2011

Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development

University of Calgary Press
www.uofcpress.com

REINVENTING AFRICAN CHIEFTAINCY IN THE AGE OF AIDS, GENDER, GOVERNANCE, AND DEVELOPMENT

Edited by Donald I. Ray, Tim Quinlan, Keshav Sharma, and Tacita A.O. Clarke

ISBN 978-1-55238-537-1

THIS BOOK IS AN OPEN ACCESS E-BOOK. It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

Cover Art: The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist's copyright.

Making a difference.
Making you think.

Acknowledgement: *We acknowledge the wording around open access used by Australian publisher,* **re.press**, *and thank them for giving us permission to adapt their wording to our policy* http://www.re-press.org/content/view/17/33/

18 The Role of Traditional Leaders in the Administration of Customary Courts in Botswana

Keshav C. Sharma

Recognizing the role played by the traditional leaders, Botswana has integrated them into its contemporary machinery of public administration. The role of traditional leaders in Botswana is particularly significant in the administration of justice as Botswana's customary courts co-exist with the modern set-up of judiciary and handle almost 90 per cent of the cases handled by the courts. The people in the rural areas find the justice administered by these customary courts to be comprehensible, inexpensive, speedy, and not too technical. These customary courts have been recognized by law, derive their authority from tradition as well as from statutes, and administer customary as well as statutory law. This chapter covers historical and contemporary background, nature of authority and jurisdiction of these courts, their relations with modern courts, machinery for their administration at the central and district levels, machinery for the review of cases, the role of the Customary Court of Appeal and of local police. The chapter concludes with a discussion of strengths, limitations, and challenges and their relevance in the modern set-up of public administration.

1. INTRODUCTION: ROLE OF TRADITIONAL LEADERS (PAST AND PRESENT)

Chieftainship in Botswana has enjoyed the glory of pre-colonial times, has survived through the colonial period, and has reconciled to the new political system of the post-independence period. Although the status, powers, and functions of traditional leaders have been gradually reduced during the post-independence period, the institution of chieftainship has not only been retained but it has been integrated into the contemporary machinery of public administration. The traditional leaders (chiefs) during the pre-colonial period enjoyed unlimited and undefined powers over their tribe. Each tribe owned a given piece of land, which was controlled by its chief. The chief was the custodian of tribal land and allocated it to tribesmen for ploughing or residential purposes. The villages were divided into several wards, each headed by a headman. The chief settled disputes, pronounced on tribal customs and traditions, and ruled on matters concerning the tribe in consultation with its members. During the period of colonial rule, the colonial government exercised minimal control over local administration at the tribal level. The chiefs were by and large allowed maximum independence in their tribal rule and in maintaining law and order (Morton and Ramsay 1987).

Chieftainship was retained in Botswana after independence and the Chieftainship Act provided the legal cornerstone for the recognition and functioning of the office of chieftainship at different levels of tribal rule. This act outlined the functions of chiefs and provisions for appointment and removal of the chief, sub-chief, regent, chief's representative, and village headman. According to this act, "a Chief is an individual who has been designated as a Chief in accordance with customary law by his tribe assembled in Kgotla; and has been recognized as a Chief by the Minister." The functions of a chief, according to the act are: to promote the welfare of the members of his tribe; to carry out any instructions given to him by the minister; to ensure that the tribe is informed of development projects in the area; to convene *Kgotla* meetings to obtain advice as to the exercise of his functions; to determine questions of tribal membership; to arrange tribal ceremonies; and to prevent commission of any offence within his tribal territory.

A chief is identified by the *Kgotla* in a customary manner and is appointed by the minister. Where there is a vacancy in the chieftainship of a tribe, due to death, deposition, or abdication, the tribe assembled in the *Kgotla* under the chairmanship of the senior member of the tribe designates the rightful successor to the chieftainship according to the customary law. The minister can at any time withdraw recognition from a chief if he or she considers it to be in the public interest to do so. The minister can suspend a chief if he or she believes that the chief is incapable of exercising his powers, has abused his powers, or is for any reason not a fit and proper person to be a chief. The minister can do so if a section of a tribe lodges such complaints with the minister against the chief. After such suspension the minister must hold an enqui ry to confirm that the allegations made against the chief are correct. After doing this, the minister can depose or suspend a chief for a period not exceeding five years, if he considers it expedient and in the interest of peace, good order, and good government. The minister is authorized by the act to issue directions to any chief for the better carrying out of his functions. Any chief who fails to comply with any direction given to him by the minister is liable to be suspended or deposed. Various other acts of Parliament (such as those covering Customary Courts, Common Law and Customary Law, Marriages, Children, Succession, Inheritance, Adoption, Local Police, Stock Theft, House of Chiefs, etc.) also cover the powers and functions of chiefs. This traditional institution has been adapted with the changing pattern of government and public administration machinery in the country since independence at the central and the local levels (Sharma 1997; 1999a; 1999b; 2003).

2. ROLE OF TRADITIONAL LEADERS IN THE ADMINISTRATION OF JUSTICE: ORGANIZATION AND ADMINISTRATION OF CUSTOMARY COURTS

2.1. Significance of Customary Courts

One of the most significant roles of traditional leaders in Botswana is in the administration of justice on customary lines. The traditional leaders

continue to play a significant role in imparting justice on customary lines as customary courts handle approximately 80 per cent of criminal cases and 90 per cent of civil cases in the country. The customary courts (about 378, at present) are popular with the people in the rural areas, as these are easily accessible, cheap, fast, and comprehensible to the ordinary people.

2.2. Authority and Jurisdiction of Customary Courts

The Customary Courts Act authorizes the minister to establish customary courts in accordance with customary law, on the recommendation of the chiefs who advise on recognition, establishment, abolition, or variation in jurisdiction of customary courts. The minister exercises the authority to appoint, suspend, or dismiss members of the customary courts.

The customary courts have civil and criminal jurisdiction. A customary court may exercise civil jurisdiction over (a) any customary law, and (b) any written law, which the court may be authorized to administer. For civil cases to be tried by the customary courts, all the parties had to be tribesmen before the amendment to the Customary Court Act of 2002, which deleted this restriction. The defendant should ordinarily be resident within the area of jurisdiction of the court or should be cause of action therein. The customary courts exercise criminal jurisdiction in connection with criminal charges and matters in which the accused is a tribesman or consents in writing to the jurisdiction of the court; and the charge relates to the commission of an offence committed either wholly or partly within the area of jurisdiction of the court.

The provisions of the Penal Code in trying the criminal cases guide customary courts. No person can be charged with a criminal offence unless the Penal Code or some other written law creates such offence. Customary courts do not have jurisdiction to try cases in which the accused is charged with treason, riot, or any offence involving the security or safety of the state, murder, bigamy, bribery, an offence concerning counterfeit currency, robbery, extortion by means of threats, an offence against insolvency law or company law, rape, contraventions of prohibitions relating to precious stones, gold and other precious metals, marriages contracted outside the customary law, and insolvency. The customary courts are also not authorized to try cases relating to witchcraft without the general or special consent of the attorney general. The minister may, by order in the Gazette,

authorize any customary court to administer any written law specified in the order. The customary courts may sentence a convicted person to a fine, imprisonment, corporal punishment, or any combination of such punishments within the prescribed limits.

Some acts such as the Stock Theft Act of 1996 authorize the customary courts with significant powers. Article 3 (1) of this act provides that:

> Any person who steals any stock or produce, or receives any stock or produce knowing or having reason to believe it to be stolen stock or produce, shall be guilty of an offense and, notwithstanding the provisions of any other written law, shall be sentenced for a first offense to a term of imprisonment for not less than five years or more than 10 years without the option of a fine, and for second or subsequent offense to a term of imprisonment for not less than seven years or more than 14 years without the option of a fine.

Further, Article 3 (II) lays down:

> Where, for the purpose of stealing, any stock or produce, or in the course of stealing any stock or produce, violence or threat of violence is used, the penalty shall be a term of imprisonment for not less than 10 years or more than 15 years without the option of a fine, and if the violence used or threat involves the use of a firearm or other offensive weapon the penalty shall be a term of imprisonment for not less than 12 years or more than 20 years without the option of a fine.

These are significant powers given to the customary courts. Before the amendment of 1997 to the Customary Court Act, the customary courts were not authorized to award a sentence of imprisonment in excess of four years or a fine in excess of P4,000, unless the state president authorized increased jurisdiction. A substantial increase in the powers of the customary courts in 1997 signifies the support of the government for customary courts.

The Customary Court Act provides that any person subject to the jurisdiction of a customary court who undermines its authority is guilty of

contempt of court and is liable to a fine not exceeding P100 (one hundred pula) or to imprisonment for a term not exceeding three months, or both.

The practice and procedure of customary courts are regulated in accordance with customary law, subject to such rules as may be promulgated by the minister. Where in any proceedings before a customary court any party demands that the case be transferred to some other court, the Customary Court of Appeal can transfer the case to some other customary court or a magistrate's court of competent jurisdiction in the interest of justice.

The Customary Courts Act provides that any chief may have access to the customary courts in the area of his jurisdiction and may examine the record of any proceedings before a court for satisfying himself as to the correctness, legality, or propriety of any judgment, sentence, or order. If he considers that any finding, sentence, or order of a customary court is illegal or improper, he can forward the record with his remarks to the court to which an appeal lies from that customary court.

2.3. Corporal Punishment by the Customary Courts

The customary courts have the authority to administer corporal punishment but no customary court can sentence any female or any person who is over the age of forty to corporal punishment. The corporal punishment is to be administered on the buttocks and not on backs. These days, it is not administered in the open *Kgotla* as in the past but in one of the offices of the premises. Where any person under the age of eighteen is convicted of an offence, a customary court may, in its discretion, order him to undergo corporal punishment in addition to or in substitution for any other punishment. No sentence of corporal punishment of more than four strokes can be carried out unless confirmed by the district officer.

Corporal punishment by the customary courts has been a subject of some controversy. While the traditionalists consider corporal punishment as an effective method of controlling crime, some members of the public consider it to be barbaric and against human rights. The traditional leaders all over the country would like to continue with this traditional form of punishment for the offenders. One could discern this from the newspaper reports. For instance, *Mmegi* (20–26 September 2002) reported the views of the Francistown Phase Four customary court president, Paul

Motshwane, who strongly believes that corporal punishment is the best tool for maintaining law and order in the modern society, especially among the youth. Motshwane claimed that he saw the fruits of corporal punishment after he was appointed the court president (*kgosi*) there. He had no doubt that corporal punishment contributed to the decline in criminal cases. Customary court president of Tatitown Margaret Mosojane was also reported to have observed that she has had feedback from some parents that their children have reformed following an appearance at the *Kgotla* for whipping. Another newspaper, *The Botswana Gazette* (5 April 2000) reported how *Kgosi* Mathuba Moremi of Maun makes parents who bring their children to *Kgotla* for punishment beat their own children in front of him. Expressing an opposite view, an editorial of *Botswana Guardian* (16 November 2001) condemned canning as a form of punishment at the *Kgotla* by observing that "canning is a form of torture. It subjects those to whom it is administered to gruesome physical pain. It is this that makes it an act that belongs to history." This editorial concluded with strong words: "This country should not allow itself to drift back to the old dark ages where brutality was an accepted norm. Caning was and will always be an abuse of those it is applied on."

The members of parliament have generally been opposed to the traditional form of corporal punishment at the *Kgotla*. However, some of them have held the opposite view. *Botswana Guardian* (16 November 2001) reported the views of MPs who echoed the sentiment of their constituents in support of the old-style corporal punishment at the *Kgotla*. Hon. Duke Lefhoko, MP for Shoshong, would like the old style of flogging restored and to be administered in public and not inside a *Kgotla* office in private. Lefhoko sees no reason to punish the offender in some private room when the trial is conducted in an open court. He would also like caning not to be restricted on buttocks, as at present, but to be administered on bare backs, as in the past. In the 1980s corporal punishment on the back was discontinued for medical reasons as some people's health deteriorated after being flogged at the *Kgotla*. According to Hon. Ponatshego Kedikilwe, MP for Madinare, corporal punishment on bare back was still an unbeatable way to bring down crime. Kedikilwe is reported to have said that old men in his constituency have told him that they saw nothing wrong with old-style corporal punishment as they grew up being caned that way and nothing untoward happened to them. *Kgosi* Tapson Jackalas would have

no problem with the threshold being raised by at least another ten years, such that even fifty-year-olds could be caned. *Kgosi* Jackalas is reported to have said in the House of Chiefs that it made no sense to exempt fifty-year-olds from corporal punishment when they (fifty-year-olds) could still assault.

2.4. Conflict between Customary Law and Common Law

As the customary courts apply customary law as well as common law, they are expected be well versed in both. The Common Law and Customary Law Act (Cap 16:01) is meant to give guidance. This act defines common law as "any law, whether written or unwritten in force in Botswana other than customary law." "Customary Law" according to this act "consists of rules of law which by custom are applicable to any particular tribe or tribal community in Botswana, not being rules which are inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice." The act provides that "any question as to the existence or content of a rule of customary law is a question of law for the court and not a question of fact." If the court entertains any doubt as to the existence of content of a rule of customary law relevant to any proceedings, it may consult reported cases, textbooks, and other sources and may receive opinions either orally or in writing to arrive at a decision in the matter.

Serious conflicts have not surfaced between customary law and common law. This was evident from the interviews in different parts of the country and at different levels of Customary Courts. The Customary Appeals Court Judge Linchwe (interviewed in 2002) also did not experience serious conflict between customary law and common law. He however pointed out that sometimes the Appeals Court has difficulty in upholding the customary law of certain tribes as these follow different practices and customs. For instance, customs on inheritance vary and different tribes view the seriousness of seduction differently. In some tribes, when the father dies, the eldest son becomes the head of the family/estate even though his mother is alive. The son may subject his mother to hardships and treat her like one of the children. The Customary Court of Appeal has, in such cases made the mother in charge of the estate. In cases where both parents are dead, the Appeal Court has taken in to account the contribution of each child to the estate and divided it accordingly. According

to the custom in Kweneng District, seduction is repugnant but only at first instance and not subsequently, whereas Kgatleng District considers the subsequent case of seduction equally repugnant. In the Bakwena tribe, when a lady has been seduced and falls pregnant, the man who impregnated her will be fined four heads of cattle or P4,000.00 (four thousand pula). Other tribes fine six heads of cattle or P2,000.00. In such cases, according to Linchwe, the Court is guided by the general principle that the customary law should not be repugnant to the standards of morality. The court interprets the standards of morality.

In some cases, traditional leaders have sought guidance and clarification by raising questions in the House of Chiefs. For instance, on 13 August 2001, *Kgosi* M.S. Linchwe of Bakgatla pointed out the varying views of the customary courts commissioner and of the Customary Court of Appeal on adultery cases and asked the minister of Local Government to state which one of the two views should be followed by the customary courts. The minister's answer to the House of Chiefs clarified the matter when she said:

> I am aware that in February 2000, the Customary Courts Commissioner delivered a revisional judgement on an adultery case, which judgement differed with the Customary Court of Appeal's view on the matter. The position was later clarified by the Attorney-General when he advised that "any law that confers rights to sue for adultery on the husband and denies the wife such rights … would be struck down by our courts as discriminatory and therefore unconstitutional."

The minister further clarified that "whatever the customary law of any particular tribe is on this matter, it should apply in the same way to wives as it does to husbands. In terms of the law, the view of the Customary Court of Appeal is correct and is the one to be applied" (Record of the House of Chiefs, 2000).

2.5. Review of Cases Tried by Customary Courts

All sentences in criminal cases tried in the customary courts in which the punishment awarded is imprisonment exceeding six months or a fine exceeding P200 were reviewed by the customary courts commissioner before the amendment of 2002 to the Customary Courts Act (without prejudice to the right of appeal of the person pronounced as guilty). The customary courts commissioner could reduce the sentence but could not increase it. He could order retrial. He could not convert acquittal into conviction. He was authorized to order the transfer of a case from one customary court to another or from customary court to the magistrate's court if requested by the aggrieved party. These powers exercised by the customary courts commissioner have been given to the customary appeals court after the amendment of Customary Court Act of 2002. This was the recommendation of the Presidential Commission on the Judiciary [Aguda Commission] (1997). This commission was generally in agreement with the view that "the Customary Courts Commissioner be stripped of his judicial powers and such powers transferred to the Customary Court of Appeal" (app. 67). The transfer of authority from the Customary Courts commissioner/director of Tribal Administration to the Customary Court of Appeal for reviewing the cases tried by the customary courts has resulted in further delays in the disposal of these cases (due to the shortage of staff in the appeals court), which were taking too long in the office of the customary courts commissioner (also due to shortage of staff). The cases tried by the customary courts, which result in imprisonment up to one year and a fine up to P2,000, continue to be reviewed by a district officer in the Office of the District Commissioner (2002). Some customary courts have expressed their dissatisfaction with the process of review by the office of the customary courts commissioner or the district commissioner on the ground of lack of legal training of the reviewing officers in these offices and the inordinate delays in the process. In some cases, by the time the cases are reviewed, the convicted person has already served the sentence!

District officers in the district commissioners' offices who review the cases from customary courts (interviewed in 2002) point out that the chiefs do not have adequate knowledge of law and their own authority given by the law. They sometimes do not follow the advice given to them

by the local police. The accused are not given time to defend themselves or to produce witnesses and are forced to admit their guilt. Chiefs have a tendency to give corporal punishment in almost all the cases even when the law does not allow such punishment. For instance, corporal punishment is not allowed for offences such as those related to stock theft or consumption or sale of Dagga, but the chiefs administer corporal punishment. The chiefs in some cases take up the cases for which they do not have jurisdiction and commit the offenders. Sometimes, cases that should go to the magistrates' courts are brought to the customary courts by the local police and the chiefs entertain these. They need to have better knowledge of law. Provision of administrative machinery for reviewing the cases tried by customary courts becomes significant due to inadequate legal knowledge and training on the part of chiefs. The increased authority and jurisdiction of chiefs given to them by the Stock Theft Act increases the significance of review function further. The district commissioner in Kanye revealed in an interview (2002) that he acquitted an man over sixty-three years of age, owner of a butchery, who had been sentenced to eight years imprisonment by the customary court on the charge of buying a stolen beast. The district commissioner noted in the plea of mitigation that the old man was sick, had sustained serious injuries in an accident, had no conviction record of any kind, and had actually been framed and trapped into committing this crime. The acquittal by the district commissioner in this case created lot of dissatisfaction among the chiefs. Such cases have created mutual dissatisfaction on both sides from time to time.

2.6. Role and Limitations of the Customary Court of Appeal

Following the authority of the Customary Courts Act, the Minister has established a Customary Court of Appeal. This court is based in Gaborone and has a panel in Francistown. Any person aggrieved by any order or decision of a lower customary court may within thirty days appeal to a higher customary court, or, if there is no higher customary court, to the Customary Court of Appeal. Any person aggrieved by any order or a decision of a customary court of appeal may, within thirty days, appeal to the High Court, provided the amount of the judgment exceeds P200 or where sentence of imprisonment exceeds six months, or corporal punishment exceeds eight strokes. A customary court of appeal consists of three persons

appointed by the minister. One of these three is appointed by the minister to be the president of the court; the minister may appoint a panel of three other persons to be alternate members of each customary court of appeal. A customary court of appeal may sit with assessors whenever the court deems it necessary. The Presidential Commission on the Judiciary (1997) expressed its discomfort with the absolute power of the minister to make appointments to that court insofar as "he does not need to consult any one or any body whatsoever" (66). This commission also expressed its discomfort with the provision of assessors without any mention of qualifications or experience or knowledge of customary law that they are expected to apply (66). In the process of hearing appeals, the appeal court judges also conduct on-the-spot informal discussions with the members of the court. These include, for example, presiding officers, police prosecutors, investigators, court clerks, and district commissioners to try and bring to their notice their mistakes, omissions, non-observance of procedures, ethical standards in educating cases, etc. All parties concerned have considered these deliberations quite helpful. A translator was employed in 2000/2001 to translate case proceedings, which are written in Setswana. (Interview with *Kgosi* Linchwe, Chairman of Customary Court of Appeal, 2002).

Legal representation is not allowed in the Customary Court of Appeal, as in all the customary courts. The Presidential Commission on the Judiciary (1997) was of the view that "it would not be proper to prohibit such representation in criminal trials in which an accused, if convicted, is liable to be sentenced to a term of imprisonment of not less than five years" (138). The government did not accept this recommendation on the ground that "it is not proper to have professional lawyers arguing cases presided over by lay persons, some whom have not had the advantage of higher education." (Government White Paper No. 3 of 1998, 16).

The Customary Court of Appeal is overstretched and overburdened due to the small number of judges and its small administrative machinery. The Customary Court of Appeal consists of three judges, who sit together to adjudicate the appeal cases. There is a branch of the court at Francistown, which serves the northern region, including Ngamiland. The administrative machinery of the appeals court in Gaborone consists of only one senior court clerk and two typists, assisted by one cleaner and one security guard (Interview with *Kgosi* Linchwe, 2002).

The small staff of the Customary Court of Appeal is now loaded with all the review cases, which were earlier being reviewed by the office of the customary courts commissioner. The amendment to the Customary Court Act passed in 2002 has removed that responsibility from the customary courts commissioner and has entrusted it to the Customary Court of Appeal, without strengthening their staff and administrative capacity. *Kgosi* Linchwe (Interview, 2002) feels that there may be a need to review the Customary Courts Act again to make a provision for additional judges who could be entrusted with the review function and there could be a clearer appreciation of difference between the review and the appeal, although this court should essentially be an appeals court and not a review court. When the appeals court started utilizing temporarily (in 2002) the services of alternate members of the appeals court for review of the cases, they were instructed by the director of Tribal Administration that it was not proper to do so, as the alternate members of the court could not be deployed that way. The director of Tribal Administration clarified that these were alternate members and not additional members of the court and therefore should not be deployed for reviewing the cases (Interview: *Kgosi* Linchwe, 2002).

The Venson Commission (2001) recommended that divisions of the Customary Court of Appeal should be set up in similar fashion with those of the High Court to cover other parts of the country. There should technically be one customary court of appeal to enforce leadership of the overall institutional structure. (99–100). This commission observed that at the time of establishing the Customary Court of Appeal, there was a plan to establish three of them covering north, south, and west.

The Venson Commission (2001) was not in favour of loading the Customary Court of Appeal with the additional task of reviewing the cases being reviewed by the district commissioners. In this context the commission observed that

> … members of Customary Court of Appeal, though competent to do so, are inundated with a variety of cases. To suggest that they should do the reviewing would overload them with work, and thus consequently clog the system. The Commission therefore recommended that reviewers be appointed for each tribal territory, and these should be coordinated and

> administered by the Customary Courts Administration Division at the national level. (99)

The appeals court is faced not only with the shortage of staff; the system of appointment, equipment of staff, grading, appraisal, and budget provisions require serious and urgent attention. The appointment of judges of the Customary Court of Appeal and the appointment of presidents of urban customary courts is not governed by clear criteria. Although the credentials of presidents of the appeal courts in Gaborone and Francistown (*Kgosi* Linchwe and *Kgosi* Monare) can not be questioned, the required qualifications and experience for appointment as a judge of the Customary Court of Appeal or its chairman have to be clearly outlined. These requirements have also to be clearly stipulated and laid down for the presidents of urban customary courts.

The Presidential Commission on the Judiciary recommended in 1997 that,

> … the Judicial Service Commission should be given the power to make appointments to the Customary Court of Appeal. That Commission should have the other ancillary powers for example, of discipline of the President and members of that Court. The Chief Justice will of course have the powers to make rules of practice and procedure in that court. The Minister shall continue to be in charge of the lower and higher customary courts and to make rules of practice and procedure in those courts. (139).

The government did not accept this recommendation on the ground that,

> … for as long as the Customary Court of Appeal is part of the customary courts systems manned by people versed in the workings of the customary law but not professionally trained, there is no justification for placing that court under the Judicial Service Commission. There is no peculiar or particular qualification pertaining to the members and the President of the Customary Court of Appeal, which the Minister would be inadequate to deal with. The Judicial Service Commission

> has no advantage over the Minister in the identification of the person best qualified to be a Court President and other members of that Court. (Government White Paper No. 3 of 1998, 17)

The level of posts available to the Court placed at that high level should be higher than what they have at present.

The location of the Customary Court of Appeal within the Department of Tribal Administration leaves much to be desired. The Customary Court of Appeal is a unit within the Department of Tribal Administration, which in turn is a part of the Ministry of Local Government. The appeals court has very little autonomy, even in terms of its administrative structure. It is dependent on the Department of Tribal Administration even for its small needs, such as tea, etc. It deserves some autonomy.

The system of appraisal also needs to be reviewed, as the appraisal of the judges of this court by the director of Tribal Administration does not appear to be satisfactory. It will make sense to have, for instance, the urban court presidents appraised by the chairman of the Customary Court of Appeal, instead of the director of Tribal Administration. Adequate qualifications and training opportunities are needed for staff working in all the customary courts, including the Customary Court of Appeal.

The Customary Court of Appeal has also experienced some difficulties with regard to implementation and enforcement of their judgments. These are sometimes not carried out by the respective courts, partly due to indifference and partly due to unhappiness to enforce orders, which changed their original judgment.

2.7. Role and Limitations of Administrative Machinery of Tribal Administration/Customary Courts in the Districts

The conditions of service in Tribal Administration have continued to remain neglected for some time in the past, in spite of the government pronouncements that these are being attended to. The calibre and morale of the administrative staff in Tribal Administration has been low. The posts of tribal secretary were upgraded in 2000, and this resulted in the upgrading of the posts under him. The physical facilities for Tribal Administration have not been very attractive, although some good buildings

have come up in some villages during the last few years. A few years back, Tribal Administration was given its own vote; otherwise, it had to depend on the district commissioner for small items like stationery. Some facilities like transport have improved gradually during the past years. The Venson Commission (2001) in this regard recommended that "financial provision for Tribal Administration should be decentralized and capacity built to enable them to make their own budgets" (100). The commission further recommended that the Tribal Administration, like the Land Board and Council, should be funded directly and be authorized to operate their own local bank accounts (96). This commission noted that Tribal Administration is not adequately provided with financial resources for the procurement of vehicles and the building of offices and staff quarters. The commission found that in most places the institution does not have resources to the extent that one office is shared between *kgosi*, local police and court clerks. The commission therefore recommended, "all new customary courts projects should be provided with a housing package, and a programme should be developed to clear the housing backlog in Tribal Administration" (101).

The Tribal Administration does not have satisfactory mechanisms for the appointment of staff at different levels. The director of Tribal Administration (before 2001 known as Customary Courts Commissioner) appoints the tribal secretary and the deputy tribal secretary. The other staff in Tribal Administration at lower levels are appointed by the staff committee at the district level, chaired by the district commissioner and includes the chief of the area and a councillor appointed by the minister. This committee, provided for by the Local Police Act, is essentially for the local police in the Tribal Administration, but it assumed this additional responsibility and has continued with it for some time. This situation is not satisfactory and needs to be given attention. As the conditions of service are not attractive; it is difficult for Tribal Administration to attract high quality staff. Qualified manpower such as the graduates of the university is not attracted to Tribal Administration, although they have joined the local government service management and even the local police. Because of the nature of locally based recruitment in the districts, the choice has tended to be restricted to the members of the tribe of the area, which is not a satisfactory situation. In order to raise the quality of Tribal Administration staff, the Venson Commission (2001) recommended that

"the post of Tribal Secretary be filled with candidates who hold a degree in law and/or Public Administration; and qualifications for Customary Courts Administration and Administrative Support Services should be at least Diploma in basic law and Public Administration respectively" (98). For strengthening the conditions of service, this commission further recommended that "conditions of service as well as scheme of service be developed for Tribal Administration and as a matter of urgency an Organization and Methods and a Job Evaluation exercise be embarked upon for Tribal Administration" (102).

The training facilities and opportunities for the tribal administrative staff are limited. A number of staff in Tribal Administration are not "trainable" due to their poor educational background, age, or temperament. Some of these staff will not be acceptable to the training institutions due to their poor educational background. Some of these may have to be retired or phased out to give way to younger and better-qualified personnel if the conditions of service improve. The Department of Tribal Administration has also not strengthened its training staff (trainers), and its initiative in this regard has been limited.

2.8. Role of Local Police

The traditional leaders and customary courts have all along been served by a "local police force," established by Local Police Act. It has operated as a separate entity, not as part of Botswana's national police force. After prolonged deliberations, the government decided in 2008 to integrate the local police into the national police force. Up to the time of integration, the Local Police Act has authorized the president to appoint such numbers of officers as may be considered necessary. The minister is in charge of the force and assigns the officers to tribal areas. Every tribal area has a committee responsible for general supervision of officers in its area. The district commissioner of the area is chairman of this committee. The chief or sub-chief of the area and a councillor of the district council appointed by the minister are its members. The president is the appointing authority but the district commissioner issues the certificate of appointment. The chief or sub-chief of the area administers the force subject to the general or specific directions of the minister. The hierarchy of local police officers

consists of officer commanding/senior superintendent at the top and junior constables at the bottom.

These local police officers are mandated to assist the traditional leaders in the exercise of their lawful duties. They help in preserving the public peace, prevent the commission of offences, and can apprehend persons with warrant of arrest.

The local police are expected to cooperate with the Botswana Police Force and can be subjected to the orders of the commissioner of police if the president so directs. A local police officer may lay information or complaint before any customary court and make application for summons or warrant. A local police officer can stop anyone and ask him or her to produce the licence, permit, or certificate that he or she must possess. He may stop, search, and detain any vehicle or vessel suspected of being employed in the commission of an offence and can arrest a person who fails to obey his authority. Any person who assaults, resists, or willfully obstructs any police officer in the due execution of his duty is guilty of an offence and liable to imprisonment up to five years.

The decision of the government to integrate the local police into the national police force could improve the existing conditions of service of local police and establish complete uniformity between the local and the national police. It could improve the promotion prospects of the local police as they will belong to a larger cadre and will have access to better facilities available to the Botswana Police.

The local police establishment, with 746 posts to serve the entire country and its 378 customary courts, is quite small. Most of the customary courts are manned by only two constables. These police officers are not well trained. Their conditions of service are also not attractive and do not compare favourably with those of the national police force. They do not get free accommodation like their counterparts in the national police, and they are not awarded any police medals for special services. The staff belonging to this force has low morale due to unattractive service conditions and limited opportunities for further training and career advancement. The local police force has remained undeveloped for long with very limited resources available. The officers undergo a nine-month course on their initial employment, but they need more and better training opportunities.

3. CONCLUSION

As noted above, one of the most significant roles of the traditional leaders in Botswana is in the administration of customary courts. These customary courts are popular with the people in rural areas, as they are easily accessible, cheap, fast, and comprehensible. Customary courts remain significant insofar as these courts handle 80 to 90 per cent of civil and criminal cases in the country. The quality of justice imparted by these courts, however, leaves much to be desired. As these courts enforce the penal code and other laws of Botswana, their sound understanding by the traditional leaders is of paramount importance. The situation on the ground appears to be that the traditional leaders do not have legal training and adequate understanding of the penal code and the laws of Botswana and their authority given to them by these laws. The amended Stock Theft Act has enhanced the powers of the customary courts considerably with the authority to give mandatory sentences of imprisonment up to five years. Therefore, adequate legal knowledge and training of traditional leaders have assumed increased significance.

While we advocate increasing education and training for the chiefs, one may wonder whether their educational status creates tensions with the modern political elites at the governmental levels. It may be noted in this context that the tensions that surface between the traditional leaders and the modern political elite are sporadic in the first place and erupt from time to time, mainly between individuals as a result of clashes of personalities. The chiefs have felt aggrieved due to their lost status, authority, importance, and respect. The new political elite, on the other hand, have occasionally tried to display their newly acquired status and authority over the chiefs and have not felt comfortable with the continuing respect of chiefs in the local community. This is what causes tension, rather than the level of education of the chiefs. Improved education of chiefs could reduce the tension between them and the modern political elite in government and strengthen the capacity of chiefs for improved performance.

The judgments given by the customary courts are subject to review by the office of the district commissioner and by the Customary Court of Appeal. The Director of Tribal Administration, formerly the Customary Courts Commissioner, reviewed the cases tried by customary courts, but

from 2002 onward, that review function has gradually been transferred to the Customary Court of Appeal. The process of review has taken too long – so much so that in some cases the convicted persons have already served the sentences before the review process is completed. The chiefs have expressed their dissatisfaction with the review function on the ground of inadequate legal training of reviewers in the district commissioners' or customary courts commissioner's offices. The reviewers on their part have pointed out that the traditional leaders, as customary court chairmen, need better understanding of the penal code and legal training for satisfactory performance.

The Customary Court of Appeal has a significant role to play, but it is extremely short-staffed to cover a large jurisdiction of the country. The Customary Court of Appeal is over-stretched and over-burdened due to the small number of judges and its small administrative machinery placed at a low level of hierarchy. The amendment to the Customary Court Act (passed in 2002) has removed the review function from the director of Tribal Administration and has entrusted this appeals court with that review function. This additional responsibility, without increasing its staff, has inundated the appeals court with review cases, thus resulting in further delays in the disposal of such cases. Appreciation of difference between appeal and review functions and creation of separate administrative machinery for review of cases has become imperative. The Customary Court of Appeal is faced not only with the shortage of staffl the system and criteria of appointment and appraisal of judges, provision for training of staff, grading, and budget provisions require serious and urgent attention. Qualifications for appointment of judges, their appointing authority, and their appraisal system have to be clearly stipulated.

The conditions of service of tribal administration and customary court staff have continued to remain neglected. The calibre and morale of the administrative staff in Tribal Administration has been low. Provisions related to their recruitment, promotions, appraisal, discipline, postings, transfers, and general conditions of service need to be improved and streamlined. Integration of Tribal Administration into the Local Government Service Management needs to be speeded up. The conditions of service of local police and their training also need to be improved. The integration of local police with the national Botswana Police Force might improve the conditions of service of local police and needs to be speeded up.

Having noted the strength and limitations of the institution of traditional leadership in Botswana and the equipment of traditional leaders, one realizes the need for enhancing their capacity for more effective performance. Specific and priority attention at present is needed on training strategies for strengthening the customary courts. Some of the traditional leaders are not educated and are at times faced with limitations in the understanding of the laws of Botswana and the penal code that they follow. They have limited understanding of their legal and traditional authority or the relationship between customary law and common law or procedures. The administrative staff of the customary courts (e.g., court clerks) do not have adequate education or training. They work with unattractive service conditions, limited facilities, and low morale. The local police in the tribal areas are also handicapped due to limited education, training, and unattractive service conditions and facilities.

Strengthening customary courts requires, among other things, training customary courts chairmen, tribal secretaries, court clerks, and the local police force. These training programs need to be organized through workshops, seminars, and lectures on specific themes, topics, and self-identified problem areas, instead of long courses leading to diplomas and certificates. Such workshops could be organized for four separate and distinct groups of court chairmen, tribal secretaries, court clerks, and local police. The court chairmen, in turn, could have workshops/seminars for three distinct groups: one consisting of paramount chiefs; another for subchiefs and chief's representatives; and a third for village headmen. The subject matter of such workshops should also be distinct with varying content and coverage for different groups.

The customary courts continue to have a place in Botswana and need to be strengthened. Recognition of training needs and adoption of some of the training strategies (such as those discussed above) could strengthen the customary courts.

REFERENCES

The Botswana Gazette (Botswana newspaper), Gaborone, 5 April 2007.

Government of Botswana. 1927. *Witchcraft Act* (Cap. 09:02), Laws of Botswana, Gaborone.

Government of Botswana. 1966. *Circumcision and Initiation Rites* (Cap. 20:02), Laws of Botswana, Gaborone.

Government of Botswana. 1966. *Constitution of Botswana*. Gaborone: Government Printer.

Government of Botswana. 1969. *Common Law and Customary Law* (Cap 16:01), Laws of Botswana, Gaborone.

Government of Botswana. 1970. *Affiliation Proceedings* (Cap. 28:02), Laws of Botswana, Gaborone.

Government of Botswana. 1972. *Local Police Act* (Cap. 21:04), Laws of Botswana, Gaborone.

Government of Botswana. 1973. *Succession (Rights of the Surviving Spouse and Inheritance Family Provisions)* (Cap. 31:03), Laws of Botswana, Gaborone.

Government of Botswana. 1981. *Children's Act* (Cap. 28:04), Laws of Botswana, Gaborone.

Government of Botswana. 1983. *Tribal Territories Act* (Cap. 32: 03), Laws of Botswana, Gaborone.

Government of Botswana. 1986. *Customary Courts Act* (Cap. 04:05), Laws of Botswana, Gaborone.

Government of Botswana. 1987. *Chieftainship Act* (Cap. 41:01), Laws of Botswana, Gaborone.

Government of Botswana. 1987. *Report of the Law Reform Committee*. National Assembly. Gaborone: Government Printer.

Government of Botswana. 1996. *Stock Theft Act, 1996*, Laws of Botswana, Gaborone.

Government of Botswana. 1997. *Report of the Presidential Commission on the Judiciary*. Gaborone: Government Printer.

Government of Botswana. 1998. *Government Paper No. 3 of 1998 on the Report of the Presidential Commission on the Judiciary*. Gaborone: Government Printer.

Government of Botswana. 2000. *Adoption of Children* (Cap. 28:01), Laws of Botswana, Gaborone.

Government of Botswana. 2000. *Record of the House of Chiefs*, Gaborone: Government Printer.

Government of Botswana. 2000. *Report of the Presidential Commission of Enquiry into Sections 77, 78, and 79 of the Constitution of Botswana*. Gaborone: Government Printer (popularly known as the Balopi Commission Report).

Government of Botswana. 2001. *Draft Government White Paper of 2001, Presidential Commission of Enquiry into Sections 77, 78 and 79 of the Constitution of Botswana*, Gaborone: Government Printer.

Government of Botswana. 2001. *Marriage Act* (Cap, 29:01), Laws of Botswana, Gaborone.

Government of Botswana. 2001. *Report of the Second Presidential Commission on the Local Government Structure in Botswana, 2001.* Gaborone: Government Printer.

Government of Botswana. 2002. *National Assembly Weekly Parliamentary Debates, Official Report, Hansard No. 138 (Part Eleven), Meeting 29–30 April, 2002*, Gaborone: Government Printer.

Government of Botswana. 2002. *Revised Draft Government White Paper of 2002, Presidential Commission of Enquiry into Sections 77, 78 and 79 of the Constitution of Botswana*. Gaborone: Government Printer.

Interview, Customary Appeals Court Judge and Chairman *Kgosi* Linchwe, Gaborone, 2002.

Interview, District Commissioner, Kanye, 2002.

Interview, District Officers in District Commissioners' Offices, Kanye and Mochudi, 2002.

Mmegi (Botswana newspaper), Gaborone, 20–26 September 2002.

Morton, Fred, and Jeff Ramsay, eds. 1987. *The Birth of Botswana: A History of Bechuanaland Protectorate from 1910 to 1966*. Gaborone: Longmans.

Sharma, K.C. 1997. "Mechanisms for Involvement of Traditional Leaders in Promotion of Good Governance." In *Traditional Leadership and Local Government*. Report of a Symposium organized in Gaborone by the Commonwealth Local Government Forum, ed. D.I. Ray, K.C. Sharma, and I. May-Parker, 40–44. London: Commonwealth Local Government Forum.

Sharma, K.C. 1999a. "Traditional Chieftainship and Contemporary Public Administration: The Case of Botswana." In *Democracy, Decentralization and Development: Selected International Experiences*, ed. E.H. Valsan, 116–23. Brussels: International Institute of Administrative Sciences.

Sharma, K.C. 1999b. "Botswana: Decentralization Democratisation and Strengthening of Local Government." In *Local Government, Democratization and Decentralization*: *A Review of Southern African Region*, ed. P.S. Reddy, 73–90. Kenwyn: Juta and Co.

Sharma, K.C. 2003. "Traditional Leadership and Rural Local Government in Botswana." In *Grassroots Governance: Chiefs in Africa and the Afro-Carribbean*, ed. D.I. Ray and P.S. Reddy, 249–62. Calgary: University of Calgary Press.