

TRADITIONAL LEADERSHIP: SOME REFLECTIONS ON MORPHOLOGY OF CONSTITUTIONALISM AND POLITICS OF DEMOCRACY IN BOTSWANA

Dr Khunou Samuelson Freddie*

1. INTRODUCTION

An objective analysis of constitutional model of Botswana has a start from the colonial era within the political relations among the Tswana politicians, traditional leaders and the representatives of the Great Britain. This article seeks to discuss the role of the traditional leaders and politicians in the constitutional construction of Botswana with specific reference to both the 1965 and 1966 constitutions. With the advent of constitutionalism and democracy in Botswana, the role of the institution of traditional leadership was redefined. The constitutional dispensation had a profound impact on the institution of traditional leadership in Botswana and seemingly made serious inroads in the institution by altering the functions, which traditional leaders had during the pre-colonial and colonial periods.

For example, constitutional institution such as the National House of Chiefs was established to work closely with the central government on matters of administration particularly those closely related to traditional communities, traditions and customs. This article will also explore and discuss the provisions of both the 1965 and 1966 Constitutions of Botswana and established how they affected the roles, functions and powers of traditional leaders in Botswana.

2. TOWARDS THE CONSTITUTIONAL CONSTRUCTION

For many African countries, the year 1960 was the *annus mirabilis* in which most of them attained independence. Botswana also took an important step towards self-government in the early sixties. In 1959 a Committee of the Joint Advisory Council (JAC) presented a report recommending that this Council should be reconstituted as Legislative Council (LC). The report was accepted and at the end of 1965 the Protectorate was endowed with a new *Constitution*¹ to ensure self rule.² The 1965 *Constitution* provided for a LC³ which consisted of thirty-one to thirty-five members, presided over by the Resident Commissioner (RC), and made up of three *ex officio* members (namely the Government Secretary, the Secretary for Finance⁴ and the Legal Secretary), twenty-one elected members (10 Europeans, 10 Africans and one Asian), 7 nominated official members and up to four unofficial members nominated by the High Commissioner (HC) drawn equally from the Africans and Europeans.⁵

The new *Constitution* also provided for a Judiciary⁶ with a High Court comprising of a Chief Justice and a Puisne judge was also established. The HC and RC were required to consult the Executive Council (EC) although they were not bound by the Council's decisions. The HC acting on the advice and consent of the LC made laws. The RC, however, reserved the right to enact or enforce any bill or motion not passed by the LC if he considered it necessary in the interests of public order, public faith or good governance.

* UDE (SEC) Moretele Training College of Education B. Juris (Unibo) LLB (UNW) LLM (UNW) LLD (NWU-Potchefstroom Campus). Senior Lecturer, Faculty of Law, North-West University, Mafikeng Campus.

¹ See the 1965 Constitution of Bechuanaland Protectorate. Chapter I of 1965 Constitution provided for the protection of fundamental rights and freedoms of the individual. Section 10 of the 1965 Constitution further provided for the Elected Members of House of Chiefs. This section also made provision for the holding of an election of the Elected Members of House of Chiefs.

² Sillery A Botswana: A Short Political History (London 1974) 155.

³ See section 44 of Chapter IV of the 1965 Constitution, which provided inter alia for the establishment of the Legislature of Bechuanaland, which consisted of Her Majesty and a Legislative Assembly. Sections 46 to 50 dealt with the Speaker, Deputy Speaker of the Legislative Assembly, qualifications for membership of Legislative Assembly, disqualifications for membership of Legislative Assembly and constituencies.

⁴ Section 12 of the 1965 Constitution provided for the office of a Financial Secretary, whose office was a public office. The Financial Secretary was a member of the Legislative Assembly. This section also provided for the office of the Minister of Finance who was responsible to conduct the business of the government of Bechuanaland relating to financial matters and for the administration of the departments of government dealing with those matters. In this section 'financial matters' meant the financial and economic policy of the government of Bechuanaland, the appropriation of public money, taxation and the administration of public funds.

⁵ Doxey GV The High Commission Territories and the Republic of South Africa (London 1963) 19.

⁶ Sections 72 to 77 of Chapter V of 1965 Constitution provided for the establishment of High Court, appointment of Judges of High Court, tenure of office of Judges of High Court, Oaths to be taken by Judges of High Court, reference to High Court in cases involving interpretation of Constitution.

The African Advisory Council (AAC) was to act as an electoral college, electing local candidates to the LC and advising the RC on matters affecting the tribes of Bechuanaland.⁷ European voters in ten constituencies (and the Asian member by voters of his own race) elected the European members. The African Council sitting as an electoral college elected the African members. There was also an Executive Council,⁸ presided over by the Resident Commissioner⁹ consisting of five other senior officials and four members nominated by the HC from the unofficial members of the Legislative Council, two Africans and two Europeans. In selecting those unofficial members, the HC had regard to the views of the unofficial members of the Legislative Council. The first elections were held in June 1961 and the first Legislative Council was inaugurated at the end of the same month.

Seretse Khama, the leader of Bechuanaland Democratic Party (later called Botswana Democratic Party (BDP)), received the largest number of votes and took his place in the LC with other Africans.¹⁰ He was also elected to sit in the EC as one of the two African members. The BDP captured 81% of the vote and 28 seats in the LC. The only other party to win 3 seats was the Bechuanaland People's Party (later called Botswana People's Party (BPP)) led by Phillip Matante, a South African refugee who was anti-*apartheid*, anti-colonial and anti-European. His strength was in the urban center of Francistown where he gained support of the African labouring class and in one rural constituency where the BPP had the backing of the local traditional leaders. The BPP captured 14% of the total vote and the Bechuanaland Independence Party (later called Botswana Independence Party) vote amounted to 4.5% of the total.¹¹

In the eyes of the mass of Tswana people, Seretse Khama was still a traditional leader, there is a saying that "Once a Chief, always a Chief". It has been said that by voting for Khama the Batswana were endorsing him as the first Paramount Chief of the Bechuanaland. The important point here is that Khama as far as Batswana were concerned, was elected because of his traditionalism. In the eyes of the people legitimacy was still derived from traditional authority. There was further evidence that "democratic" balloting in Bechuanaland was based in large part upon traditionalism.¹² From the granting of self-government in 1965 events moved swiftly. The election manifesto of the BDP declared that the party favoured independence as soon as possible. The new government accordingly lost no time in asking Great Britain to declare a date for this next important step. In October 1965 the British replied that independence would be granted on 30 September 1966.¹³ Unlike in other African countries, for example, South Africa, and Zimbabwe, the independence and freedom of the state of Botswana did not evolve from an armed struggle spearheaded by military wings.

The colonial government willingly gave political power to BDP, which had been a co-operating partner all along. Seretse won the colonial government to his side and peacefully pushed the idea of the independence of Botswana. Batswana always say: "*Ntwa kgolo ke ya molomo, ga se ya tlhobolo*" loosely translated to mean that "war is the one of dialogue and not guns". Botswana gained its independence through negotiations.¹⁴ Originally, a constitutional Committee drawn from the Legislative Council drafted a *Constitution* for independent Botswana. The next step was to present the *Constitution* to the Legislative Assembly which approved the Draft Document. However there was little opportunity for the public, outside of those actually involved in the construction of the *Constitution* to voice their opinions.

⁷ Anon <http://www.gov.bw/gem/Botswana> History of Democracy.html; [Date of Access: 20 February 2004.

⁸ Section 25 of Chapter III of 1965 Constitution provided for the executive authority of Bechuanaland. The executive authority of Bechuanaland vested in Her Majesty. Sections 26 to 30 of Chapter III of 1965 Constitution dealt with Ministers of government of Bechuanaland, tenure of office of Ministers, Cabinet, exercise of Prime Minister's functions during absence or illness and allocation of portfolios to Ministers.

⁹ Section 17 of Chapter II of 1965 Constitution made provision for the Commissioner and Deputy Commissioners. For more information in this regard, see section 31 of Chapter III of 1965 Constitution, which provided for the special responsibilities of the Commissioner. These responsibilities included inter alia matters pertaining to: (a) external affairs (b) defence including the armed forces (c) internal security including the organisation, use and operational control of the police.

¹⁰ Doxey GV *The High Commission Territories and the Republic of South Africa* (London 1963) 20.

¹¹ Gunderson GL *Nation Building and the Administrative State: The Case of Botswana* (PHD-Thesis University of California 1970) 283.

¹² Gunderson GL *Nation Building and the Administrative State: The Case of Botswana* (PHD-Thesis University of California 1970) 283.

¹³ Sillery A *Botswana: A Short Political History* (London 1974) 159.

¹⁴ When Botswana gained independence in 1966, Seretse Khama, the first President of Botswana confirmed the peaceful nature of Batswana when he said that: "Our role is not one of violence. We will achieve our independence without it. Our mission for Africa will be to demonstrate for our neighbour South Africa that we have a stable African government in which no man is discriminated against on racial grounds and in which the living standards of all are being raised." See in this regard Munger ES *Bechuanaland: Pan-African Outpost or Bantu Homeland?* (London 1965) 2.

There was no claim, however, that the proposal had actually received public approval but only that they were explained to the people and traditional leaders were encouraged to hold *kgotlas* to discuss the proposals with their subjects. All in all, the emphasis lies in the fact that the traditional leaders, rural masses and the general populace of Botswana were not given an opportunity to take an active part in the *Constitution* making processes.¹⁵ The Draft *Constitution* was subsequently debated and approved at an independence Conference held in London on 21 February 1966. There were four Africans from Bechuanaland represented at the Conference: the Prime Minister and leader of the Legislative Assembly, Seretse Khama, headed the delegation. He also invited his deputy Prime Minister Quett Masire, Bathoen, representing the House of Chiefs and PG Matante, leader of the opposition, to attend the Conference. There were also four colonial administrative officers from the Bechuanaland Protectorate in attendance as well as 15 representatives from the United Kingdom. The Africans were outnumbered nineteen to four by Europeans in that Conference which was to design the structure of government for independent Botswana.¹⁶

A document was finally agreed upon. However, both Bathoen and Matante had reservations on various aspects of the proposed *Constitution*. The BDP representatives (Seretse and Masire) agreed to the final Draft, but Bathoen and Matante walked out of the Conference and were not present at the final meeting. Since Bathoen was invited to represent the House of Chiefs (HC) in the constitutional Conference, it turned out to imply that the traditional leaders were not represented in the final draft of the Botswana *Constitution*. Bathoen's withdrawal could be seen as his failure to carry out the mandate of the House of Chiefs. Therefore Chief Bathoen himself silenced the voice of the traditional leaders. Matante explained their withdrawal from the Conference as follows:¹⁷

There had been inadequate consultation with the people of Bechuanaland on the proposals, which had been put forward for the independence *Constitution*, and ... that the (Seretse's) government had no mandate to carry the country into independence.

After the *Constitution* had been negotiated, the British government decided to grant independence to the Bechuanaland Protectorate. The party elected to rule during the period of self-government, namely BDP party became the Botswana Democratic party (BDP) and carried the country into full self-rule. It ought to be emphasized that there were no new elections at independence in 1966. There were no alterations in the party alignment in the Legislative Assembly, which became the National Assembly (NA). The House of Chiefs remained as it was during the self-government and the Bechuanaland civil service changed its name to the Botswana civil service. President Seretse Khama (the country's first president) uttered the following words at the first independent ceremony:¹⁸

It would be wrong of me ... not at the outset to state again as I have done so frequently before to express the great gratitude of my people for the protection and assistance, which have been given to Botswana by the United Kingdom during the long period of our independence ... though we are very proud that we ourselves are now independent and politically free to make our own way in the world, it should not therefore be thought that past affections and regard have been immediately erased. We look forward to a continuing association of pleasant friendliness in which the ties of past may in some sense be preserved.

The structure of government designed for independent Botswana as embodied in the *Constitution of the Republic of Botswana*¹⁹ followed with minor exceptions the model of British parliamentary democracy. At independence Botswana became a unitary form of government with the central government at the apex of the structure. The next level of government was local government and public enterprise, which enjoyed a modicum of autonomy in operational matters. The *Constitution* of Botswana vested all executive powers with the President who was the head of the State and government.

¹⁵ Gunderson GL Nation Building and the Administrative State: The Case of Botswana (PHD-Thesis University of California 1970 278-279).

¹⁶ Gunderson GL Nation Building and the Administrative State: The Case of Botswana (PHD-Thesis University of California 1970 279).

¹⁷ Gunderson GL Nation Building and the Administrative State: The Case of Botswana (PHD-Thesis University of California 1970 280).

¹⁸ Sillery A Botswana: A Short Political History (London 1974) 161.

¹⁹ 1966 Constitution of Botswana.

In addition, Botswana adopted both a British model of government, which stressed political accountability to parliament as the supreme legislative body and the presidential system, which provided for an executive president who exercise all executive powers.²⁰ After the new government had been installed, it transformed monarchical politics into republican politics. The hereditary rule of traditional leaders was confined to the House of Chiefs. At independence, the *kgotla* was declared an apolitical place and traditional leaders were unilaterally declared politically neutral by the government. Both were thus shielded and excluded from party politics and politics in general.²¹ It was however, feared that the institution of traditional leadership could be jeopardized if subjected to open attacks inherent in political debates. It was quite fair to argue that if traditional leaders were to enter parliament, some of their subjects would vote for them. Therefore traditional leaders were barred from entering the parliament in their capacities as traditional rulers. They were required by the law to renounce their traditional leadership before they could join politics. This political arrangement still prevails today.²²

One of the major problems and challenges facing those involved in the task of nation building in post-colonial Botswana was finding a place in the modern political setting for traditional leaders that would be acceptable to them and yet conform with the new political order. The inevitability of the controversial tension between the new political order and the institution of traditional leadership became common and obvious. These were not the only challenges which faced Botswana but factors which gripped many post-colonial African countries. Before the advent of colonialism in 1885, traditional leadership was the centre of political life for the various Tswana ethnic groups or tribes. This institution of traditional leadership underwent some changes during the colonial period. When independence was finally granted in 1966, new changes and accommodation had to be made to fit the institution of traditional leaders in the new system of government and post-colonial administration.²³

The BDP government's transformation process was met with heavy opposition from some of the traditional leaders. Chief Bathoen II of Bangwaketse tribe was the strongest traditional leader among his peers and had often clashed with the new government over the issues of changes and transformation of traditional rule. Bathoen II was completely reactionary towards change. For a time Bathoen II and his fellow traditional leaders staged away from modern politics and used their considerable power to run affairs their own way. They formed the right wing of the BDP and clashes continued with the new President, Seretse Khama, over the pace at which tribal traditions should be adjusted to modern conditions.²⁴ The BNF set about the task of building a united front among the opposition parties and other dissatisfied elements including young traditional leaders who were upset at their loss of power following the constitutional reforms.

Dr Koma educated in South Africa, Britain, Czechoslovakia and Moscow returned to Botswana just before the 1965 election and brought together the Motsete wing of the BPP traditionalists led by Chief Bathoen II of the Bangwaketse, civil servants and organized labour groups to provide a nationalist opposition. This was the first opposition party to attempt to unite the relatively mobilized town-dwelling residents with the rural tribesmen by promoting socialist programs while defending the prerogative of the traditional authorities.²⁵

²⁰ The President and his Ministers were members of the National Assembly – the former by virtue of his position as the President of Botswana but the latter as elected representatives of their respective constituencies. Some Ministers could be specially elected members of parliament who were elected by the house at its first session after a general election.

²¹ Maundeni Z “The Struggle for Political Freedom and Independence” in Edge WA and Lekorwe MH (eds) Botswana: Politics and Society (Pretoria 1998) 131.

²² In the present Botswana, traditional leaders are not allowed to participate in politics unless they renounce their traditional leadership positions. In other words they cannot become Cabinet Ministers and members of the parliament if they still hold their traditional leadership positions.

²³ Somolekae GM and Lekorwe MH “Chieftaincy system and Politics in Botswana” in Edge WA and Lekorwe MH (eds) Botswana Politics and Society (Pretoria 1998) 186–190. In some of the African countries, like Tanzania and Guinea the institutions of traditional leadership were abolished after independence mainly because they were considered unnecessary. In Guinea, for example, it was considered unnecessary to keep an institution that represented nothing at all. This had not been the case in Botswana. The institution has been retained. New legislation further limiting the powers of traditional leaders and almost reducing this institution to nothing have been introduced.

²⁴ Mungler ES Bechuanaland: Pan-African Outpost or Bantu Homeland? (London 1965) 25.

²⁵ Osei-Hwedie BZ “The Political Opposition in Botswana: The Politics of Factionalism and Fragmentation” 2001 Transformation 58. The BNF has since independence been a strong opposition party which attempted to unite all Batswana across the ethnic lines. According to Osei-Hwedie Botswana had 12 political parties which had no seats in parliament in 2001. These political parties were: The Independence Freedom Party (IFP), the Botswana People's Party (BPP), the Botswana Progressive Union (BPU), the Botswana Labour Party (BLP), the Marxist-Lennist, Engel and Stalinists Party (MLES), the United Socialist Party (USP) and the United Action Party (UAP). UAP was also known as Bosele. Other political parties such as Lesedi La Botswana (LCB) and Botswana Liberal Party (BLP) have been

By nominating Chief Bathoen II as its presidential candidate, the BNF hoped to win a tribal base to supplement its anticipated victories in the towns.²⁶ In fact it was the BNF that avowedly stood as a spokesperson for traditional leaders. It promised the latter a house of representatives with law-making powers, which they would share with other interest groups. With these new developments, traditional leaders developed a new perspective of party politics and for the first time became interested. Traditionalists seized the opportunity offered by the party, elected Chief Bathoen II as BNF leader and for the first time a real chance existed for traditional leaders to regain their lost powers.²⁷

Unfortunately, the BNF was not a popular party. If traditional leaders threw their lot with the party, most risked staying out of power for a long time and this was not a risk they were prepared to take. They therefore grudgingly accepted it as an alternative to the House of Chiefs. What has always been confusing about BDP political practice towards traditional leaders was that its founding leader, Seretse Khama, was himself the supposedly heir apparent and Chief-elect to the Bangwato tribal throne. Seretse's BDP established a House of Chiefs where the eight traditional leaders of the Tswana speaking communities were given automatic status and became its permanent members.

Other minority ethnic groups such as Bakalaka, the San, Bayeyi and Bakgalagadi, which were not represented in the House of Chiefs, viewed this constitutional arrangement as a way of institutionalising tribal supremacy. The traditional leader's authority was not only greatly reduced but was under threat too as Kgosi Mosei put it:²⁸

The choice faced by the government was whether to meet Chiefs head-on or to neutralize them quietly. So Seretse, a calm, shrewd tactician, ate the young Chief raw ...

Masire, Seretse's deputy and Seretse himself attached great significance to the political transformation and the building of both economic and social pillars of the state of Botswana.²⁹ To them nation building and real transformation were impossible without making some inroads and changes in the institution of traditional leadership which was viewed in some quarters as conservative and anti-development. The BDP leaders were aware of the fact that changes would stir opposition among certain traditional leaders since they feared to lose their sovereignty and power.³⁰

3. CONSTITUTIONAL IMPERATIVES

The Republic of Botswana became independent on September 1966.

deregistered because of their political inactivity. The largest of all these parties was the BDP. The BNF and BCP were the most important opposition parties. Osei-Hwedie explained that although Botswana had long experience of multipartyism, in reality the country's politics had since independence been dominated by BDP. It is submitted that the political success of BDP was attributed to the fact that the BDP used the kgotla made up of the traditional leaders and rural masses to mobilize the support. Another reason is that the BDP is always cohesive without splinter groups and fought the elections as the united force. The BDP also utilized its ideology known as kagisano to articulate the aspiration of all the citizens. The BDP's slogan of Kagisano promotes the key values of peace, unity, harmony and sense of community.

²⁶ Vengroff R Botswana Rural Developments in the Shadow of Apartheid (United States of America 1977) 86-67.

²⁷ Maundeni Z "The Struggle for Political Freedom and Independence" in Edge WA and Lekorwe MH (eds) Botswana: Politics and Society (Pretoria 1998) 127.

²⁸ Maundeni Z "The Struggle for Political Freedom and Independence" in Edge WA and Lekorwe MH (eds) Botswana: Politics and Society (Pretoria 1998) 127-128 ; Khunou SF "The Land and Property Rights of the San Communities in Botswana: A Hidden Agenda of Human Rights Discourse" Unpublished Paper Presented at the Law Conference of Society of Law Teachers of Southern Africa 17-2-January 2005 Bloemfontein 10.

²⁹ Maundeni Z "The Struggle for Political Freedom and Independence" in Edge WA and Lekorwe MH (eds) Botswana: Politics and Society (Pretoria 1998) 127-128. Khama, Masire and Bathoen were all key figures in the Botswana Legislature. BDP leader, Seretse Khama was a man of outstanding ability and dealt with the opposition in a very smooth and brilliant way. There was a mantle around Seretse from his famous grandfather, Chief Khama the Great and from his even more able if not hard headed, uncle Tshekedi Khama, with whom Seretse had a bitter struggle. Seretse was one of the most progressive men in independent Botswana and was popular with African teachers and businessmen. His birth, experience and sense of responsible leadership made him attractive to the traditionalists. But it would be a mistake to assume that Seretse Khama was the most active politician in the Botswana Democratic Party's government. That description fitted his highly intelligent and effective number two man, Quett Masire. It was Masire who had visited Kenya, Ethiopia, Ghana and elsewhere for political discussions with African leaders. John Banda, parliamentary Secretary for Education in Northern Rhodesia (now Zambia) described Masire as bright and a brilliant scholar.

³⁰ The reason why some of the traditional leaders opposed the new BDP led government was because they lost their powers through new constitutional arrangements. See 7.1 above and 7.3 below.

The Botswana *Constitution* established a non-racial democracy, which maintains freedom of speech, freedom of press and freedom of association and affords all citizens equal rights.³¹ According to Crowder, Botswana is the only country in Africa, which has maintained the *Constitution* inherited from its colonial masters. Crowder further maintained that this *Constitution* is not subject to threats of radical changes.³² The Botswana government adhered strictly to the letter and the spirit of the *Constitution* by ensuring freedom to all its inhabitants. Crowder suggested emphatically that the character of the Republic of Botswana was shaped by the personality of Seretse Khama. Unlike other African countries, which gained independence in the sixties, Seretse Khama never abused his power to manipulate the *Constitution* to suite his personal needs and interests. It is also worth stating that Seretse never used his position to change the *Constitution* to claim his chieftainship of Bangwato, which he was forced to renounce by Britain. To do so he would have basically identified himself with one section of the country and that possibly would have been a dividing line of the nation he strove to unite.³³

The British government bequeathed to Botswana a written *Constitution* as the framework of institutions, powers, procedures and rights, which have become invested with an accepted authority.³⁴ What the British government forgot to do for Botswana was to make the *Constitution* “the supreme law of the land”.³⁵ It is traditionally accepted that Botswana inherited a Westminster model of government. The so-called Westminster model presupposes the existence of certain features, such as the partial fusion of the organs of government and the responsibility of the executive to the legislature. What is also commonly overlooked is the bicameral nature of the legislature.³⁶ Throughout the history of the system in Britain, no written *Constitution* has ever been adopted. The imported model was just a modified version of the system. It is therefore not totally correct to refer to Botswana system as Westminster model.³⁷ It is therefore true that some of its features are rooted in that system, while others are imported from other systems. The Westminster model is not based on a written *Constitution*.

³¹ Anon <http://www.gov.bw/government> index:htm, [Date of Access 25 October 2004]. Section 3 of the 1966 Constitution provides that: Whereas every person in Botswana is entitled to the Fundamental Rights and freedom of the individual, that is to say, the right to his race, place of origin, political opinion or colour, creed or sex but subject to respect for the rights and freedom of others and for the following, namely: (a) Life, liberty, security of person and the protection of law (b) Freedom of conscience, of expression and of assembly and association (c) Protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection of those rights and freedoms subject to such limitations of that protection as contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest. In *Kamanakao and Others v The Attorney-General and Another* 2001 (2) BLR 654, the court held that fundamental rights and freedoms exist only as contained in the Constitution and only to the extent mentioned in that Constitution. The court in *Unity Dow v Attorney General* 1992 BLR 119, raised important questions of the commitment of Botswana to protect human rights. It touched in particular on the protection of women’s rights and showed how little progress has been achieved in this area by the government of Botswana to develop the rights of women in particular and human rights in general. In the Dow case the High Court of Botswana dealt with a matter concerning the provision of the Citizenship Act of 1984 that denied citizenship to children born in Botswana of a female citizen married to a non-citizen. It was argued that such a provision violated the Constitution. The court ruled in favour of the applicant and nullified the provision of the Citizenship Act as ultra vires the Constitution. The court in the Dow case demonstrated its willingness to protect human rights. However, in the *Kamanakao* case the court seemed to have abdicated its role as a guardian of human rights.

³² Crowder M “Botswana and the Survival of Liberal Democracy in Africa” in Gifford P and Roger L (eds) *Decolonisation and African Independence: The Transfer of Power, 1966-1980* (Britain 1981) 461.

³³ Crowder M “Botswana and the Survival of Liberal Democracy in Africa” in Gifford P and Roger L (eds) *Decolonisation and African Independence: The Transfer of Power, 1966-1980* (Britain 1981) 461.

³⁴ In *Attorney-General v Dow* 1992 BLR 119, the court stated that the Constitution of Botswana is the legislation or compact, which establishes the state itself. “It paints in broad strokes on a large canvass the institutions of that state, allocating powers, defining relations between such institutions and between the institutions and the people within the jurisdictions of the state and between the people themselves.” The court further stated that the Constitution provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all future state actions. No person can claim to be above the Constitution of Botswana. See also *Attorney-General v Moagi* 1982 (2) BLR 124, where the court held that the Constitution such as Constitution of Botswana, embodying fundamental rights should as far as its language permits be given a broad construction. Constitutional rights and freedoms conferred without express limitation should not be cut down by reading implicit restrictions into them so as to bring them into line with the common law.

³⁵ Otlhogile B “Constitutional Development in Botswana” in Edge WA and Lekorwe MH (eds) *Botswana: Politics and Society* (Pretoria 1998) 153.

³⁶ Otlhogile B “Constitutional Development in Botswana” in Edge WA and Lekorwe MH (eds) *Botswana: Politics and Society* (Pretoria 1998) 153. The 1966 independence Constitution which is of the Westminster type, contains a justiciably and entrenched Bill of Rights in the liberal mould. See in this regard Sanders Bill of Rights Issue 20. Since independence Botswana developed a reputation for political stability. Of all the countries of Southern Africa, Botswana is by far the most democratic and peaceful.

³⁷ Otlhogile B “Constitutional Development in Botswana” in Edge WA and Lekorwe MH (eds) *Botswana: Politics and Society* (Pretoria 1998) 153.

The *Constitution of Botswana* provides the institution of traditional leadership with a judicial, ceremonial and developmental role.

4. CONSTITUTIONAL FEATURES OF HOUSE OF CHIEFS

The *Constitution* provides for the establishment of a House of Chiefs³⁸ that is an advisory body to the National Assembly and the Executive. The establishment of the House of Chiefs is not the first attempt to get the various Botswana traditional leaders to advice a government. During the colonial period in 1920, the ADC was formed, providing a forum at which traditional leaders could advice the colonial government. The traditional leaders, however, were unhappy about that colonial arrangement because the HC in Mafikeng still had overriding authority over them.

This kind of unhappiness continued into the post-colonial Botswana era because advice from the House of Chiefs is not binding on government. Some of the traditional leaders never hid their displeasure about the formation and role of such a House. They preferred a house with law-making authority, which Proctor succinctly calls a “house of lords” solution.³⁹ Politicians, however, were opposed to the formation of such a “House of Lords” because they feared that:⁴⁰

A chiefly chamber in a bicameral legislature of chieftainship would seriously impede the modernization, which was seriously needed ... and that Chiefs were too conservative, too interested in preserving their autocratic position and too committed to the interests of their tribes than those of the nation.

The *Constitution* of Botswana provides for the establishment of the House of Chiefs in Botswana.⁴¹ The *Constitution* (before 2005 amendment) further outlined the composition of House of Chiefs as follows:⁴²

- ❑ Eight *Ex officio* Members
- ❑ Four Elected Members; and
- ❑ Three Specially Elected Members.

The *Constitution* of Botswana (prior to the amendment of 2005) stated that the *ex officio* members of the House of Chiefs shall be persons performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes.⁴³ This kind of constitutional setup excluded other tribes such as Bakalaka, Bakgalagadi and Basarwa from the House of Chiefs. The traditional leaders of those members were unhappy about their exclusion from the House and made calls and demands for their participation in the House of Chiefs and the amendment of sections 77, 78 and 79 of the *Constitution*.⁴⁴

³⁸ See in this regard sections 77, 78 and 79 of 1966 Constitution of Botswana. See also section 12(2) of Constitution (Amendment) Act of 2005.

³⁹ Somolekae GM and Lekorwe MH “Chieftaincy System and Politics in Botswana” in Edge WA and Lekorwe MH (eds) Botswana: Politics and Society (Pretoria 1998) 194.

⁴⁰ Somolekae GM and Lekorwe MH “Chieftaincy System and Politics in Botswana” in Edge WA and Lekorwe MH (eds) Botswana: Politics and Society (Pretoria 1998) 194.

⁴¹ Section 77(1) of 1966 Constitution of Botswana. Section 83 of the 1966 Constitution, which deals with the rules of procedures of House of Chiefs. The House of Chiefs may subject to the approval of the President make rules regarding its own procedure for all or any of the following matters: (a) The appointment or election and tenure of office of a Chairperson of the House. (b) The time and place at which the House shall meet. (c) The manner in which the views of the House shall be recorded and if necessary expressed to the Minister, the National Assembly or to any other person or body. (d) The regulation and orderly conduct of the proceedings of the House. (e) The manner in which the Elected Members and Specially Elected Members of the House shall be elected. See also Rules and Procedures of the House of Chiefs Act 27 of 1965 which deals with matters pertaining to meetings and sittings of the House, business of the House, process of debate, rules of debate, rules of procedure of the House of Chiefs, decisions and Bills. Furthermore the House of Chiefs (Salaries and Allowances) Act 5 of 1987 makes provision for the salary of a Chairperson of the House of Chiefs, salary of members of the House, allowances of a Chairperson and members allowances exempt from income tax, subsistence allowance, transport allowance, duty allowance and termination allowance.

⁴² Section 77(2) of 1966 Constitution of Botswana.

⁴³ Section 78 of 1966 Constitution of Botswana. The Constitution of Botswana recognizes only these tribal Communities.

⁴⁴ See the 1966 Constitution of Botswana. One of the key demands of the traditional leaders was the amendment of sections of the Constitution to cater for the participation of the minority tribes in the House of Chiefs. See *Kamanakao and Others v The Attorney-General and Another* 2001 (2) BLR 654. The issue in this case was whether the failure of Constitution and Chieftainship Act (Cap: 41:01) of 1968 to acknowledge the Wayeyi tribe and to allow them to have their members sit as members of the House of Chiefs discriminated unfairly against such tribe. The appellants on behalf of the Wayeyi tribe argued that sections 77 to 79 of the Constitution were inconsistent with the fundamental rights provisions of sections 3 and 15 of the Constitution and hence they were null and void. It was further argued that sections 77 to 79 of the Constitution did not treat the Wayeyi tribe and appellants as equal with the eight tribes

The composition of the House of Chiefs was affected by the amendment of section 77, 78 and 79 of the *Constitution of Botswana*, which was passed by Parliament. In 2005, the parliament of Botswana amended the *Constitution* with regard to the establishment and representation of traditional leaders of all tribes in the House of Chiefs in Botswana. In terms of the amendment, a new House of traditional leaders called *Ntlo ya Dikgosi* was established. This new constitutional arrangement also replaced the word ‘Chief’ with ‘kgosi’.⁴⁵ This amendment was intended to make the *Constitution* tribally neutral and to be more representative and democratic.⁴⁶ The *Constitution of Botswana* also provides that Elected Members of the *Ntlo ya Dikgosi* shall be elected from among their own number by the persons for the time being performing the functions of the office of sub-Chief in the Chobe, North-East, Ghanzi and Kgalagadi districts.⁴⁷ The Specially Elected Members of the House of Chiefs are elected by *ex officio* and Elected Members of the House of Chiefs (now *Ntlo ya Dikgosi*) in accordance with the provisions of the *Constitution*.⁴⁸

Four Elected Members are elected every five years or when a vacancy occurs. Rules provide that at any time when a vacancy exists among the Specially Elected Members an election shall be held as soon as practicable to fill the vacancy in accordance with the provision of these rules. Unlike the *ex officio* members and elected members, the specially elected members should have English as a requirement.⁴⁹

Every officer of the *Ntlo ya Dikgosi* has in the exercise of the power conferred and duties imposed on him all powers and enjoy all the privileges of a member of the Botswana Police Force⁵⁰ under the provisions of the Criminal law.⁵¹ An officer of the *Ntlo ya Dikgosi* may arrest without warrant any person who commits an offence and any person within the precinct of the House whom he or she reasonably suspects of having committed or being about to commit an offence.⁵²

who have Chiefs that have automatic membership of the House of Chiefs as *ex officio* members. It was further argued that the effect made by these sections (77 to 79) is unduly discriminatory and the court must so pronounce. The court stated that there is no doubt that under the wide definition of the expression ‘discriminatory’ the treatment given to the Wayeyi and other tribes by omitting their tribes from having an *ex officio* members in the House of Chiefs amounted to unfairness and discrimination, which is not justified and is intolerable. The court acknowledged that the Wayeyi tribe are subjected to disability, which the eight tribes do not suffer. However, the court concluded that distinctions or differentiation were sanctioned by the *Constitution* itself and anything that is authorised by the *Constitution* cannot be subsequently declared to be illegal.

⁴⁵ Ethnic groups who were not mentioned in the *Constitution of Botswana* had a strong case to contend that the *Constitution* discriminate against them. The *Botswana Constitution* seemed to be at a crossroad. However President Festus Mogae announced government’s intention and commitment to amend the sections which discriminated against other tribes. He made this encouraging announcement on 31 September 2003, at the 37th Independence Day of Botswana. The move to recognize the existence of other tribes besides the eight tribes in the House of Chiefs is a constitutional requirement necessary for nation building, tolerance and harmonious relationship between tribes. See in this regard section 2 of the *Constitution (Amendment) Act 9 of 2005*. The *Constitution (Amendment) Act* substituted the words ‘House of Chiefs’ with the words ‘*Ntlo ya Dikgosi*’. The word ‘he’ was replaced with the words ‘he’ or ‘she’. This constitutional amendment promotes gender justice. It also creates an arrangement, which prohibits tribal discrimination with regard to the representation of traditional leaders in the *Ntlo ya Dikgosi*. See also section 77(1) of the *Constitution (Amendment) Act 9 of 2005*. *Ntlo ya Dikgosi* consists of not less than thirty-three or more than thirty-five members. These members are persons who performed functions of the office of the kgosi in respect of the following areas: (i) Barolong Farms in the Southern District (ii) Chobe in the North West District (iii) Ga-Malete in the South East District (iv) Ga-Mmangwato in the Central District (v) Ghanzi District (vi) Goo-Tawana in the North West District (vii) Kgalagadi District (viii) Kgatleng District (ix) Kweneng District (x) Ngwaketse in the Southern District (xi) North East District and (xii) Tlokweng in the South East District. In addition to these members in the *Ntlo ya Dikgosi* there are also five persons who are appointed by the President. It is also important note that the word “kgosi”, which has replaced “Chief” in the constitutional amendment has always been used by the Tswana to refer to a traditional leader. This has been the case long before the *Constitution* could be amended.

⁴⁶ The fact that the *Constitution of Botswana* prior to amendment recognized eight tribes and not others had divided the country along the ethnical lines. This had in many instances caused hostility and disunity among the Tswana people. Members of those eight tribes regarded themselves as the first citizens while members of the minority groups were regarded as the secondary citizens.

⁴⁷ Section 78 of 1966 *Constitution of Botswana*. See also section 12(2) of the *Constitution (Amendment) Act 19 of 2005*.

⁴⁸ Section 79 of 1966 *Constitution of Botswana*.

⁴⁹ See sections 77, 78 and 79 of 1966 *Constitution*.

⁵⁰ For more information regarding the statutory powers of the Police Force in Botswana, see the *Police Act (Cap:21:01) of 1979*. Section 6 of the *Police Act of Botswana* makes provision for duties, functions and administration of the Police Force which include powers to protect life and property, prevent and detect crime, repress internal disturbances, maintain security and public tranquillity, apprehend offenders, bring offenders to justice and generally maintain peace. Traditional leaders are directed to discharge the duties of the Police Force in Botswana. This statutory dispensation makes traditional leaders police officers.

⁵¹ For more information regarding the statutory regime of criminal law in Botswana, see the *Penal Code (Cap: 08:01) of 1964*.

⁵² *House of Chiefs (Election of Elected Members) Regulations* under section 83(e) of the *Constitution of the Republic of Botswana*.

Other qualifications for membership are:⁵³

- ❑ Members of the *Ntlo ya Dikgosi* must not be politicians;
- ❑ Must not have been involved in active politics in the past;
- ❑ Must not be civil servants;
- ❑ Must be Batswana; and
- ❑ Age 21 or above.

The *Ntlo ya Dikgosi* in Botswana does not have legislative powers. As elaborated before, it was created purely to advise Parliament on customary matters and on the interests of the traditional leaders' respective tribes. Since its inception, the *Ntlo ya Dikgosi* suggested amendments to some Bills. Some of its advice has been accepted and some of it has been rejected. However, the following specific Bills cannot be passed by Parliament without consulting the *Ntlo ya Dikgosi*:⁵⁴

- ❑ Any bill that would alter any provision of the *Constitution*;
- ❑ Any bill that would affect the designation, recognition or removal of powers of Chiefs, sub-chiefs or Headmen;
- ❑ Any bill that would affect the organization, power or administration of customary laws; and
- ❑ Any bill that would affect tribal organization or tribal property.

The National Assembly is required to refer the above Bills to the *Ntlo ya Dikgosi* 30 days before the National Assembly can pass them. The House has also concentrated on asking the Minister of Local Government (the Minister responsible for the affairs of the traditional leaders) questions and thus seeking clarification on several issues of importance to it. The *Ntlo ya Dikgosi* has been hampered in its operations by the lack of expertise of its members:⁵⁵

Almost all the amendments were suggested by Chief Bathoen and the debate was generally little more than a dialogue between him and the Minister ... the only others who contributed significantly to the discussion were Chiefs Linchwe ... and Leapetswe Khama. Some members made occasional comments, which were often confused, ill informed, and irrelevant and a few never said a word.

Despite the inactivity of some of the members, the House still continues to suggest amendments to bills and requests clarification from Ministers on several issues. The complaints that the House had no law-making powers were partly the reason for Bathoen II's resignation from chieftainship to join politics. Members of the House complained that they had not been consulted before the *National Security Act* of 1986⁵⁶ was passed. It is an indication that government sometimes did not take the House seriously where matters of policy were concerned.⁵⁷ At both national and local government levels, traditional leaders, particularly those in the *Ntlo ya Dikgosi*, District Councils and Land Boards have assumed the role of public servants. Clearly, they owe their allegiance to their employer who is of course the government of Botswana. Their formal impact is limited to the virtually powerless *Ntlo ya Dikgosi*. But as a potential competitor in the political arena, the traditional leaders pose a considerable challenge to the central government.⁵⁸ The post-colonial government in Botswana also subjected the traditional leaders to almost severe, if not more severe, controls than the colonial administration.⁵⁹

⁵³ See section 79 of 1966 Constitution. See also section 13 of Constitution (Amendment) Act 19 of 2005.

⁵⁴ Mijiga FS *The Role of Traditional Leaders in a Democratic Dispensation* (Johannesburg 1998) 13. See also section 85 of the 1966 Constitution of Botswana which inter alia states that the House of Chiefs is entitled to discuss any matter within the Executive and Legislative authority of Botswana of which it considers it as desirable to take cognisance in the interests of tribes it represents.

⁵⁵ As quoted by Somolekae GM and Lekorwe MH "Chieftaincy System and Politics in Botswana" in Edge WA and Lekorwe MH (eds) *Botswana: Politics and Society* (Pretoria 1998) 195.

⁵⁶ The National Security Act (Cap: 23: 01) of 1986 makes provision for national security and other activities prejudicial to the interests of the nation. Sections 3 to 8 of the Act (Cap: 23: 01) of 1986, deals inter alia with wrongful communication of certain information, protection of classified information, unauthorised use of uniforms, passes, interfering with persons on guard at prohibited places, harbouring fugitives.

⁵⁷ One of the reasons why the government did not allow traditional leaders to marshal their inputs on the National Security Act (Cap: 23: 01) of 1986 may be attributed to the fact that the Act deals with secret state matters and information.

⁵⁸ Despite the weak political position of traditional leaders in these structures, some of the traditional leaders have a considerable support in rural areas. Traditional leaders in District Councils, Village Development Committees and Land Boards are always outnumbered by the government officials and politically elected councillors. Often these officials and politicians dominated traditional leaders.

⁵⁹ Mzilethi JZ "The Interaction Between Traditional and Modern Political Institutions: Its Implications for Developments in Botswana" (MA-Thesis Centre for Southern African Studies 1977) 31. However, after independence the trend of the development of a traditional

The 1966 independence of Botswana resulted in a situation in which the traditional leaders were viewed as being directly responsible to government. However, this situation is not peculiar to Botswana as illustrated by Mzilethi:⁶⁰

The fact that (the post colonial) African governments have tended to use traditional leaders ... as agents of central government has reduced their power base and most important of all, began to alienate them from their people. African governments have treated loyal traditional leaders with consideration ... Disloyal and unco-operative traditional leaders have suffered fates of marginalization and oppression.

It would seem therefore that whilst the Botswana government sees the system of traditional leadership as a potential hindrance to progress towards democracy and socio-economic development, they also see its value in binding the society together for a common purpose. Provided, therefore, that the traditional leaders carry out the programme of the government, government, like the British before them, are content to see the institution remains and even prosper. However, the retention and prosperity of the institution of the traditional leaders are to be directed and trimmed in accordance with the dictates and directives of the government.⁶¹

Traditional leadership remains significant to a great many Batswana, especially in rural areas. The government is quite aware of this fact, hence it allocated them roles and functions in the *Ntlo ya Dikgosi* and other government institutions. Indeed, part of the BDP's success in the past elections such as the 1990, 1994, 1999 and 2004 elections and the prevailing political stability is the result of the government's attempts at giving traditional leaders a semblance of power. Although the *Ntlo ya Dikgosi* is not a central institution especially in terms of law-making, there is surely an impression on the part of many that the institution still exists and that it has a contribution to make in the running of national affairs.⁶²

5. CONCLUSION

In view of the preceding discussion, it is evident that both the 1965 and 1966 Constitutions of Botswana were the products of the political negotiations under the umbrella of the Great Britain. The 1966 Constitution in particular and subsequent legislation proclaimed to define and regulate the framework within which the traditional leaders should operate in Botswana. Traditional leaders are required to redefine their roles within the framework of a democratic dispensation of Botswana.

The roles of traditional leaders at local and central government in Botswana is shrouded with problems and daunting challenges. In Botswana, despite the fact that the Constitution recognises the status, roles and powers of traditional leaders, government officials and politicians play a dominant role over traditional leaders. They provide legitimacy and direction on policy articulation. Therefore, under the constitutional dispensation of Botswana, traditional leaders lost much of their pre-colonial and colonial authority due to increased legislative bureaucratization and constitutionalism.

leader vis-à-vis central government relations became clearer. The initial period of the Protectorate, the British government felt constrained, legally and morally to support the authority of the traditional leaders as long as the minimal level of order was maintained, non-interference in tribal matters and acceptance of indirect rule were cornerstones of its policy. This relationship was modified as tax collection duties and the performance of certain local administrative functions expanded.

⁶⁰ As quoted by Mzilethi JZ "The Interaction Between Traditional and Modern Political Institutions: Its Implications for Developments in Botswana" (MA-Thesis Centre for Southern African Studies 1977) 31.

⁶¹ In view of the above, it appears that the central government of Botswana dictates the agenda of the politics of the traditional leaders. Therefore traditional leaders have no choice but to follow ways paved by the government.

⁶² Somolekae GM and Lekorwe MH "Chieftaincy System and Politics in Botswana" in Edge WA and Lekorwe MH (eds) Botswana: Politics and Society (Pretoria 1998) 196. These past elections also included the 1965, 1970, 1975 and 1980 elections. In 1965, Seretse Khama won the majority of the election simply because of his character and position as a traditional leader.