



## **Demise or Resilience, Customary Law and the Changing Order in Africa: The Case of Chieftaincy in Botswana**

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### **Abstract**

This paper reviews customary law and how it relates to the institution of Chieftainship in Botswana from the pre-colonial to the post colonial period. It accedes to the widely held view that in Botswana, as in many other African countries where the institution of chieftainship was undermined by colonial rule, chiefs have survived and continues to play a pivotal role in evolving African societies. In Botswana, customary laws governing the institution of the chieftainship, particularly the succession rules, have enabled the chieftainship to surmount the hurdles placed against chiefs by the colonial government. The colonial government onslaught on chieftainship only weakened some chiefs, but not the institution. Since 1966 the post-colonial liberal democratic government of Botswana has continued to enact laws which whittled down the powers of the chiefs considerably, but the institution has adapted and chiefs have also managed to manipulate the political situation to their advantage. Today, due to the dynamism of customary law, chiefs play a pivotal role in the socio-economic, political and administrative systems of Botswana.

### **Résumé**

Cet article examine la loi coutumière et indique ses relations avec l'institution de la chefferie au Botswana de la période coloniale à la période postcoloniale. Il s'accorde avec la thèse répandue, comme dans beaucoup d'autre pays africaines, où la chefferie a été amoindrie durant la période coloniale, mais où les chefs ont pu survivre et jouer un rôle important dans les sociétés africaines en voie d'évolution. Au Botswana, les lois coutumières reconnues dans les institutions

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de la chefferie traditionnelle, notamment dans les règles de succession, ont permis à la chefferie de surmonter les obstacles entre les chefs et le régime colonial. La pression de régime colonial sur les chefs traditionnels a seulement amoindri certaines chefs, mais non pas l'institution. Depuis 1966, le gouvernement libéral, démocratique, postcolonial du Botswana a institué des lois qui affaiblissent les pouvoirs des chefs considérablement, mais l'institution de la chefferie s'adapte et les chefs ont eu à exercer un pouvoir politique à leur avantage. Actuellement, à cause du dynamisme de la loi coutumière, les chefs jouent un rôle important sur les plans socio-économique, politique et administratif au Botswana.

## Introduction

What Rey's colonial administration in the 1930s had failed to accomplish, the post-independence government had managed to achieve. They removed the powers of the *dikgosi* by creating new administrative institutions, to do some of the work done by *dikgosi* previously' (Tlou and Campbell 1997:336).

The capacity of Chiefs to open up to non-royal advice will determine in a large measure their responsiveness to modern trends. The survival of the institution of chieftainship will depend on the dynamism and responsiveness it displays in the face of changing realities in the society (Linchwe 1994:396).

These statements capture the main concerns of the present work. These are the erosion of the powers of *dikgosi* during the colonial era, the scrapping of much of what was left of those powers by the new government after independence, and the resilience and survival of *dikgosi* and the institution of *bogosi* to the present, albeit in a highly transformed manner. Unlike in some African countries, the institution of chieftaincy in Botswana was not invented by the colonialists, or post colonial state. In fact, it predates colonialism.

Although there is no single universal definition to the concept of customary law, there are certain core features which are discernible from many of them as the few examples here indicate. For his part, Hamnett defines customary law as 'a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority'. He emphasises the fact that a critical factor of most customary law is that it is unwritten. There are no written records in customary law and this means the idea of precedent is difficult to utilise. This aspect allows customary norms to be flexible and adaptable and to function as 'instruments for legal change rather than the fossilised remnants of a dead past' (Hamnett 1975:16). Another analyst accords with Hamnett's view by maintaining that customary law is not prescriptive by nature since it is evolutionary. Thus, he also emphasises the dynamic aspect of customary law in his study. This law grows with specific people to whom it relates and these people give it content (Yakubu 2002:17). Presenting

a paper on customary law in Botswana, Athalia Molokomme provided a comprehensive and embracing definition of the concept of customary law. She contends that 'Customary law means different things to different people, at different points in time'. In whatever manner it is used, 'customary law should be understood in its social, cultural, political and economic context'. In the case of Botswana, Molokomme provides various meanings of the term customary law. There is what she terms 'Traditionalists Customary Law'. This encompasses the 'values', 'traditional norms', habits and other principles which have been linked with different Batswana ethnic groups before contact with Europeans. Used in this context, customary law is equated with traditional and cultural values as shown in the setswana phrases *ngwao ya setswana* (setswana culture), and *mekgwa le melao ya setswana* (ways and laws of setswana). This type of law is regarded as legitimate and is often employed by traditionalists in efforts to resist the coming of new laws and policies (Molokomme 1994:348-349). Today very little is known about 'pure' customary law because it was practised about two centuries ago and it was not written. What exists is what has been passed on from generation to generation orally, and some of this has been lost or changed by the socio-economic and political transformations which have since occurred over the long period (ibid.).

According to Molokomme (1994:350), the second kind of customary law is the 'Living Customary Law'. This, 'describes a way of life based upon certain norms of behaviour which are based, in varying degrees, on tradition'. This 'living' or 'contemporary' customary law is shown by the way of life of many people in both rural and urban Botswana. This law is not static, because it is dynamic, negotiable, flexible, fluid and is a reflection of the people's adaptation to socio-economic changes occurring in Botswana society. Although viewed by traditionalists as contaminated by modernisation and other western ways, this customary law is often closer to the real lives of ordinary people. These definitions of customary law are not exhaustive or water-tight compartments. Most authors emphasise the fact that customary law is not written, and for Botswana, this aspect of customary law has also been noted by Isaac Schapera, who further maintained that many Tswana practices, traditions, values and norms are inherent in the social system, and they have been developed, used and accepted over time (Schapera 1938:87). Almost all these definitions emphasise key aspects of customary law such as its unwritten nature, dynamism or flexibility, and that it is given meaning by a specific people to whom it applies. In this study, we shall utilise these characteristics of the law as they relate to chiefship in the past, the present and prospects for the future.

The paper analyses selected aspects of customary law in Botswana, and the manner in which they relate to the institution of *bogosi*. Botswana is a multi-ethnic country, consisting of setswana language speakers and non-setswana speakers, but the name Batswana is an all embracing term used to refer to all citizens of the country. The setswana groups belong to the Sotho-Tswana language cluster, while non-setswana speaking groups such as Basarwa, Basubiya, Babirwa and Bakalanga have different origins. In this study, the customary law on *bogosi* to be presented is largely concerned with the setswana-speaking groups. Owing to their origin, setswana-speaking groups share similar customs, norms and traditions.

The concept of chiefship, its nature and viability has attracted the attention of scholars from the mid-twentieth century to the present. In the 1950s and 1960s, modernisation theorists posited that chiefship was on its deathbed and would be replaced by bureaucratic systems. Similarly, proponents of the dependency and underdevelopment theories argued that the institution was facing extinction in the near future (Nyamnjoh 2002:3 quoting Warnier 1993:318 and Harneit Sievers 1998:57). In Botswana, the nature of *bogosi* among setswana-speakers in the pre-colonial, colonial and post colonial periods has attracted massive scholarship since the pioneering works of Isaac Schapera in the 1930s. Many of the works on this subject concentrate on the nature, powers, duties and privileges of *dikgosi* and they document the concerted efforts by the colonial and post colonial state to undermine *dikgosi* and *bogosi*. Among some of these scholars are Schapera (1938, 1970), Proctor (1965), Sekgoma (1995), Mgadla (1989, 1998), Lekorwe and Somolekae (1998), Seretse et al. (1983), and Ngcongco (1989). A few of these recent works express scepticism about the future viability of the institution and argue that it can only survive at the whim of the government (Sekgoma; Seretse). A diametrically opposed view has been provided by the insightful work of Francis Nyamnjoh, which has offered a new dimension on the adaptability and survivability of the institution of *bogosi* in spite of all the major changes after independence in 1966 (Nyamnjoh 2002).

In order for us to demonstrate how customary law or *bogosi* has been undermined or enhanced throughout decades of changes, it is imperative to re-state some of the issues and conclusions that have been visited and revisited by earlier studies. The paper discusses the powers, duties and privileges of *dikgosi* as understood under customary law, and the changes that have occurred in the institution of *bogosi* from 1885 to 1965 (colonial period), and from then on to the present independent Botswana. The study endorses the position adopted by numerous previous works that the colonial state reduced and undermined the powers of *dikgosi*, and the institution of *bogosi*

as understood under customary law. It also accedes to the conclusions that the post-colonial state further eroded and diminished the powers of *dikgosi* and undermined the institution. However, a departure from some of the previous studies is in the argument against the conclusion that the institution is bound to die a natural death, or collapse under the weight of state legislation. We argue that although changes in the colonial period weakened the institution of *bogosi*, Batswana upheld and clung to it, and the indirect rule government realised the crucial administrative link, indispensability and vitality of *dikgosi* in the success of governance. Despite its somewhat weakened status in modern Botswana, *bogosi*, backed by the flexibility of customary law which enables it to adapt to new roles, continues to enjoy sizeable support, especially in the rural areas. It argues that society at large has accepted the new roles of the *dikgosi* as 'prescribed' by the government but, as Nyamnjoh noted, *dikgosi* have continued to negotiate and re-negotiate their positions (Nyamnjoh 2002:5) and have succeeded in their quest to play a crucial political and administrative role in the country, reaping substantial benefits and concessions from the state which relies on them for political and administrative expediency.

### **The pre-colonial setting**

In many pre-colonial African societies, one could assume leadership of a society because of various reasons. An individual could save his kinsmen from disaster such as war or drought, or could accumulate wealth and gain support in that way. On the other hand, one could excel in hunting or perform a memorable feat, and hence be accorded a leadership role by society. Ascendancy to the throne was also hereditary, with those belonging to the royal house or closely related to it ascending in the event that the position fell vacant.

The pre-colonial Tswana states were autonomous or independent political entities. Each *Kgosikgolo* (paramount chief) was the head of his own tribe and did not owe allegiance to any other superior authority. In setswana customary law, a *kgosi* was (and still is to a large extent) born. *Bogosi* was hereditary in the male line, passing normally from father to son, hence Schapera's saying that, 'A chief is never selected' (Schapera 1938:42). Upon the death of a *kgosi*, or incapacitation, his eldest son would automatically accede to the throne. This rule appears to have been largely upheld during the pre-colonial period although there were a few cases where *bogosi* was acquired through some unconventional methods such as trickery or force.

If the eldest son was still too young to assume the reigns of power, his uncle would rule as a *Motshwareledi* (regent). No woman could assume the position of *Kgosi*. The installation of a setswana *kgosi* was conducted by his people

in a *kgotla* (village assembly), where his uncle drabbed him with a leopard skin (Schapera 1938:62).

Setswana customary law conferred immense powers and privileges on a *kgosi*. According to Schapera:

The Chief, as head of the tribe occupies a position of unique privilege and authority. He is a symbol of tribal unity, the central figure round which the tribal life revolves. He is at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people (Schapera 1938:62).

However, although the *Kgosi* had great powers and commanded immense wealth, he had some duties and obligations to his subjects. In times of stress, such as drought, he would redistribute cattle or grain to his subjects, and he had an obligation to protect his people, take care of the needy in society and be hospitable to visitors. He was supposed to be generous in return for the privileges accorded him, and use his wealth for the general welfare of the community (Lekorwe et al. 1999:188). The immense powers, prestige and superior status of the *kgosi* did not mean that he was an autocrat who was above the law. There was a council of advisors, normally drawn from the *kgosi's* senior relatives such as his uncles which limited the manner in which the *kgosi* exercised his powers, and it acted as checks and balances on the way in which he conducted tribal matters. A *kgosi* was obliged to cooperate with his subjects as this would make him a real chief as symbolized by the setswana saying, '*Kgosi ke Kgosi ka Morafe*' ('A chief is a chief by the grace of his tribe'). He was thus obliged to cooperate with his subjects and advisors (Schapera 1938:84). There were also some tribal mechanisms in place designed to act as checks on those leaders who tended to deviate from the norm.

All matters of public domain were dealt with before the general tribal assembly attended by men in the *kgotla*. (Women and people known as *Malata* 'serfs', usually from a tribe regarded as inferior such as Basarwa – derogatively called 'Bushmen' – could not attend). All men could express their opinions on any matter at the *kgotla* and the ultimate decisions taken by the *kgosi* would be highly influenced by these deliberations. In addition to being a public meeting place for discussing crucial issues in the village, and being a place where laws were made, the *kgotla* was also a court where civilian and criminal cases brought before the *kgosi* were adjudicated (Schapera 1938:80-81; Ngcongco 1989:46; Mgadla 1989:48). The pre-colonial situation briefly outlined above epitomised setswana customary law regarding the institution of *bogosi* and *dikgosi*. This was the situation on the eve of colonialism, although some of these features had been affected by contact between

Batswana societies and outside forces such as missionaries, traders and travellers since the beginning of the nineteenth century.

### **Colonialism and *Bogosi* 1885-1927: The initial phase of undermining the institution**

Botswana became a British Protectorate in 1885 after the infamous Berlin Conference where European powers partitioned the African continent. Britain declared a Protectorate over the autonomous Tswana states reluctantly. The declaration came about only as a result of the imperial contest between the Germans, the Portuguese and the Boers during the scramble for Africa. Britain dreaded the spectre of Botswana falling under any of her rivals because that would seal off the 'road to the north' (the present path through which the railway line and the main road run, linking north and southern Botswana), which was a gateway to the 'riches' of central Africa and beyond. We shall not belabour the details of how the exercise was implemented and the reaction of Batswana, suffice it to mention that some Batswana *dikgosi* initially opposed the declaration of a protectorate because they felt that there were no external threats to their independence. In the end however, they reluctantly accepted British 'protection'.

After securing her three protectorates in Southern Africa (Botswana, Lesotho and Swaziland) Britain placed them under a High Commissioner stationed in South Africa. In the case of Botswana, there was also a Resident Commissioner also based in South Africa. This officer was responsible for the daily administration of the country and he reported directly to the High Commissioner. The British did not want to carry the burden of administering poor Botswana, hence the adoption of the 'indirect rule' system in which the *dikgosi* were to be used to govern their own people as they had before. With a skeletal administration of a few Resident Magistrates (District Commissioners after 1932), the Border Police and other minor officials in Botswana, Britain started introducing laws (proclamations) and orders some of which eroded the powers of *dikgosi*, contravening and undermining existing Tswana laws and customs in the process.

The Bechuanaland Protectorate, as Botswana was known during the colonial period, was established by an Order-in-Council of 1885. This piece of legislation conferred upon the High Commissioner powers to legislate for the country, but in the execution of that duty, he had to respect the 'Native Laws and Customs' of Batswana. From 1885, the system of indirect rule employed Roman Dutch law in Botswana, and this existed alongside an African administration that was still administering setswana laws and customs (Mgadla 1994:50).

The first and real significant move in the assertion of colonial power, a move which hived off some major powers of *dikgosi* came through the Order-in-Council of May 9, 1891. This legislation '...empowered the High Commissioner on the advice of administration officials, to suspend, fine and dispose uncooperative or troublesome *dikgosi* and to draw boundaries between the various Tswana nations' (Mgadla 1994:50). Prior to this measure, the *dikgosi* had, even under British protection, continued to exercise their roles, functions and powers over their subjects in the usual manner, employing setswana laws and customs in the *kgotla*.

The Order-in-Council had far reaching implications on the institution of *bogosi*. This legislation was the first step in the beginning of the gradual erosion of the legislative, judicial and administrative powers of *dikgosi*. With this legislation, the High Commissioner needed only to respect setswana law and customs if they were compatible with British laws, interests and policies. The Order meant, '...that chiefs were now responsible to the British and not to their subjects' (Lekorwe and Somolekae 1998:189). The 1891 Order-in-Council gave the High Commissioner powers to make laws for the Protectorate, appoint government officials and interfere in tribal affairs. Elsewhere in Africa, indirect rule also preserved indigenous laws and institutions, but dictated that they could only apply in instances where they were not incompatible with '...English ideas and institutions' (Yakubu 2002:5). In Botswana, Gilbert Sekgoma argues that in cases where there was conflict between British and setswana interests and laws, Her Majesty's position took precedence, and that this was an indication of who wielded real power (Sekgoma 1998:2). It can be observed that this legislation was a direct affront to customary law regarding *bogosi*. Batswana *dikgosi* and their advisers made laws in the *kgotla*, and they were promised that they would continue to govern as they had done in the past. If the High Commissioner was now empowered to make laws and interfere in tribal affairs, this meant that *dikgosi* no longer possessed supreme powers because those customary laws that were adjudged to be in conflict with British interests faced nullification. However, at this juncture it would appear that the colonial power was not so firmly entrenched to be able to tamper with well established practices such as the designation, suspension or removal of *dikgosi*, hence it adopted a cautious approach.

Some Batswana *dikgosi* realised the impending threat to their authority and contested the new measures, arguing that British actions amounted to interference in the affairs of their *merafe*. *Kgosi* Sebele II of Bakwena ignored British orders, and as punishment, a fine of 10 head of cattle was imposed on him. The colonial administration even considered deposing him for his



uncooperative behaviour in favour of his brother. This step was abandoned after the realisation that Sebele commanded greater support than his brother (Mgadla 1994:50). In this case, the British were swayed by the atmosphere prevailing in the society. They were not prepared to face the consequences of a possible revolt, which would have been expensive to quell, and hence they did not trample on the customary law regarding the remedy to be applied by the Tswana to an unsuitable *kgosi* – deposition by his subjects in a *kgotla*.

The colonial administration was adept at gauging the general opinion of society in matters regarding *bogosi*, and hence some of their policies and actions were based on the general concerns of the public. This is exemplified by the 1893 debacle between *Kgosi* Sekgoma Letsholathebe of Batawana and the colonial authorities. Letsholathebe had opposed British laws and missionary activities on numerous occasions. As a form of punishment, the Resident Commissioner deposed him and replaced him with Mathiba Moremi (also from the royal house). The Batawana *morafe* was divided on the conduct of their *Kgosi* (Mgadla 1994:50), and the administration realised that its drastic measures would not be met with stiff resistance. Commenting on the role of Batswana in determining colonial actions at this juncture, Mgadla maintains that ‘Even if the *kgosi* did challenge colonial policy, the administration was hesitant to remove the chief unless there was clear support in the *Kgotla* for such a decision’ (Mgadla 1994:51). On the Batawana incident, the *morafe*, or a large section of it, was not prepared to confront the British on the issue, probably feeling that the action taken against their *Kgosi* was appropriate. However, the might and resilience of the institution are borne out by the fact that the British ‘installed’ another royal who had some legitimacy to the throne, and not an outsider, an action that did not run directly counter to tradition and custom.

During the early phase of colonialism, some *dikgosi* started taking advantage of colonialism to enhance their authority and positions even by indulging in some activities which were not necessarily customary. On the other hand, Batswana were also becoming increasingly aware of their influence on colonial actions, as well as exploitative designs by some of their *dikgosi* which were not sanctioned by customary laws. This atmosphere came to the surface with the Native Labour Proclamation of 1907. The proclamation, ‘made it illegal for *dikgosi* to bind themselves by contract to the provision of labour’. Batswana *dikgosi* had wanted to raise funds for development and the payment of taxes by sending young able bodied men to South African mines. This was largely opposed by Batswana *merafe* who regarded these measures as exploitative and unnecessary. The intervention of the colonial government by preventing *dikgosi* sending Batswana to the

mines meant the powers of *dikgosi* in this area were curtailed and the welfare of the larger society enhanced. In this case, the administration had 'restricted the *dikgosi* because of popular demand' (Mgadla 1994:51). Sending more Batswana men to the mines enabled them to pay tax, and this meant increased revenue for chiefs who pocketed 10 percent of the tax collected. Thus, with British protection behind them, the *dikgosi* imposed additional exactions on the peasantry for personal gain, a feature of indirect rule observed elsewhere in Africa (Mamdani 1996:46). In Botswana, again as in other parts of the continent under indirect rule, these situations would be abused by some *dikgosi*.

In the early decades of indirect rule, that is before 1920, the *dikgosi* were gradually being incorporated into the colonial central government system. However, during this phase of indirect rule, the colonial state did not interfere much in the customary laws and institution of *bogosi* (Mgadla 1994:51; Molokomme 1994:352). The colonial administration was content with their use of *dikgosi* as agents or emissaries to the general populace. In order to ensure that *dikgosi* become an effective link between the administration and Batswana, a Native Advisory Council later (African Advisory Council) was set up in 1919 supposedly as a forum through which Africans could air their views to the administration, but, as Mamdani rightly observed, this body largely became a forum where the Resident Commissioner delivered his proclamations and little debate took place. This had the effect of weakening *dikgosi* vis-à-vis the British administration (Mamdani 1996:46). The council, which was chaired by the Resident Commissioner comprised of *dikgosi* and some headmen who were chosen in the *kgotla* as members. The council '...lacked any sense of popular representation in that the elected councillors were chosen by *dikgosi* without adequate consultation with their people in the *kgotla*'. One of the elders who was interviewed on the nature of representation of the council lamented its lack of contact with the society at large:

Deliberations and resolutions made at council were rarely, if ever, discussed in *dikgotla* prior to the meetings. Once resolutions had been approved by the resident commissioner and *dikgosi*, the latter announced them in *dikgotla* and the public had little to say in deliberating over them, contrary to the democratic practice of *dikgotla* (Mgadla 1994:53, interview with Masimega Tshosa ward, Molepolole, 18 Nov, 1987).

In this instance, it would appear *dikgosi* were interested in promoting their own interests and serving the interests of the British rather than those of their subjects. The British colonisers were undermining the deliberative process of the *kgotla* and this was likely to alienate *dikgosi* from their people because

they had departed from the traditional practice of consultation popularly known in setswana as *Therisanyo*. These practices demeaned *dikgosi* in the eyes of the society, and when the colonial administration flexed its muscles in the not too distant future, and further eroded the powers of *dikgosi*, they were to have little sympathy from their subjects. This was the situation in 1926 and 1927 when legislation was passed 'removing civil marriages and *boloi* (witchcraft) from *dikgosi*'s jurisdiction' (Mgadla 1994:53), and more of such measures would be undertaken during the highly confrontational years of 1934 to 1943. It is however, worthy to note that the disregard for the due process of consultation by some *dikgosi* would have demeaned the positions of individual *dikgosi*, but not the institution per se.

### **The phase of heightened confrontation, 1934-1943**

In the late 1920s and early 1930s, some *dikgosi* became more autocratic in dealing with their subjects, despite the introduction of legislation by the colonial administration aimed at reducing their powers. This could have been due to the realisation of their weaknesses vis-à-vis the administration and hence the need to portray themselves as powerful by being autocratic (Lekorwe and Somolekae 1998:189). Two leading *dikgosi* in the protectorate were accused by their subjects of autocratic tendencies in a letter sent to the Resident Commissioner in Mafeking. The residents alleged that *kgosi* Bathoen II of Bangwaketse '...made his people work without food', and that his orders, 'cannot be questioned'. In the same letter, residents described *kgosi* Tshekedi Khama of Bangwato as, 'the most absolute tyrant that ever sat upon the Bangwato chieftainship' (Ibid). However, it should be noted that the colonial government was partly responsible for some of the dictatorial tendencies displayed by some *dikgosi*. In most colonial situations, indirect rule tended to provide its 'functionaries (chiefs) with powers which were bound to be abused'. The benefits that accrued to chiefs such as dues and shares from taxation for their service were later abused by increasing personal exactions on the peasantry (Mamdani 1996:54). In Botswana, Resident Commissioner Charles Rey noted some of this abuse in the late 1920s and 1930s and this prompted him to institute the controversial 1934 proclamations reducing the powers of *dikgosi*. On the other hand, Batswana were also becoming distrustful of the behaviour of some *dikgosi*. The unbecoming behaviour of the *dikgosi* and the reaction of some sections of the *merafe* has been described succinctly by Schapera thus:

Freed by the support of the administration from tribal sanctions formerly restraining him (*kgosi*) he often tended to care more about asserting the rights that remained to him than about his corresponding duties and obligations.

He became more autocratic and exacting and less willing to consider the welfare of the tribe or to use his wealth for its benefit. All this the people began to resent, a tendency reinforced by educational advancement and the possibilities of escape opened up by labour migration (Schapera 1938:86).

Schapera reiterates that while civilisation may not have 'destroyed fidelity' to the *kgosi*, it made Batswana to be more critical of the conduct of *dikgosi*. As already stated, this occurred at a time when the colonial administration had removed the mechanisms and remedies that society used to employ against oppression and abuse. This could also be another reason why Batswana did not react strongly to the introduction of legislation reducing powers of *dikgosi*, although it ran counter to their customs and traditions. In spite of the changes noted by Schapera, Batswana still largely held the institution in high esteem. The reaction of Batswana to the conduct of some *dikgosi* should be viewed not against the institution, but as against the conduct of individual *dikgosi*.

The years 1934 to 1943 witnessed the beginning of increased colonial intervention in Batswana's legal and political affairs. This was after Colonel Charles Rey was appointed Resident Commissioner in 1927. Rey attributed the lack of development in Botswana to what he saw as the dictatorial powers of *dikgosi*, and hence he enacted two draconian proclamations, namely the Native Administration Proclamation No. 74 of 1934 and the Native Tribunal Proclamation No. 75 of 1934 to 'tame' *dikgosi* (Steenkamp 1994:296-97). During this period, the colonial administration felt entrenched enough to institute measures which would further reduce the powers, privileges and functions of *dikgosi* (Sekgoma 1998:3), hence further undermining some of the customary laws governing *bogosi*. These proclamations have been discussed at length elsewhere (Sekgoma 1998; Mgadla 1994; Lekorwe et al. 1998) and we shall only briefly summarise them here. The Native Administration Proclamation provided for the recognition, approval, dismissal and suspension of *dikgosi* by the High Commissioner. Furthermore, 'the High commissioner was also given the power to refuse to recognize and approve newly appointed chiefs, despite the support those chiefs might command from their people', in the interests of public good and good government. The proclamation also introduced Native Councils to assist *dikgosi* in administering their tribes. This seriously eroded the independence and power of *bogosi* because henceforth *dikgosi* were no longer able to rule as they saw fit, but were subjected to the advice of tribal councils (ibid). The Native Administration Proclamation whittled down the powers of *dikgosi* and changed Tswana law and customs regarding the institution. The new measures stipulated that a successor to a *kgosi* should be appointed by the tribe at the *kgotla*, and the new *kgosi* had to obtain the recognition of the High

Commissioner. The proclamation ordered that the name of the newly appointed *kgosi* should be submitted to the Resident Commissioner for consideration. This, according to Lekorwe and Somolekae, 'constituted a major deviation from the Tswana law of succession. It obviously weakened the position of the chief within the community' (1998:189). Considering the manner in which some *dikgosi* behaved in relation to their subjects during this period, it would appear the general population somehow maintained a low profile in the saga, including the court battle which followed the introduction of the proclamations.

The proclamation had the effect of rendering *dikgosi* mere civil servants of the government as they were now bound to promote colonial interests and ignore those of their subjects. Lekorwe further emphasises the predicament that *dikgosi* found themselves in, by stating that for one to become *kgosi*, they needed British recognition, and the colonial government could withhold recognition of a *kgosi* who was regarded as being anti-colonial. They could even proceed to take the drastic action of appointing their puppet to the position of *kgosi* (Lekorwe and Somolekae 1998:189). However, in practice, customary laws on *bogosi* remained resilient because in instances where the British fell out with a *kgosi*, they would install a royal who had some semblance of recognition and legitimacy from the *morafe*, and would not appoint a commoner, or an outsider with no royal connection. Furthermore, the Native Councils which had to be consulted by *dikgosi* under the new dispensation were not a radical departure from the traditional Tswana consultative bodies, although they could have been transformed in this instance. In the main, the indirect rulers still recognised the vitality of the institution – that it was the main link between it and the populace.

The native proclamation reaffirmed the dictates of the 1891 law which deprived the *dikgosi* of the powers to try serious cases such as those involving murder, rape and treason, and transferred these powers to the magistrate's court and the high court. These laws affected the position of *dikgosi* adversely because they could only deal with relatively minor cases and those involving customary law and customs. Sekgoma argues that the colonial administration viewed these measures as 'desirable reforms aimed at modernizing outmoded and autocratic institutions and thus making them amendable to modern forms of administration' (Sekgoma 1998:4). This was the view of the British, while the majority of Batswana continued to admire and utilise their institutions. For Batswana, *bogosi* remained a viable body which still plays a crucial role in modern Botswana as we shall observe shortly.

Batswana *dikgosi*, namely Tshekedi Khama of Bangwato and Bathoen II of Bangwaketse, took the colonial administration to court for what they

regarded as an affront to their powers. They argued that this was a breach of a promise of non-interference in the affairs of *merafe* made by the British when declaring the protectorate. They protested that the Order-in-Council of 1891 had not altered their powers (Mgadla 1994:54). However, they lost the legal suit. A decade later in 1943, the administration issued a series of other proclamations to placate *dikgosi* and neutralise the effects of the 1934 proclamations. Proclamation No. 32 of 1943 was designed to repeal the earlier Native Administration Proclamation. However, it did not change the essence and effect of the 1934 proclamation because it still provided the High Commissioner with powers to recognise, suspend or dismiss a *kgosi* or *kgosana* (headmen), whose actions were considered a 'threat to good order, public peace and good government' (Sekgoma 1998:4). The mere dilution of the former stringent measures were a result of pressure from dissatisfied *dikgosi*, and British realisation that the latter could render indirect rule unfeasible through non-compliance. Thus the winning of some concessions, however minor, is an indication that *dikgosi* could deploy their might to their advantage.

The 1943 proclamation introduced a new phenomenon, that of the native authority. This was a new concept in tribal administration. The new authority took over the function of *dikgosi* which had been vested in the native councils by proclamation No. 74 of 1934. Under the new proclamation, a *kgosi* was now required to work with members of the native authority and decisions were to be arrived at through consensus or majority vote. On the effects of this proclamation, Sekgoma observes that 'This requirement had the net effect of reducing the Chief's power in his *kgotla* and seriously constrained his freedom of action on matters which affected his constituency' (Sekgoma 1998:5).

Through this action, the British gave more authority to the community. This change was accepted by the society as it would counter the dictatorial tendencies displayed by some *dikgosi* earlier on. As noted, the setswana administrative system was buttressed by consultation on crucial issues in the *kgotla*, and, although the chief would state the final decision on any issue, the decision would be based on the deliberations of the *kgotla*. It was indirect rule that tended to arm *dikgosi* with 'uncustomary' powers, such as disregard for the traditional consultative process. The 1943 proclamation only brought back some minor powers previously held by *dikgosi*. The *kgosi* could now make some laws in conjunction with the *morafe*. The crucial issue was that the *kgosi* had first to consult with the *morafe* at the *kgotla*. The *kgotla* on this occasion again assumed its critical role in Batswana affairs because the *kgosi* had to consult it, and not the tribal elders alone (Mgadla 1994:55). Batswana

wanted to participate in decision making in the *kgotla*, and instances of challenges to the undue authority of *dikgosi* by educated Batswana like Simon Ratshosa is evidence that society was against a 'created chieftship' with powers previously unknown and not sanctioned by tradition.

### **Dawn of a new era: Independence, onslaught, adaptation and resilience**

If *dikgosi* had entertained any hopes that their powers would be restored after independence by an African government, then those were dashed even during the transition period. The struggle between the young and educated politicians who led the country to independence and *dikgosi* started during the constitutional talks in 1963 (Tlou 1997:335). At stake was the issue of the amount of powers to be wielded by *dikgosi* in the new dispensation. Ultimately, whilst the new government accorded *dikgosi* some recognition, it further reduced their powers. The new democratically elected government of Botswana was determined to shut out *dikgosi* from wielding significant political power. Contrary to what transpired at independence in some African countries where chiefship was regarded as irrelevant (Lekorwe and Somolekae 1998:190), *bogosi* was not abolished in Botswana. Here, the government introduced a series of legislation which, as some analysts have observed, further reduced the powers of *dikgosi* and rendered the institution almost meaningless (Sekgoma 1998:15). The party which emerged victorious from the first general elections – the Botswana Democratic Party (BDP) – was led by a traditional chief and had amassed wide support from the rural areas where chiefship had massive appeal. Unlike the radical Botswana Peoples Party (BPP), the BDP had realised the influence and grasp of *bogosi* on Batswana and hence its utility as a 'vote bank'. This party has since treaded delicately on issues of *bogosi*, hiving off some crucial powers from *dikgosi* whilst also acceding *dikgosi* some crucial benefits because of their strategic position in society and the influence they wielded.

At independence in 1966, Botswana adopted a 'liberal democratic' system of government modelled on the Westminster system. The new constitution that was adopted entailed separation of powers, with legislative powers being the preserve of parliament, policy making powers falling under the executive and judicial powers coming under the judiciary. The new system of government differed with the pre-colonial setswana government where judicial, executive and legislative powers were vested in the *kgosi* (Lekorwe and Somolekae 1998:190). But this superstructure operated alongside or above a tribal setswana system, which in fact continued to be the main judicial and

administrative system at grassroots level in the rural areas where the majority of Batswana lived.

From its inception, the post-colonial state cherished the establishment of a plural democratic government based on the rule of law and a free enterprise economic system. These values could not be accomplished without some radical reforms of the traditional Tswana political system (Sekgoma 1998:14). These radical reforms have been instituted and the chieftaincy has proved itself capable of adapting to new circumstances because the capitalist economic enterprise was not a new phenomenon, but rather it adopted a higher gear with independence. In addition to parliament, the constitution also provided for a house of chiefs. The function of the house of chiefs was to advise the government on matters concerning customary laws and tradition. The house could also call on a minister to answer questions and clarify matters. This institution had no legislative powers and its opinions and advice were not binding on government (Proctor 1968:22). *Dikgosi*, as would be expected, disapproved of this aspect of the house's powers. The nature of the house of chiefs – its deprivation of any significant powers – signalled the intention of the new government. Notwithstanding, the mere existence of the house and the fact that its members have on several occasions made significant contributions on national issues and legislation points to the ability of *dikgosi* to maintain some of their rights.

The first piece of legislation which indicated that the new government was intent on wresting some of the remaining powers from *dikgosi* and enhancing the earlier colonial legislation was the Chieftainship Act of 1965. The Act recognised the institution of *bogosi*, but it explained the position of *dikgosi* in relation to the government by stating that:

... no person shall hold or assume chieftainship of any tribe or exercise or perform any of the powers of a chief unless he has been recognised as chief of such a tribe under this Act. Such person shall have to be designated by a tribe assembled at a *kgotla* in the customary manner, and his name shall be sent to the president ... The president shall by notice in the *Gazette*, recognise the person so designated as chief of such tribe (Lekorwe and Somolekae 1998:190).

Lekorwe and Somolekae have candidly assessed the effect of this piece of legislation on *bogosi*. They argue that this provision of the Chieftainship Act in effect means the President can choose not to recognise a *kgosi* for any reason known to him. They further argued that the President's reason for choosing to recognise a *kgosi* was similar to that of the colonial government where a *kgosi* had to be loyal and subordinate to the central government. In this regard, a *kgosi* was recognised for political reasons (ibid). With respect



to the setswana-speaking groups, the government has not, at any time refused to recognise a chief who has been designated by the particular group to ascend to the throne. It has only been in recent times that the government or politicians have intervened in favour of their candidate in villages composed of multi-ethnic groups, and where the true holders of the throne are not easy to discern such as in the Tati Siding village of north-eastern Botswana.

The Act of 1965 was further strengthened by the Chieftainship Amendment Act of 1970, which placed *dikgosi* under more close control by the government. The amended Act accorded the president powers to unseat a *kgosi* without waiting first to receive complaints from his subjects. After consulting the *morafe*, the President could appoint a regent to rule a *morafe* if the rightful heir was not ready to assume office. This Act meant that, 'in Botswana the decision to recognise the appointment of a Chief is the prerogative of the President'. The Chieftainship Act of 1965 had almost the same impact as the 1934 Act in that it denied *dikgosi* some of their most cherished powers. Thus, 'the subjection of succession to presidential recognition was a practice that was inherited from the colonial administration' (Sekgoma 1998:8). Although the state had armed itself with drastic powers such as the suspension or removal of a paramount chief, in practice such powers have been rarely revoked, and in instances where they have, the government has suffered political setbacks such as the loss of votes at elections and non cooperation from the chief's subjects.

Notwithstanding these developments, the Botswana government has continued its further erosion of the powers of *dikgosi* in the past three and a half decades. The Chieftainship Amendment Act of 1987 was one of the laws which progressively subordinated the *dikgosi* to the government. This Act placed *dikgosi* under the Minister of Local Government, Lands and Housing. The Act maintained that, 'the Chief can be designated as such in accordance with customary law by his tribe in the traditional assembly, but that he has to be recognised as such by the minister' (Lekorwe and Somolekae 1998:191). In line with this, it has been noted elsewhere that in independent Botswana, succession to *bogosi* is not based on the dictates of customary procedure in selecting the rightful heir, but it depends on whether the selected heir is acceptable to government (Sekgoma 1998:8). The Act empowers the minister to suspend a *kgosi* if he/she has valid reasons to believe that the *kgosi* of any *morafe* has abused his powers or is not capable of exercising them. After this suspension, the minister can order an enquiry and consider representations from the chief's side. Following this enquiry, the Minister can depose a *kgosi* from *bogosi* for a period of not more than five years. 'The Act has, therefore, continued to elevate the status of politicians at the expense

of chiefs'. The intention of this Act was to obtain cooperation from *dikgosi*, denigrate their political influence and restrict their ability to act freely. Exercising her/his powers under the Act, the Minister of Local Government can simply remove a *kgosi* from office just like a civil servant, although a *kgosi* comes from a royal house (Sekgoma 1998:8) These measures have prompted some of the *dikgosi* to voice their concerns, with the paramount *kgosi* of Batawana complaining that 'The contemporary chieftainship institution is not the same as chieftainship in the ancient days because government has relegated it to the status of a lower profile civil service' (Lekorwe and Somolekae 1998:192). Powers conferred on a minister to remove a *kgosi* should not be viewed as indicative of the demise of *bogosi*. In reality it has proved difficult for ministers to exercise such powers, especially in instances where the *morafe* stood behind their chief. The massive support enjoyed by *dikgosi tse dikgolo* renders the exercise of draconian powers difficult as such action could be politically suicidal. The mere removal of a *kgosikgolo* by a minister does not appear to be as simple as Sekgoma seems to imply. It is an action that calls for full and unflinching tribal backing.

In some rare instances, the government has indeed invoked its powers under this Act. Testimony to this was the government versus Bangwaketse debacle of 1994. In that year, the Minister of Local Government suspended *kgosi* Seepapitso for allegedly failing to cooperate with the government during a visit by the Zambian President to the Bangwaketse capital of Kanye. The Minister proceeded to appoint Seepapitso's son to act as *kgosi* of Bangwaketse. This matter was contested in the courts by the *morafe* and their *kgosi* against the government, and it ended up at the Court of Appeal which ruled that the suspension was lawful, but that the minister had made an error by not consulting the tribe before appointing the son. *Kgosi* Seepapitso was reinstated following this judgement (Lekorwe and Somolekae 1998:192-3). Following this saga, the ruling party lost the Kanye parliamentary seat to the opposition in the 1999 general elections. Although Kanye had been an opposition stronghold since the resignation of *kgosi* Bathoen II to join the opposition Botswana National Front (BNF) hence attracting a lot of support from his subjects, some residents have argued that, in this instance, Bangwaketse wanted to punish the ruling party for suspending their *kgosi*. The government later appointed *Kgosi* Seepapitso as Botswana's ambassador to the United States. While this appointment has rightly been interpreted as a move aimed at removing an errant chief from the scene (Nyamnjoh 2002:7), elsewhere it has been seen as an attempt to placate the *kgosi* and his *morafe* and thus gain political mileage (Personal communication with five Bangwaketse elders aged 50 to 78 years, 21/10/2002). The appointment of a *kgosi* to a diplomatic

position ahead of career diplomats, has also been seen by observers and the opposition as a political move designed to boost the image and revive the political fortunes of the ruling party in Ga-Ngwaketse.

Another move to reduce the powers of *dikgosi* was the setting up of district councils in 1966. The councils were, among others later accorded the responsibility of taking control of stray cattle (*matimela*) in accordance with the Matimela Act of 1968. This Act, empowered the councils to collect and dispose of stray cattle, taking away this responsibility from *dikgosi*. Stray cattle not collected after a stipulated period could be sold and the money used by councils. This Act impacted heavily on *dikgosi*'s key source of wealth. Presently, they are not involved in matters of taxation, and they no longer receive the 10 percent tax commission that was earlier paid by the British administration. The *morafe* does not plough for *dikgosi* or provide them with tribute anymore. Because these traditional requirements are no longer in practice, this has seriously diminished *dikgosi*'s wealth, power, status and prestige. This is because '...chiefs have now been reduced to the status of civil servants and have to depend on a salary like all other government employees'. Cattle have been a major source of wealth and prestige in traditional Tswana society. Although this is still the case to some extent, other economic activities in modern Botswana such as the ownership of bottle stores, bars, and restaurants have become important sources of wealth in which commoners can invest (Lekorwe and Somolekae 1998:194). The opening up of such opportunities to commoners can be viewed as another reason why Batswana have not reacted strongly to the government's onslaught on *dikgosi*'s powers, especially powers that would have hindered commoners access to economic and political opportunities. Some Batswana maintain that in the past some *dikgosi* were oppressive and unnecessarily restrictive in what their subjects wanted to pursue. They mention a *kgosikgolo* among the Bangwaketse in the colonial days who did not allow his subjects to own certain items like cars and build houses of brick and corrugated iron, because he was the only one supposed to have those (Personal communication with Montsho Seditse 73, Keto Matlhare 80 and John Baruti 67 at Kanye, 21/10/2002).

Despite the loss of their traditional sources of wealth, *dikgosi* have renegotiated their position in the new system and have won sizeable benefits. Paramount chiefs are paid a relatively attractive salary and enjoy an enhanced status (as evidenced by three professionals who left their careers and became chiefs, namely *Kgosi* Tawana II of Batawana and *Kgosi* Letlamoreng II of Barolong, both lawyers, and *Kgosi* Kgari of Bakwena, a teacher). In addition, they enjoy the privilege and status of occupying the prestigious flats at the

parliamentary village. They are accorded the privileges of buying cars at half the price, with the government paying a 50 per cent subsidy and have, on numerous occasions accompanied the President on state visits. These are privileges enjoyed by the country's legislators (members of parliament), and the extension of these to *dikgosi* shows the importance attached to these positions and the *dikgosi*'s right to privileges. This is not a situation peculiar to Botswana. Elsewhere in Africa, the might and elevated status of the institution has been shown by the fact that highly educated personalities with doctoral degrees from European Universities have settled for chiefship and they also enjoy numerous benefits and privileges from the state (Nyamnjoh 2002:14-15).

A major blow was dealt *dikgosi* and Tswana customary law when the Tribal Land Act was promulgated in 1968. This Act provided for the establishment of land boards which wrested the powers of custody and allocation of land from *dikgosi* and vested them with the new land boards, turning *dikgosi* into ex-officio members of these boards, and rendering them mere bystanders in the process of land allocation (Sekgoma 1984:11). As noted earlier, *dikgosi* were responsible for allocation of grazing, residential and cultivation land. Although they lost some of these powers such as allocation of land to concessionaires during the colonial period, they continued to allocate land in their respective reserves. After independence, the government realised that *dikgosi* did not have the resources and capacity to allocate land effectively. Since land is a sensitive issue, and the *dikgosi* had enjoyed the privilege of first priority to the best lands in terms of residence and cultivation, it was clear that the continuation of this practice would cause strife and hence the government intervened. However, it should be noted that Botswana still regard the *dikgosi* as custodians of their land as shown by the recent resistance to give land boards tribally neutral names (for example, the change from Bangwato Land Board to Central District Land Board). The attachment of *dikgosi* to land was also emphasised in the Balopi commission when setswana-speaking groups argued that subject tribes cannot have a paramount chief because they do not have land (*Botswana Guardian*, 22 March 2002; *Botswana Gazette*, 24 October 2001). In Gammangwato, subject tribes such as Batswapong, Bakalanga and Babirwa are held to be occupying Khama's land and hence the opposition by Bangwato for the installation of paramount chiefs by the former. In fact, most Botswana believe that the land boards are meant for the efficient allocation of land since they have the resources, but that in actual fact the land belongs to different *merafe* with the chief being the custodian.

In the judicial sphere, it was the Customary Court Act of 1966, which further whittled down the remaining judicial powers of *dikgosi*. In the pre-colonial period *dikgosi* possessed unlimited jurisdiction, tried all types of cases, and determined the sentences. The Customary Court Act placed further limits on the powers of *dikgosi*. These limits were first introduced in the colonial period and have been continued by the independent government. The Roman Dutch law introduced in the country in 1891 had removed some of the privileges and powers of the *dikgosi*. The District Commissioner and the Magistrate have since then been armed with powers to revoke decisions of customary courts. In present day Botswana, one can decide whether to be tried by a magistrate or by a customary court. This was a new development which undermined the role of *dikgosi* in today's legal system. *Dikgosi* were dissatisfied with this development and one of the outspoken *dikgosi*, Bathoen II of Bangwaketse resigned from *bogosi* and joined opposition politics. He stood on the opposition ticket for the parliamentary seat of Kanye in the 1969 general elections where he defeated the then Vice President Ketumile Masire. This was an indication of the fact that Batswana, especially those in the rural areas, still followed their *dikgosi* and were prepared to offer them substantial support. However, this did not deter the new government which continued its relentless drive to deprive *dikgosi* of much of their powers and privileges. But, in the process, it accorded new roles and privileges that, while serving government's interests, they also enhanced the positions of *dikgosi* and bolstered the resilience of the institution.

### **Demise or resilience: Customary law and the future of chieftainship in Botswana**

In trying to grapple with the issue of whether the institution of *bogosi* is on its deathbed in Botswana, we shall begin by discussing the concept of succession, a concept that Batswana, especially those from the Tswana speakers who have a strong tradition of paramount *dikgosi*, have stuck to tenaciously. As noted at the beginning, succession to the office of *kgosi* among Batswana was hereditary in the male line, with the *kgosi*'s eldest son ascending to the throne if the office fell vacant. In case of his minority, his uncle would act as regent or if a *kgosi* died without male issue, then his next brother would take over. We also noted that no women could be *kgosi*, the exception having been the regents Ntebogang of the Bangwaketse *morafe* from 1924 to 1928, and Mmamoremi who became regent for her son among the Batawana. These were the only rare cases during the colonial period (Ngcongco et al. 1987:19-22; Tlou 1998:22). Despite their paucity, the cases point to the dynamism of the institution and the fact that chiefship has long been amenable to reform.

Mention has also been made of the fact that according to customary law and tradition, a *kgosi* was born, and not elected, hence the setswana saying *kgosi ke kgosi ka tsalo* (a chief is a chief by virtue of birth).

Throughout the colonial period, the eldest male sons of *dikgosi* in the Tswana groups have ascended to the throne. In the case of a minority, a regent would take office as exemplified by the case of *Kgosi* Tshekedi of Bangwato who became regent in 1925 upon the death of *Kgosi* Khama III. The heir, Seretse Khama was by then only four years old. In other instances, a royal would become *kgosi* if for some reason, the *kgosi*'s direct descendant was not available. Hardly any commoner, or person outside royalty, ascended to the throne as *Kgosikgolo* during the colonial period, and this tradition persists today. The same applies to the election of a *kgosi*. Among the Bakwena, Bakgatla, Barolong, Balete, Bangwato, Batawana, Bangwaketse and Batlokwa, a paramount *kgosi* has never been elected and even today they insist that a *kgosi* should be born in the traditional line. The persistence and strength of this practice and tradition has been highlighted by the Balopi commission where the aforementioned groups adamantly castigated the idea of a paramount chief being elected, whilst maintaining that they were not against the election of sub-chiefs from the minor merafe. However, the ability of *bogosi* to lend itself to reform was exemplified by the recent ascendancy of a woman to paramountcy in one of the main setswana-speaking tribes. After the death of the Balete *kgosi* Kelemogile Mokgosi, Mosadi Seboko presented herself as a suitable and legitimate candidate to claim the throne amongst the royals. After some minor resistance from some royal males, the Balete finally accepted Seboko to be their *kgosikgolo*. This further buttresses the fact that chiefship has been successful at adapting to social and political changes in Botswana (Nyamnjoh 2002:12).

This paper maintains that the institution of *bogosi* shall continue to exist, and that if its ability to adapt to the changing circumstances is anything to go by, then it shall live for sometime to come. While it is true that some of the functions, powers and privileges of *dikgosi* have continued to diminish in relation to those of politicians and top civil servants, the fact is that on the other hand, *dikgosi* have become a core pillar in the administrative and judicial spheres of this country. *Dikgosi* have already taken up new roles that do not necessarily accord with the traditionalist and ideal form of *bogosi*, as was the case in the pre-colonial period, and the diluted *bogosi* of the colonial period, but these roles have so far proved to be in accordance with the existing social and political realities. Indeed, the functions of *dikgosi* have been essential in the orderly functioning of Botswana's society.

The changing order in Africa, and the world generally, means that the institution of *bogosi* should adapt to the times if it is to be of any relevance. In Botswana, *bogosi* has demonstrated its resilience by adapting and accepting its new role and status in society. Batswana have also accepted new developments and appear content with the new roles of the *dikgosi*, although these roles may be regarded as subservient to the new order. The paramount *dikgosi* of some Batswana groups have personally accepted the fact that tradition has changed, and that *dikgosi* ought to adapt if they are to remain relevant. Presenting a paper entitled 'Does Customary Law Have a Future in Botswana', *Kgosi* Seepapitso IV of Bangwaketse emphasised this position in his statement that 'our traditional pattern of life has indeed changed and this could be made positive by us accepting the change and by introducing certain concepts that would ameliorate the trauma of change' (Seepapitso 1994:343).

The role of *dikgosi* and *bogosi* in Botswana in the colonial and post-colonial period has changed in response to the demands and dictates of existing realities. As already noted, *dikgosi* were turned into civil servants by the colonial administration. *Dikgosi* became intermediaries between the colonial administration and the society, and although they were denied the tribute and other forms of levy, which were their sources of wealth from their people, they accepted the 10 percent tax commission that they were paid. Having lost the power to levy tribute and other dues from their constituents, *dikgosi* had to adapt to the new order and the salaries and other benefits that accrue to the *dikgosi* should be viewed as payment for their new roles in society. In order to grasp the economic power held earlier on by *dikgosi* and its relation to their subjects, it is worth noting the statement by the paramount *kgosi* of Bakgatla, Linchwe II that:

In appreciation of his role in the society, the tribe paid tribute in the form of cattle, ivory, skins, corn etc. Tribute was also paid in the form of labour to plough the chief's fields. The social security systems of the tribe hinged on the chieftaincy and the wealth that surrounded the institution as a result of tribute, on claimed cattle and cattle captured at war (Linchwe 1994:397).

In times of need, the *kgosi* would redistribute such cattle and grain among his subjects. Today, *dikgosi* do not have access to resources from their subject, and the obligations mentioned above no longer apply. This scenario has, in a way, made them dependent on government. The dependence (mainly salaries and other benefits) does not mean that *dikgosi* have lost all power, influence and support among Batswana. This dependence has not been one-sided because although politicians and top civil servants have reaped immense benefits by utilising *dikgosi*, they have also accorded *dikgosi* considerable

benefits and privileges in terms of status and influence which makes the latter dependent on *dikgosi*. The present position of *dikgosi* has been well relayed by Nyamnjoh in his contention that they are part of an elite that manipulates whilst also being manipulated (Nyamnjoh 2002:10).

As already stated in the previous sections, the colonial and post colonial state introduced measures which undermined traditional Setswana *dikgotla* (courts) and the manner in which they used to dispense justice. The introduction and superimposition of the District Commissioner and magistrate courts over customary courts clearly show the diminution of customary law. However, the majority of Batswana live in the rural areas, and even those who stay in towns cannot afford the exorbitant fees and services of attorneys. Customary courts have been introduced in towns, and despite the transformations that have taken place, it is quite evident that many Batswana still seek, and will continue to seek, recourse in the customary courts of the country. The vitality of customary law in Botswana's society has been highlighted by *Kgosi* Linchwe when he stated that 'There is growing recognition that customary law is here to stay. However, it is being called upon to be more innovative than has hitherto been the case' (Linchwe 1994:400). Customary law has demonstrated its innovativeness because there is 'living customary law' which does not depend on precedent as many of the judgements on cases, rules and norms in the long past have been forgotten. This law is based on the prevailing circumstances, and this is the customary law used in some of the customary courts in towns (Molokomme 1994:350). This demonstrates that customary law is flexible and hence its resilience.

*Bogosi* plays a vital role in Botswana's judicial system, and the government has realised the important role of *dikgosi* in it. The importance that government attaches to customary law and the resilient nature of *bogosi* has been well stated by Tlou and Campbell (1997:337) in their assertion that:

Notwithstanding its loss of power since independence, *bogosi* has proved to be resilient, especially in applying customary laws and custom in the settlement of disputes. The government has recognised the importance of customary law by establishing the customary court of appeal. It is interesting that so far the government has appointed royals to be presidents of the court.

This indicates that customary law still commands respect from important quarters in Botswana, and that the *dikgosi* are still regarded as custodians of customary law. Although appeals from the customary court proceed to the customary court of appeal which was established in 1986, and, matters can be appealed to the high court and finally the court of appeal, customary law and *dikgosi* would have played their role. With the increase in criminal and civil cases, the role of the customary court in the future cannot be over-



emphasised. Although some of those who preside over some customary courts, especially urban customary courts and customary courts of appeal, should not necessarily be *dikgosi*, they are expected to apply customary law in their courts.

In this changing world, the institution of *bogosi* and customary law should adapt and realign with the existing realities and be relevant to today's situation. *Bogosi* has assumed new roles during the colonial period when it was used by the colonial government to mobilise people and act as an intermediary between the government and society. The adaptability or the ability to adapt to changing circumstances has been revealed by what transpired after independence to the present day. The state in Botswana has whittled away much of what the chiefs retained from the colonial state. On the other hand, it has utilised and had been utilised by *dikgosi* in different ways to serve different interests. Although the *dikgosi* have not gone along with the diminution of their powers quietly, they have accepted their new roles, whilst staking their claims by using their traditional power base to wring some benefits from the government. For its part, the Government of Botswana has managed to manipulate *dikgosi* and use them effectively to link with the populace. *Kgosi* Linchwe has rightly observed this development by noting that 'Chiefs are therefore amongst the best placed individuals for social mobilisation' (Linchwe 1994:395).

The institution of *bogosi* has been used by the post-colonial government as its agent in performing the functions of the maintenance of law and order in the villages. In the new dispensation, 'it has also been mobilising the rural population to ensure both the economic and political reproduction of a plural democratic state' (Sekgoma 1998:12). *Dikgosi* have been used in social activities like village cleanliness campaigns to encourage people to participate in anti-litter campaigns and environmental programmes, preventing tree cutting and veld burning, and also mobilising people in building dams for rural development (Sanders 1983:373). The post-colonial situation in Botswana has some resemblance to that in her neighbour Zimbabwe. Here too, chiefs have been utilised by government to ensure successful governance in the rural areas and also for political campaigns and, conversely, it has been politically prudent for government to accede concessions to the chiefs (Mate 2002:19).

It seems Botswana society has come to accept and expect the new roles and status of *dikgosi*, and this would accord well with Molokomme's concept of the living customary law whereby new rules and practices which are not necessarily customary in the traditionalist sense, come to be accepted as customary. These new roles should not be viewed simply as insignificant. In fact they indicate that *dikgosi* play a vital role in national security and social

mobilisation for national development. Without the general mobilisation performed by *dikgosi*, it would be difficult for politicians and government to carry out their agendas and programmes. In the rural areas *dikgosi* have effectively mobilised people against the rising crime as the case of Molepolole mephato mobilised by regent Kgosikwena Sebele shows. Bakwena responded positively to the *kgosi*'s call for mephato to be deployed against criminals, and their success irked a powerful cabinet minister because Sebele was his former political opponent, and it was feared he would reap political benefits from the exercise.

The Botswana state has utilised *dikgosi* to enhance its position politically by emphasising the fact that *dikgosi* were custodians of tradition. The government has employed the traditionalist ideology to gain political capital from the rural people, using *bogosi* as an embodiment of Tswana tradition and culture. *Bogosi* has also been used to gain cooperation of the majority of the rural inhabitants in supporting the democratic state and its capitalist economy (Sekgoma 1998:13). Whilst one would concur with this well articulated position, one would also hasten to add that this acquiescence or the fact that *dikgosi* have taken up these new roles smoothly, and are performing well is the very source of their survival and strength in a changed situation in which they cannot afford to contest or openly oppose the government. Sekgoma captures the situation concerning the admission of weakness by *dikgosi* and the reasons for that by noting that 'They (*dikgosi*) have also shied away from opposing the government of the day. In recognition of this support, the government has assured them life positions in office, satisfactory salaries, and services of secretaries and local police officers in their courts' (Sekgoma 1998:15).

*Dikgosi* no longer receive any material support from their subjects, and society is content that the responsibility has now fallen to the government. In this regard, it should suffice to add that not all has been lost by *dikgosi*. The acquiescence of *dikgosi* to government has been well reciprocated because the government has taken over the responsibility of providing for the traditional dues they used to receive from their subjects.

Nowadays *dikgosi* maintain law and order and perform other ceremonial duties such as welcoming visitors at public meetings in their *kgotla*. Although Sekgoma argues to a certain extent rightly that critical power lies with the state, and that in such a situation the future of *bogosi* in Botswana was hanging in the balance and its survival unpredictable (*ibid*), it is evident that *dikgosi* have a vital role to play in today's society and that it will not be easy to forego the institution. Members of parliament, ministers and civil servants understand that the success or failure of the *kgotla* meetings and their agendas

to a large extent depend on the importance to which a *kgosi* attaches to such visits, and the vigour with which he mobilises the general populace.

Although the survival of *bogosi* seems assured, it is apparent that there are certain requirements that the *dikgosi* and the institution of *bogosi* should do to ensure that survival. *Dikgosi* are aware of this need to adapt and fulfil the requirements as evidenced by *Kgosi* Linchwe's assertion that:

Given new emerging realities and demands of a changing society, however, it is clear that royal families cannot offer adequate leadership and guidance on their own. It is necessary for chieftainship to welcome new skills and ideas, and incorporate the contributions of individuals and groups with diverse professional, occupational and other backgrounds from outside the bounds of heredity and royalty (Linchwe 1994:395).

*Kgosi* Linchwe continues to maintain and reiterate the requirements for *bogosi* to survive by stating that:

The capacity of chiefs to open up to non-royal advice will determine in a large measure their responsiveness to modern trends. The survival of the institution of chieftainship will depend on the dynamism and responsiveness it displays in the face of changing realities in society (Linchwe 1994:396).

*Dikgosi* in the modern era need to be literate if they are to handle the complexities and intricacies of modern administration. This requirement has been well summarised by *Kgosi* Linchwe in his assertion that 'Chiefs can remain relevant by constantly relating to the changing needs and experiences of their people, and by avoiding the stigma of being labelled a relic of a conservative past with little relevance to the present' (ibid.).

These observations testify that customary laws relating to the duties, powers and privileges of chieftaincy are not static, but dynamic. Some aspects of customary law have changed to align with new trends, and this has been the case of Botswana under indirect rule and the independent state. The position concerning the relevance and adaptability of chiefship in Botswana has been well captured by Francis Nyamnjoh when he averred that 'chieftaincy remains ... part of the cultural and political landscapes, but is constantly negotiating and renegotiating with new encounters and changing material realities' (Nyamnjoh 2002:8).

## Conclusion

Customary law with its different meanings to different people is a long established aspect of African societies. The fact that it was not written but largely passed on orally from generation to generation over centuries means that much of its 'pure' form has been lost. The law has been affected by changes brought about by contacts between Africans and outsiders, espe-

cially Europeans. In Botswana, colonialism facilitated changes as western education and influence gained ground. Whilst the colonial government laboured to undermine customary setswana customs and norms by reducing the powers of *dikgosi*, the latter, on the other hand tried to use the protection provided by the government and extend some of their powers. The government that took power at independence has transformed *bogosi* by sweeping away some of the remaining powers of *dikgosi*, but *dikgosi* have also gained immensely and they continue to wield great influence in the country. With the approach of the 2004 general elections there is talk of some paramount chiefs entering the political fray as parliamentary candidates, while not relinquishing the paramountcy. The precedence has already been set by the current Vice President who still remains paramount chief of Bangwato. *Dikgosi* therefore, can manoeuvre the situation and benefit from both worlds – the traditional and the modern. Hence one can hazard to conclude that the institution is destined to make its historic mark even in the future.

## References

- Colclough, C. and McCarthy C., 1980, *The Political Economy of Botswana: A Study of Growth and Distribution*, Oxford: Oxford University Press.
- Hamnett, I., 1975, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho*, Boston: Routledge and Kegan Paul.
- Linchwe II, 1994, 'Chieftainship in the 21st Century', in *Botswana in the 21st Century* (Proceedings of a Symposium organised by the Botswana Society, Gaborone, 1994), pp. 395-401.
- Lekorwe, M.H, and Somolekae, G., 1998, 'The Chieftaincy System and Politics in Botswana, 1966-1995', in Edge W.A. and Lekorwe, M.H. (eds.), *Botswana: Politics and Society*, Johannesburg: J.L. van Schaik, pp. 186-198.
- Mamdani, M., 1996, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, London: James Currey.
- Mate, R., 2002, 'Creating and Celebrating Africanness: Juggling with Men and Women Interests in Family Life. The Status of Customary Law as a Measure of Political Commitment to Gender Equality in Zimbabwe', Paper presented at the 10th General Assembly of the Council for the Development of Social Science Research in Africa on 'Africa in the New Millennium', Kampala, Uganda, 8-12 December 2002).
- Mgadla, P.T. and Campbell, A., 1989, '*Dikgotla*, *Dikgosi* and the Protectorate Administration', in Molutsi, P., and Holm, J., (eds.) *Democracy in Botswana*, Gaborone: Macmillan, pp. 48-56.
- Mgadla, P.T., 1998, 'The *Kgotla* in a Traditional Tswana Setting' in Edge, W.A. and Lekorwe M. (eds.), *Botswana: Politics and Society*, Johannesburg: J.L. van Schaik, pp. 3-10.

- Molokomme, A., 1994, 'Customary Law in Botswana: Past, Present and Future', in Botswana in the 21st Century (Proceedings of a Symposium organised by the Botswana Society, Gaborone, 1994) pp. 347-369.
- Ngcongco, L.D, 1989, 'Tswana Political Tradition: How Democratic?' In Molutsi P. and Holm, J., (eds.) *Democracy in Botswana*, Gaborone: Macmillan, pp. 42-47.
- Ngcongco, L.D. et al., 1987, 'The Modernists: Seepapitso, Ntebogang and Isang', in F. Morton, and J. Ramsay, eds., *The Birth of Botswana: A History of the Bechuanaland Protectorate from 1910 to 1966*, Gaborone: Longman, pp. 11-29.
- Nyamnjoh, F., 2002, 'Myth and Right: Chieftaincy and Democracy in Cameroon and Botswana', (Paper presented at the 10th General Assembly of the Council of Social Science Research in Africa on 'Africa in the New Millennium', Kampala, Uganda, 8-12 December 2002).
- Parsons, J., 1984, *Botswana: Liberal Democracy and the Labour Reserve in Southern Africa*, Boulder, Colorado: Westview Press.
- Picard, L., 1987, *The Politics of Development in Botswana: A Model of Success?*, Boulder, Colorado: Lynne Rienner Publishers.
- Proctor, J.H., 1968, 'The House of Chiefs and the Political Development of Botswana', in *Journal of Modern African Studies*, 6, pp. 59-79.
- Ramsay, J. and Morton, F., 1987, *The Birth of Botswana: The Political History of the Bechuanaland Protectorate from 1910-1966*, Gaborone: Longman.
- Ramsay, J., 1998, 'The Establishment and Consolidation of the Bechuanaland Protectorate, 1870-1910', in Edge W.A., and Lekorwe, M. (eds.) *Botswana: Politics and Society*, Johannesburg, J.L. van Schaik, pp. 62-100.
- Schapera, I., 1984, *A Handbook of Tswana Law and Custom*, London: Cass.
- Schapera, I., 1970, *Tribal Innovators: Tswana Chiefs and Social Change*, London: Athlone Press.
- Segkoma, G.A, 1998, 'The Nature, Structure and Functions of Chieftainship in Contemporary Botswana: Possibilities for Democratisation', June.
- Seretse D.N., et al, 1983, 'Chieftainship in Botswana: Precolonial, Colonial and Independence', Unpublished research project, University of Botswana.
- Sillery, A., 1952, *The Bechuanaland Protectorate*, London: Oxford Univ. Press.
- Steenkamp, P. Jr., 1991, 'Cinderella of the Empire? Development Policy in Bechuanaland in the 1930s', in *Journal of Southern African Studies*, 17, 2, pp. 291-308.
- Tlou, T. and Campbell, A., 1997, *A History of Botswana*, Gaborone: Macmillan.
- Tlou, T., 1998, 'The Nature of Botswana States: Towards a Theory of Botswana Traditional Government – The Case of Batawana', in Edge, W.A. and Lekorwe, M.H. (eds.) *Botswana: Politics and Society*, Johannesburg: J.L. van Schaik, pp. 11-31.
- Wylie, D., 1990, *A Little God: The Twilight of a Patriarchy in a Southern African Chiefdom*, Hanover and London: Wesleyan University Press.
- Yakubu, John, 2002, 'Colonialism, Customary Law and the Post Colonial State in Africa', Paper presented at the 10th General Assembly of the Council for

the Development of Social Science Research in Africa on 'Africa in the New Millennium', Kampala, Uganda, 8-12 December 2002.)