BNR Online ISSN: 2709-7374

Botswana's Quest for Tribal Equality: 20 Years after the Balopi Commission and Kamanakao Case

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By early 2020 it was almost twenty years since two historical events took place in as far as Botswana's quest for tribal equality is concerned. These two historical events were the Presidential Commission of Inquiry into Sections 77, 78 and 79 of the country's Republican Constitution ('the Balopi Commission') and the *Kamanakao I and Others v. The Attorney-General and Another* 2001 (2) BLR 654 (HC) ('the *Kamanakao I Case*'). In this series, we consider whether Botswana has, almost twenty years since these two historical events took place, made any significant strides towards the attainment of the needed tribal equality. This, we shall do by considering, *inter alia*, the implementation or lack thereof of the recommendations of the Balopi Commission and the judgment of the *Kamanakao I case* per Chief Justice Julian Nganunu, Justice Maruping Dibotelo, and Justice Unity Dow J as they then were.

To lay a basis for this discussion, we shall make an exposition of the circumstances leading to the Commission's establishment, and the Commission's terms of reference and recommendations. We shall also make an exposition of the *Kamanakao I case*, making a summary of the issues before court, the submissions by the parties and the court's decision. We shall make a critique of Botswana's tribal equality, considering the extent to which government has implemented the recommendations of the Balopi Commission. We shall also make a critique of Botswana's tribal equality, considering the extent to which government has implemented the judgement of the *Kamanakao I* case.

For many years, there had been a perception that the Constitution of Botswana ('the Constitution') had some sections that promoted tribal discrimination. The impugned sections of the Constitution were sections 77, 78 and 79 which many believed perpetuated tribal inequality between the so-called main tribes and minority tribes. As far back as 1995, then Member of Parliament (MP) for Nata-Gweta, Olifant Mfa, had moved a motion calling upon government to amend sections 77, 78 and 79 so that they become tribally neutral. Unfortunately, this call was not heeded to. Regrettably, at the time, our language was littered with two undesirable nomenclature -the so-called main tribes and minority tribes. The so-called minority tribes, all of which had no paramount chiefs, included Wayeyi, Bakalanga, Bambukushu, Baherero, Basarwa, Bakgalagadi and Basubiya among others. On the contrary, the so-called main tribes, all of which had paramount chiefs who were *ex-officio* members of the House of Chiefs, were Bamangwato, Bakwena, Bangwaketse, Batawana, Batlokwa, Bakgatla-ba-Kgafela, Barolong and Balete.

Obviously in protest to this, the Wayeyi, a tribe under Batawana rule and domination, did, on 24 April 1999, install their own paramount chief, Shikati Calvin Kamanakao. It is common course that they did this contrary to the Chieftainship Act (Cap. 41:01), the Tribal Land Territories Act, and sections 77, 78 and 79 of the Constitution of Botswana. In response to this, the then Deputy Attorney General, Ian Kirby, on 15 July 1999, wrote to the Wayeyi, informing them that since they are not a recognised tribe, they could not install their own paramount chief. As was expected, the Wayeyi, who were supported by Kamanakao Association which was founded by University of Botswana's professor and Wayei activist Lydia Nyati-Ramahobo in 1995, challenged government's decision, something which resulted in some disquiet. In response to this disquiet, which threatened Botswana's national unity, peace and stability, President Festus Mogae, on 28 July 2000, established a twenty-one member Presidential Commission of Inquiry into Sections 77, 78 and 79 of the Constitution of Botswana ('the Balopi Commission'). The Balopi Commission's terms of reference were threefold, namely '(a) to review sections 77, 78, and 79 of the Constitution of Botswana and to seek a construction that would eliminate any interpretation that

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renders the sections discriminatory; (b) to review and propose the most effective method of selecting members of the House of Chiefs; and (c) to propose and recommend measures to enhance the efficiency and effectiveness of the House of Chiefs'.

The Commission, which according to Ramahobo, collected public opinions by visiting 41 villages and towns; holding 43 public meetings; listening to 38 oral submissions, and receiving 10 group and 40 individual written submissions, made recommendations to government through White Paper No.1 of 2001. One of the recommendations was that even if sections 77, 78 and 79 were not unfair, they, and any other mention of a specific tribe, should be removed from the Constitution due to the citizens' perception that they are discriminatory. The second was that the term 'chief' in the Constitution, a remnant of the British colonial system, should be replaced with the indigenous term *Kgosi*. The third was that the House of Chiefs of Botswana should continue to exist as it represents the country's unity, and it should be renamed *Ntlo ya Dikgosi* in Setswana, the national language. The fourth was that the members of the House of Chiefs should not be allowed to join political parties. The fifth was that members of the House of Chiefs should be chosen based on tribal territorial claims, creating geographically based representation rather than the old method of specifying which tribes can have *ex officio* members in the House.

In 2001, the Wayeyi took the government's decision to deny them the right to install their own chief to court. The question before the court was whether the failure by the Constitution and Chieftainship Act (Cap. 41:01) to acknowledge Wayeyi tribe and to allow them to have their members sit as members of the House of Chiefs discriminated unfairly against them. In that case, *Kamanakao I and Others v. The Attorney-General and Another* 2001 (2) BLR 654 (HC) ('the *Kamanakao I case')*, the Wayeyi tribe, led by Kgosi Kamanakao, argued that sections 77, 78 and 79 were inconsistent with the fundamental rights provisions of sections 3 and 15 of the Constitution. They also argued that sections 77, 78 and 79 were discriminatory on the basis of tribalism contrary to sections 3 and 15. Their other contention was that the sections were unjustifiably discriminatory on the basis of tribalism as they afforded preferential treatment to *ex-officio* members of the House of Chiefs.

The Wayeyi wanted the court to make several orders. The first was an order declaring that section 2 of the Chieftainship Act (Cap. 41:01) was unconstitutional as it was discriminatory on the basis of tribe particularly in that it interpreted 'tribe' to mean only eight tribes to the exclusion of other tribes in Botswana. The second was an order declaring that the Chieftainship Act and the Tribal Territories Act (Cap. 32:03) were discriminatory in that they discriminated on the basis of tribe. The third was an order declaring that the second Respondent's decision not to recognise Shikati Kamanakao as paramount chief of Wayeyi was discriminatory on the basis of tribe and *ultra vires* the provisions of sections 3 and 15 of the Constitution. The fourth was an order compelling the second Respondent to put in place a constitutional structure for the appointment of chiefs, headmen and other Wayeyi traditional authorities. The fifth was an order that the second Respondent introduces Shiyeyi language as a national medium of instruction in schools and that the culture of the Wayeyi be part of the school curriculum.

The Respondents contended that in so far as the sections complained of were part of the Constitution, they could not be declared null and void by the High Court or any other court which was itself a creature of the Constitution. They also contended that the Constitution was a package arrived at after negotiations and all that it contained was approved by the founders as part of the State: to declare any part of that package as unconstitutional would be to rewrite the package: the judiciary was also part of that package and it could not supervise *post facto* what was done and sealed then. They further contended that no court of the land could declare any part of the Constitution as null and void. Responding to the argument that the Chieftainship Act and the Tribal Territories Act were discriminatory, the Respondents contended that the provisions of the Acts were saved by the provisions of section 15(4)(e) of the Constitution which permitted discrimination in certain special circumstances. They further argued that section 15(9) applied to exempt

the Chieftainship Act and Tribal Territories Acts from falling foul of the anti-discrimination provisions of the Constitution because they were Acts that repealed and re-enacted provisions which had existed immediately prior to the coming into operation of the Constitution and had since been continued.

The court held, firstly, that 'without being designated a tribe under the Chieftainship Act the Wayeyi and any other tribe could not have a chief and in these circumstances the Chieftainship Act did not afford the Applicants equal treatment and they therefore did not enjoy equal protection under that law as required by section 3(a) of the Constitution'. Secondly, it held that 'the Respondent had not placed any special circumstances before the court that could justify the differentiation between tribe and tribe in Botswana which would bring the provisions of section 15(4)(e) into operation'. Thirdly, it held that 'in defining "chief" and "tribe" under section 2 of the Chieftainship Act to refer only to eight tribes and not the applicants, the Act did not afford equal protection of the law to the Wayeyi and the Applicants and to that extent the Act was in conflict with section 3(a) of the Constitution and contravened the rights of the Applicants'. Fourth, the court held that 'as to the orders which had to be made to give effect to the Applicants' requirements for orders to compel the government to appoint and recognise Wayeyi chiefs, their headmen and other traditional leaders and to give effect to the orders to introduce their language as a medium of instruction and their culture to be part of their school curriculum, the courts, as a matter of judicial policy, were reluctant to issue orders for the carrying out of works and other activities which required the courts' supervision'.

Fifth, the court held that 'the order for the recognition of the first Applicant as chief of the Wayeyi had to fail as there was a dispute of facts which could not be resolved whether he could legitimately claim the chieftainship and by granting the relief the court would be second guessing the legislature as regards its response to the court's decision'. Sixth, the court held that 'section 2 of the Chieftainship Act had to be amended in such a way as would remove the discrimination complained of and give equal treatment to all tribes under that Act. If other laws had to be amended to accord the Applicants this right then necessary action had to follow'. *Obiter*, the court stated that 'its refusal to order as applied for was not an expression that the issues in the case had to be ignored: on the contrary there was an urgent requirement on the part of the government to attend to them lest they bedevilled the spirit of goodwill existing between the different tribes and communities in the country'.

Botswana's Quest for Tribal Equality: 20 Years after the Balopi Commission and *Kamanakao* Case, Part II

We have made an exposition of the circumstances leading to the Balopi Commission's ('the Commission) establishment and its terms of reference and recommendations. We have also made an exposition of the *Kamanakao I case*, giving a summary of the issues which were before court; the submissions by the parties and the court's decision. We shall now make a critique of Botswana's tribal equality, considering the extent to which government has implemented the recommendations of the Commission. As stated above, the Commission's terms of reference were threefold, namely '(a) to review sections 77, 78, and 79 of the Constitution of Botswana and to seek a construction that would eliminate any interpretation that renders the sections discriminatory; (b) to review and propose the most effective method of selecting members of the House of Chiefs; and (c) to propose and recommend measures to enhance the efficiency and effectiveness of the House of Chiefs'. As stated before, one of the Commission's recommendations was that even if sections 77, 78 and 79 were not unfair, they, and any other mention of a specific tribe, should be removed from the Constitution due to the citizens, perception that they were discriminatory.

The Constitution of Botswana ('the Constitution') was indeed amended to give effect to this recommendation. Prior to the amendment, section 77(1) provided for a House of Chiefs consisting of eight *ex-officio* Members; four Elected Members; and three Specially Elected Members. Section 77(1)

(a), as amended, established *Ntlo ya Dikgosi* in place of the House of Chiefs as per the Commission's recommendation. It also provides for the composition of *Ntlo ya Dikgosi*.

While this constitutional amendment must be commended for establishing *Ntlo ya Dikgosi* and broadening its composition to cover all geographic regions in the country, it must be condemned for mentioning specific tribes by name and not mentioning others. The Commission had specifically recommended that in order to address the citizens' perception that sections 77,78 and 79 were discriminatory, mention of a specific tribe should be removed from the Constitution or anywhere else it appeared. Interestingly, there is mention of all the tribes except those that had been complaining of marginalisation, namely Basubiya, Wayeyi, Bakalanga, Basarwa, Bakgalagadi, Baherero and Bambukushu among others. The Basubiya and Wayeyi are subsumed under Chobe district and Goo Tawana tribal jurisdiction respectively. Bakalanga, Basarwa and Bakgalagadi are subsumed under North East District, Ghanzi District and Kgalagadi District respectively. Section 77(1) (b), as amended, provides for five persons who shall be appointed by the President of Botswana. This is another malady because it allows for the politicisation of *Bogosi* (chieftainship). Like every politician, the President is likely to appoint those who are aligned to his political party.

Section 77(1) (c), as amended, provides for such number of persons, not being more than 20, as may be selected under section 78(4)(c) of the Constitution. Section 78(4) (c) of the Constitution provides that members from Ghanzi, Chobe, Kgalagadi and North East shall not be designated to *Ntlo ya Dikgosi* according to the established norms and practices of those areas. It is only Bamangwato, Bakwena, Bangwaketse, Batawana, Batlokwa, Bakgatla, Barolong and Balete who have the right to designate their *Dikgosi* according to their established norms and practices. This implies that the other tribes have no norms and practices worthy of designating their own *Kgosi*. Because Basarwa, Bakgalagadi, Basubiya and Bakalanga are not bestowed with the right to designate their *Dikgosi* according to their own established norms and practices, they, in terms of section 78, as amended, select a Member to *Ntlo ya Dikgosi* by election or in such other manner as the Regional Electoral College may agree. Invariably, such selection is done through elections. In this way, they, in my view, select a regional representative rather than a *Kgosi*. Not only does this lower the tribes' status, it also increases the chances of politicisation of *Bogosi* because where votes count, politics invariably creeps in.

The second recommendation of the Commission was that the term 'chief' in the Constitution, a remnant of the colonial order, should be replaced with the term *Kgosi*. This has been implemented. On 30 April 2008, the Bogosi Act, Cap. 41:01 (hereinafter referred to as the *Bogosi* Act) came into effect. Through section 29, the *Bogosi* Act repealed the Chieftainship Act, Cap. 41:01 which was blamed by many for being the enabler for tribalism. The Bogosi Act replaced the term 'chief' with the term '*Kgosi'* as recommended. The third recommendation of the Commission was that the House of Chiefs of Botswana should continue to exist as it represents the country's unity, and it should be renamed *Ntlo ya Dikgosi*. Indeed, the House of Chiefs has been retained and renamed *Ntlo ya Dikgosi.* Sections 77, 78 and 79 of the Constitution, as amended, regulate the establishment and composition of *Ntlo ya Dikgosi*, designation and selection of Members to *Ntlo ya Dikgosi* and the qualifications for membership of *Ntlo ya Dikgosi.*

The fourth recommendation of the Commission was that the members of the House of Chiefs (now *Ntlo ya Dikgosi*) should not be allowed to join political parties. This, too, has been implemented. Section 79 (4) of the Constitution, as amended, provides that 'a Member of the *Ntlo ya Dikgosi* shall not, while he or she is such a Member, participate in party politics, but active participation in politics prior to being a Member of the *Ntlo ya Dikgosi* shall not bar any person from being such a Member. The fifth recommendation of the Commission was that members of the House of Chiefs (now *Ntlo ya Dikgosi*) should be chosen based on tribal territorial claims, creating geographically based representation rather than the old method of specifying which tribes can have *ex officio* members in the House. As argued above, this has neither brought tribal parity nor ended the perception of tribal discrimination because,

in essence, it is largely the so-called minority tribes who choose their representatives to *Ntlo ya Dikgosi* based on tribal territorial claims. On the other hand, the so-called main tribes have their *Dikgosi*, who are *Dikgosi* by birth and whom they designate according to their own established norms and practices, as their representatives in *Ntlo ya Dikgosi.* Not only that. The so-called minority tribes are not allowed to designate their representatives to *Ntlo ya Dikgosi* according to their established norms and practices. This privilege is reserved for the so-called main tribes.

Of course, the aforesaid shortcomings notwithstanding, government has, through amending sections 77,78 and 79 of the Constitution, as well as repealing the Chieftainship Act and enacting the Bogosi Act, significantly moved Botswana towards tribal equality. In my view, legislative amendment needs to be made to make mention of all our tribes in the Constitution, the Bogosi Act and any other relevant legislation. Also, legislative amendment needs to be made to provide for the same method for the designation of a *Kgosi* for all tribes. If designation is to be according to established norms and practices of a tribe, that should apply for all tribes. On the contrary, if designation is to be through elections, that should apply for all tribes. I am, however, hesitant to endorse this method for *Dikgosi* are born, not voted into office.

It is incontrovertible though that compared to the period before the amendment of sections 77,78 and 79 of the Constitution, and the repeal of the Chieftainship Act and enactment of the Bogosi Act, tribal equality has improved, and we have a more cohesive nation. This, in my view, is evidenced by the fact that such tribal pressure groups as Kamanakao Association, Special Promotion of Ikalanga Language (SPIL) and First People of the Kalahari are almost non-existent. Of course, especially during the heat of build-up to the 2019 general elections, the rivalry between former President Ian Khama and President Masisi threatened to open the tribal wounds between Bangwato and other tribes, but such wounds have not festered beyond the elections.

Botswana's Quest for Tribal Equality: 20 Years after the Balopi Commission and *Kamanakao* Case, Part III

We made an exposition of the circumstances leading to the Balopi Commission's ('the Commission') establishment and its terms of reference and recommendations. We have also made an exposition of the *Kamanakao I case*, giving a summary of the issues which were before court; the submissions by the parties and the court's decision. We have also made a critique of Botswana's tribal equality, considering the extent to which government has implemented the recommendations of the Commission. As stated above, the Commission's recommendations were implemented to a large extent through the amendment of sections 77, 78 and 79 of the Constitution of Botswana; the repeal of the Chieftainship Act, Cap. 41:01 and the enactment of the Bogosi Act, Cap. 41:01. Notable among the implemented recommendations are the establishment of *Ntlo ya Dikgosi;* the replacement of the term 'Chief' with '*Kgosi'*; the broadening of *Ntlo ya Dikgosi*'s composition to cover all geographic regions in the country, and the representation of minority tribes in *Ntlo ya Dikgosi* though that is by elected representatives and not 'born *Dikgosi'* as is the case with the eight tribes.

However, though the Commission had recommended that mention of a specific tribe should be removed from the Constitution or anywhere else it appears in order to address the citizens' perception that sections 77, 78 and 79 are discriminatory, that was not done. The amended section 77 still mentions some of the eight tribes, but none of the minority tribes is mentioned. For instance, it mentions GaMalete; GaMmangwato and Goo Tawana at subsections (1) (a) (iii); (1) (a) (iv) and (1) (a) (vi) respectively. It does not, for instance, make mention of Ku Bukalanga. Basubiya and Wayeyi, for instance, are subsumed under Chobe and Goo Tawana respectively. Bakalanga, Basarwa and Bakgalagadi are subsumed under North East District, Ghanzi District and Kgalagadi District respectively. Also, a revision of the recommendations was made in April 2002 through a government white paper titled 'White Paper No.2 of 2002' which opted

to let the selection process for the House remain the same, allowing the eight *Dikgosi* of the 'main tribes' to retain their posts, a move which the House of Chiefs itself approved.

We now make a critique of Botswana's tribal equality, considering the extent to which government has implemented the judgment of the *Kamanakao I case* per Chief Justic Nganunu, Justice Dibotelo and Justice Dow as they then were. The *Kamanakao I case* held that 'without being designated a tribe under the Chieftainship Act, the Wayeyi and any other tribe could not have a chief and in these circumstances the Chieftainship Act did not afford the Applicants equal treatment and they therefore did not enjoy equal protection under that law as required by section 3(a) of the Constitution'. It held further that 'the Respondent had not placed any special circumstances before the court that could justify the differentiation between tribe and tribe in Botswana which would bring the provisions of section 15(4)(e) into operation'. It also held that 'in defining "chief" and "tribe" under section 2 of the Chieftainship Act to refer only to eight tribes and not the applicants, the Act did not afford equal protection of the law to the Wayeyi and the Applicants and to that extent the Act was in conflict with section 3(a) of the Constitution and contravened the rights of the Applicants'. The court also held that 'section 2 of the Chieftainship Act had to be amended in such a way as would remove the discrimination complained of and give equal treatment to all tribes under that Act. If other laws had to be amended to accord the Applicants this right then necessary action had to follow'.

According to section 2 of the repealed Chieftainship Act, Cap.41:01, 'tribe' meant 'the Bamangwato Tribe, the Batawana Tribe, the Bakgatla Tribe, the Bakwena Tribe, the Bangwaketse Tribe, the Bamalete Tribe, the Barolong Tribe or the Batlokwa Tribe'. In terms of section 2 of the repealed Chieftainship Act, Cap.41:01, 'Chief' was defined as 'a Chief of one of the tribes and includes any regent thereof'. As has been stated earlier, the Chieftainship Act, Cap.41:01 was repealed by section 29 of the Bogosi Act, Cap.41:01. The Bogosi Act came into effect on 30 April 2008. In terms of section 2 of the Bogosi Act, the term 'tribe' now means 'any tribal community in existence and recognised as a tribe immediately before the commencement of this Act and includes such other tribal communities as may be so recognised under section 3'. In terms of section 2 of the Bogosi Act, the term '*Kgosi'*, which has replaced the term 'Chief', means 'a person so designated by the tribe and recognised as such by the Minister under section 4'.

Section 3 (1) of the Bogosi Act provides that 'the Minister, after consulting a tribal community in its Kgotla, may recognise that tribal community as a tribe'. Section 3 (2) provides that 'in deciding whether a tribal community shall be recognised as a tribe, the Minister shall take into account the history, origins, and organisational structure of the community, and any other relevant matters'. In terms hereof, the word tribe no longer only refers to the eight tribes. Also, it is no longer only the eight tribes which have a *Kgosi*. All other tribal communities, including the so-called minority tribes, have the right to be recognised as a tribe, and to, therefore, have a *Kgosi*, if their history, origins, organisational structure, and any other relevant matters warrant such recognition. In that regard, the court's ruling was abided by. This, in my view, significantly removed the discrimination complained of and accorded equal treatment and protection of the law to the so-called minority tribes as required by section 3(a) of the Constitution. The court also held that 'as to the orders which had to be made to give effect to the Applicants' requirements for orders to compel the government to appoint and recognise Wayeyi chiefs, their headmen and other traditional leaders and to give effect to the orders to introduce their language as a medium of instruction and their culture to be part of their school curriculum, the courts, as a matter of judicial policy, were reluctant to issue orders for the carrying out of works and other activities which required the courts' supervision'.

The court further held that 'the order for the recognition of the first Applicant as chief of the Wayeyi had to fail as there was a dispute of facts which could not be resolved whether he could legitimately claim the chieftainship and by granting the relief the court would be second guessing the legislature as regards its response to the court's decision'. Of course, from a legal point of view and on the basis of judicial

precedent, the court was right in refusing to grant the aforesaid two orders prayed for. But, *obiter*, the court stated that 'its refusal to order as applied for was not an expression that the issues in the case had to be ignored: on the contrary there was an urgent requirement on the part of the government to attend to them lest they bedevilled the spirit of goodwill existing between the different tribes and communities in the country'.

In my view, constitutionalism and democracy would have been better served had government heeded the court's statement above, especially with respect to the introduction of minority tribes' languages as a medium of instruction in schools as well as mainstreaming minority tribes' cultures in the school curriculum though it was said obiter and had no binding effect. No wonder in an Alternative Report submitted to the Human Rights Committee on the International Covenant on Civil and Political Rights (ICCPR) in May 2007, RETENG, the Multicultural Coalition of Botswana wrote: 'The amendments through Bill number 34 of 2005 were cosmetic and left the discrimination intact'. The report continues to say 'The discrimination denies non-Tswana ethnic groups the following rights: a) group rights to land, b) representation in the House of Chiefs; c) the right to educate their children in their languages; c) the right to educate their children about their histories, customs, values and culture; d) the right to enjoy their languages and culture on national radio and television'. This view is supported by Professor Francis B Nyamnjoh in his journal article titled 'Insiders and outsiders: citizenship and xenophobia in Southern Africa'.

Acknowledgement

This piece first appeared in a three-part series in the *WeekendPost*, on 25 January 2020, 4 and 18 February 2020.