions; land & heritage, socio-economic circumstances and their indigenous languages.

1. Indigenous institutions

The newly formed government of South Africa during the early 1990's established various commissions or institutions to promote constitutional democracy by embracing their diverse cultures.¹⁰ Traditional Leadership and Customary Law were accommodated through Chapter 12 of the SA Constitution of 1996, which recognizes the authority of traditional leaders and

⁶ DeWet, FP: Make our children proud of the heritage, Spring 2006, p. 62.

⁷ United Nations Permanent Forum on Indigenous Issues: Indigenous Peoples, Indigenous Voices (Factsheet).

⁸ UN: Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, 2005, p. 3.

⁹ SouthAfrica.info: <<http://www.southafrica.info/about/people/population.htm#.UbaOBnf8LIU>> (02.08.2013).

¹⁰ Constitution of South Africa 108 of 1996, Chapter 9.

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customary law.¹¹ It allows for traditional authorities to function within the framework of South Africa's legal system and states that the courts must apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.¹² The Khoisan also want to be included in this legislative framework as it pertains to traditional authorities with due consideration of their differences.¹³ They have been in ongoing discussions with government for the last 18 years to address this recognition of their indigenous leadership.

In 1999 the former South African President Nelson Mandela established the National Khoisan Council (NKC). The NKC is a negotiating forum set up to address the constitutional accommodation of the Khoisan's historical leadership within the traditional leadership constitutional framework.¹⁴ The government investigated the leadership claims by the Khoisan during the period. The results of their investigation were compiled in *Status Quo* reports. The groupings included on this structure are the San, Griqua, Koranna, Nama and the Cape Khoi. The NKC membership comprised 22 members across different parts of South Africa.¹⁵ However despite its eighteen years of existence, the NKC continues to find itself in 'negotiations' with government with no meaningful progress made. The pending National Traditional Affairs Bill of 2010¹⁶ does make room for the recognition of the Khoisan leadership. The public participation process for the Bill was completed in 2010 but is currently awaiting approval by the Minister of Cooperative Governance and Traditional Affairs. It is unclear when the bill will be tabled before parliament.¹⁷

2. Language

Section 6 of the constitution refers to the word "indigenous" in reference to a number of African languages recognized under apartheid, which became the eleven official languages of the Republic in 1994, but it does not include the Khoisan indigenous languages. Nine of the eleven official languages are southern Nguni languages (such as Xhosa and Zulu) spoken by the majority of the South African population. 13.3% of the population speaks Afrikaans as a first language and 8% speaks English¹⁸. While these languages enjoy prominence in South Africa, none of the Khoisan indigenous languages such as Khoekhoegowab; Khwedam; !Xu or N/u are recognized as official languages.

The South African constitution makes reference to the Khoisan languages by way of section 6: "A Pan South African Language Board established by national legislation must

(a) promote, and create conditions for, the development and use of

(i) all official languages;

(ii) the Khoi, Nama and San languages;..."¹⁹

The Pan South African Language Board (PanSALB) is responsible under article 6 of the Constitution for the protection and promotion of the language rights of the different Khoisan-

¹¹ Constitution of South Africa 108 of 1996, Chapter 12.

¹² Constitution of South Africa, Chapter 12.

¹³ National Traditional Affairs Bill 2010, Section 21 and 22.

¹⁴ Department of Traditional Affairs: <<http://www.dta.gov.za/index.php/speeches/deputy-general/67-background-information-on-the-national-khoi-san-council-.html>> (02.08.2013).

¹⁵ National Traditional Affairs Bill 2010, preamble.

¹⁶ The proposed bill will seek to combine the National House of Traditional Leaders Act 22 of 2009 and the Traditional Leadership and Governance Framework Act 41 of 2003 into a single statute that will also incorporate the leadership and community structures of the Khoisan people. Through this single Bill, it then sets out how recognition of both traditional and Khoisan leadership will be formally recognized.

¹⁷ Chairperson of National Khoisan Council, Mr. Cecil le Fleur's statement before the United Nations Permanent Forum on Indigenous Issues, May 2013, New York.

¹⁸ Ibid.

¹⁹ Constitution of the Republic of South Africa, No. 108 of 1996, Section 6.

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language speakers.²⁰ In 1999 it established the Khoisan National Language Board (KSNLB), the first legally constituted body of indigenous peoples to represent themselves on this issue, which has raised the issue of endangered languages and the absence of indigenous languages and knowledge systems in the public school system and in governance. Overall the KSNLB has fallen short of meeting its expressed aims, as acknowledged by its own membership. PanSALB has since almost nearly ceased to exist. They also made it clear from the beginning that they would only be able to assist the Khoisan with grant applications. The constitutional provision unfortunately did not result in any further legislative and institutional measures to protect these endangered languages other than ad hoc project initiatives in limited parts of the country.²¹

3. Land

The UN Special Rapporteur best describes the current problem of Khoisan community development and land in his 2005 report:

“The root cause hindering economic development and intergenerational cultural survival, has been the forced dispossession of traditional land that once formed the basis of hunter-gatherer and pastoralist economies and identities. This historic dispossession of land and natural resources has caused indigenous people to plunge from a situation of self-reliance into poverty and a dependency on external resources. The most pressing concern of all the Khoi-San communities is securing their land base, and where possible, re-establishing access to natural resources necessary for pastoralism, hunting-gathering or new land-based ventures such as farming.”²²

Section 25(7) of the South African Constitution provides for restitution of rights in land to persons or communities who were dispossessed of property after 19 June 1913 as a result of the Natives Land Act. The Natives Land Act of 1913 was the first major piece of segregation legislation passed by the Union Parliament, and remained a cornerstone of Apartheid until the 1990s when it was replaced by the current policy of land restitution. The act decreed that only certain areas of the country could be owned by natives. These areas totalled only 13% of the entire land mass of the Union as a result of past racially discriminatory laws or practices.²³ Khoisan communities argue that they were dispossessed of their lands by Dutch and later British settlers and their colonial administrations long before the 1913 cut-off date.²⁴

The President of the Republic of South Africa, Jacob Zuma during his State of the Nation Address in February 2013 announced the government’s willingness to consider historical claims for land lost before the 1913 cut-off date.²⁵ This announcement could result in a possible amendment to the Restitution of land rights Act 22 of 1994. Subsequently the South African Land Affairs Ministry called a representative meeting of Khoisan leaders this year in Kimberley. This meeting was to discuss the various options open to the Khoisan communities as it pertains to land claims.²⁶

Some Khoisan communities have benefitted from the existing restitution programme post 1994. The landmark case²⁷ of the Nama²⁸ community from Richtersveld demanded the ful-

²⁰ Ibid.

²¹ International Labor Organization: Current trends, Geneva, 1999, p. 18.

²² UN: Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, 2005, p. 10.

²³ Constitution of the Republic of South Africa, Act 108 of 199, Section 25 (7).

²⁴ Draft Restitution of land rights Amendment Bill 2013, Explanatory memorandum to the Draft Restitution of land rights Amendment Bill, 2013.

²⁵ State of the Nation Address by His Excellency Jacob G Zuma, President of the Republic of South Africa on the occasion of the Joint Sitting of Parliament Cape Town, 14 February 2013: <<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34250&tid=98676>> (02.08.2013).

²⁶ Ibid.

²⁷ In the case of Alexkor & Others vs Richtersveld Community & Others, this Nama community brought a claim for the restoration of their ancestral land in terms of the Restitution of Land Rights Act of 1994, a statutory mechanism giving effect

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filment of their land rights over this mineral-rich and much exploited area. After a lengthy legal process, the Constitutional Court acknowledged the Nama lost their land before the Natives Land Act of 1913 was promulgated on the basis of racial prejudice and administrative action, and stated that the principle of restitution should apply.²⁹

However, the Khomani, a San group from the Trans Frontier Kalahari Park (amongst others) continues to experience serious post-settlement challenges. During the 1970s the Khomani San of the southern Kalahari (Northern Cape Province) were dispossessed from the then Kgalagadi Transfrontier Park, their traditional land, and were dispersed through South Africa, living in small groups or "clans" as a de facto underclass. The South African Human Rights Commission released reports of their investigation around the situation of the Khomani San. They found the living and social conditions of the Khomani San have not substantially improved and a number of human rights issues have appeared. The government departments responsible for development projects allegedly did not provide the promised assistance nor delivered the required social services to the community. Abuses by the local police were also reported as well as the lack of access to justice services.³⁰

The UN Special Rapporteur formally recommended in his report that needs-assessment research in Khoisan communities should be undertaken by the competent government authorities that might define the magnitude of the problem and suggest practical remedial measures. The Khoisan however continue to experience serious challenges around land in terms of access, ownership and post settlement support.³¹

4. Socio-economic situation

The various Khoisan groups are highly diverse, speaking different languages and with different cultural practices and levels of economic development.

In terms of poverty, the Khoisan, in particular the Nama and the San people are some of the poorest population groups in South Africa. Living in rural areas and stigmatized as a rural underclass by dominant sectors of society, the Khoisan also work as menial labourers watching sheep or doing domestic work without tenure rights or job security in poorly paid seasonal work on farms³². Khoisan children, youth and women are vulnerable to discrimination, violence, drug abuse, high suicide rates, prostitution, alcoholism and other syndromes associated with poverty. A chief concern for Khoisan women in particular is the unacceptably high level of domestic violence, murders and assaults with weapons. The HIV/AIDS rate is alarmingly high in South Africa. Government and civil society groups are challenged by the lack of statistical evidence for the HIV infection rates in Khoisan communities³³.

Yet, there have been several public concerns raised by the Khoisan about the ambiguities surrounding the continued use of the category "Coloured," to which the Khoisan were arbitrarily assigned during the apartheid regime, in policies concerning employment, recruit-

to the government's constitutionally-mandated land-reform and -restitution programme. The appellant in this case was the mining corporation Alexkor, which had an interest in the diamondiferous parts of the Richtersveld area. An important aspect of the case was the community's assertion that it used the land according to its indigenous customs, an assertion upheld in both the Supreme Court of Appeal (SCA) and the Constitutional Court, and on the basis whereof the land was returned to the community. It was thus decided that the Richtersveld community's claim to the land incorporated a claim to the minerals in the land, and that the community's entitlement to both the land and the minerals should be acknowledged and restored. Incorporated in this was the right of the community to claim compensation for past exploitation of the land by Alexkor and the state.

²⁸ One of the five main groupings comprising the Khoisan people in South Africa.

²⁹ Case of Alexkor & Others vs Richtersvelds Community & Others, Constitutional Court of South Africa (Case CCT 19/03), 14 October 2003.

³⁰ UN: Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, 2005, p. 7.

³¹ UN: Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people (2005), p. 19.

³² International Labor Organization: Current trends, Geneva, 1999, p. 13.

³³ UN: Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, 2005, page 16.

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ment and job security. The UN Rapporteur on Indigenous Peoples affirms this concern that this categorization might be misused to victimize the Khoisan in the emerging occupational structure of the democratic South Africa.

This issue is also a serious structural concern for the Khoisan as the current affirmative action legislative framework, as it pertains to employment equity, excludes the Khoisan. It can be inferred that the Khoisan are lumped under the category of Coloured; yet the Khoisan don't identify themselves as Coloured. There have been serious concerns expressed around the implementation of affirmative action in the workplace. Some argue that only the black dominant groupings and those in the right political affiliations are able to benefit from the employment opportunities that affirmative action offers in post-apartheid South Africa. The Khoisan as a political minority in South Africa are seriously marginalized from gaining access to employment opportunities firstly because there is no formal constitutional record of their existence and secondly because they are falling under the term Coloured.³⁴

Conclusion

The Khoisan are a distinct aboriginal people who survived colonialism, apartheid, and assimilation of their identity. The evidence of this life lived is found in the political, cultural and socioeconomic challenges they continue to live in post-apartheid South Africa. They are not constitutionally accommodated; nor their land rights respected; their indigenous languages are not recognized to the point of near extinction; they are facing extreme challenges in terms of alcohol and drug abuse. But at the same time they have distinct gifts life bestowed upon them, such as being genetically the oldest inhabitants on earth. They showed the world they are able to adapt from one difficult situation to another. Hopefully they would be able to find a bridge from these current day challenges to who they once were.

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