

BOTSWANA

Chieftainship (Bogosi) BILL no. 13 of 2007

Commentary submitted by: RETENG: The Multicultural Coalition of Botswana; Kamanakao Association and Minority Rights Group International.

In the 1999 Wayeyi Court case against the Government of Botswana (Misca 377/99) the court ordered:

that Section 2 of the Chieftainship Act (Cap 41:01) be amended in such a way as will remove the discrimination complained of and to give equal protection and treatment to all tribes under the Act. If other laws have also to be amended to accord the applicants this right, then necessary action must follow' (pages 60-61 of the judgement).

Obviously by 'other laws' the court was referring to Sections 77 to 79 of the Constitution and the Tribal Territories Act which are closely related to the Chieftainship Act as they also discriminate along tribal lines as rightfully observed by the court when it stated that:

the discriminatory effect of the definitions we have referred to in Section 2 of the Chieftainship Act leads to serious consequences when it is remembered that this Act is one of **the three laws** that define which tribal community can be regarded as tribe, with the result that such a community can have a chief; who can get to the House of Chiefs and that only a tribe can have land referred to as a Tribal territory' (page 51).

In response to this judgement, the Government decided to amend Sections 77 to 79 of the constitution. Instead of achieving equality among tribes, it transferred the discriminatory definitions of 'Chief' and 'tribe' from the Chieftainship Act into the constitution. Thus this amendment continued to exclude other ethnic groups such as the Wayeyi and continued to recognise the Tswana as the only tribes, who can own land as groups, can have their chief recognised and have their language, culture and history be a part of public domain.

After the exercise to amend the constitution, which was basically meant to preserve discrimination against the non-Tswana and sustain the Tswana hegemony, now the government has gone ahead to amend the Chieftainship Act in order to align it with the discrimination that has been preserved in the Constitution. This has resulted in Bill No. 13 of 2007. The exercise to amend the Chieftainship Act after the amendment of the Constitution are merely cosmetic since the Constitution is the supreme law of the land, and once the discrimination has been entrenched therein, then other lower laws such the Chieftainship Act have no relevance in terms of bringing about equality among tribes.

The following are the **most important aspects** of the Bill :

1. Translation Exercise

The bill translates the following words from English to Setswana language: chief (Kgosi), chiefs (dikgosi), chieftainship (bogosi) , regent (otshwarelela bogosi) Deputy chief (Mothusa Kgosi)

2. 22 of Members of the House of Chiefs are not Chiefs

By definition of who is chief and how they are selected (Sections 4-6) – it is clear that the 22 members of the House of chiefs who were elected by other members of the tribal administration in November 2006, are not chiefs. Verbally, they are referred to as chiefs (Kgosi), but by this definition and procedure of designation, it becomes obvious that they are not chiefs.

- They were not designated by their tribes in a kgotla, due to death or resignation of another chief,
- They are not the rightful successors of any chieftaincy.

This procedure clearly refers to people who were already chiefs and not any other person. On national radio, if one of the 22 is being mentioned in the news or announcement, they are referred to as ‘member of the House of Chiefs (*leloko la ntlo ya dikgosi*)’ – (not even as ‘small chief of region x’) as it was the case before. On the other hand the chief of the eight Tswana are referred to as Chief of the X – tribe. This is clear that the 22 additional members only that, and not chiefs.

3. Recognition of Tribal Community

- ◆ **Sections 3:** gives the option for a Minister to recognise a ‘tribal community’, the definition of which is not very clear. (‘any community or ethnic group, whether or not living within a tribal territory, which organised in a tribal manner’). What is not clear is what entails being ‘organised in a tribal manner’. This section does not say who or what initiates/triggers this recognition?
- ◆ **Section 21:** – gives another window of opportunity to recognise a person who has been designated by his/tribe as chief. It is not clear what powers they would have – whether they would fall under category one (Chiefs – preside over a district) or category 2 (sub-chiefs – preside over a region within a district) or 3 (specially elected (preside over a village within a region). (See Sections 77 to 79). Through this section a Wayeyi chief could be recognised if the Minister so desired, and it is not clear what would make them wish to desire so, under what circumstances? The Wayeyi designated their chief according to their custom on March 25th, 2005, and submitted his name to the Minister the same year, but he has not been recognised or submitted to the House of Chiefs. So we could wait for 200 years hoping the Minister will desire to recognise our chief some day.
- ◆ **Section 18:** (which was Section 16 in the old Act) has always provided members of non-Tswana tribes with an opportunity to apply for membership into the Tswana tribe (**not to be recognised as independent tribes, they apply to assimilate and accept Tswanadom**) . It is this section, that has been used to assume that the Tswana have adopted the non-Tswana into their tribe, even though they never applied. For instance, it is this section that

empowers government to assume and act in a manner that defines the Wayeyi as Batawana because they are in the Batawana territory and they have been admitted into the Batawana tribe by the Batawana Chief. The fact is that the Wayeyi never applied, but instead have gone to court since 1948 to be recognised as Wayeyi.

- ◆ The 2001 judgement clearly states on page 7 ' that the Wayeyi are a tribe with a distinct language and culture' (Misca 377/1999). If the Bill was meant to implement the Kamanakao case, then it should have recognised the Wayeyi as per the judgement with clear rights to be enjoyed stipulated.
- ◆ The Court further observed that '
...having section 2 of the Chieftainship Act declared ultra vires the Constitution does not necessarily mean that the Wayeyi will be included therein to be the ninth tribe. It may well be that the legislature, in its wisdom, will create equality between tribes by removing the special status of the eight tribes... and undertake such consequential amendments as shall be necessary (page 58).
- ◆ Now since the review of Section 77 to 79 did not remove the special status of the eight Tswana tribes, it meant that the alternative was to recognise the Wayeyi as the 9th tribe. Neither this bill nor the new Sections 77 to 79 have recognised the Wayeyi or has the potential to do so and make them equal to the Tswana tribes.

4. Other achievements of the bill include:

- ◆ Minister can hire and fire chiefs without consulting the tribe
- ◆ Chiefs assist in arresting those who have committed an offence
- ◆ Chief now have to have some qualification and retirement age at 80.
- ◆ The Act is now gender neutral

5. Conclusion

- ◆ The amendments have not addressed the discrimination between the Tswana and non-Tswana speaking tribes. Sections 3 and 21 which seem to give a window of opportunity to recognise a tribal community as a tribe is not clear as to what would be the benefits of that recognition. Can the recognised tribe have a recognised chief who has equal status, authority and rights as the Tswana chief as stated in the revised section 77 of the Constitution? In other words can they have a territory? Would they represent their tribe and not a region within a Tswana territory? Obviously not because of what is stated in Section 30 (2) of this new bill. Can they be admitted to the House of Chiefs? May be, but obviously only in category 2 (sub-chief) at regional level or category 3 (special election by the President). In both cases they would not be equal to the Tswana but actually continue to be subordinate, and they would not represent their tribe unless the constitution is amended.
- ◆ The Wayeyi struggle is a struggle for the recognition of their cultural rights to language, land and leadership, in order to be represented and have voice in

matters affecting their lives. It is not merely about having a chief in a powerless house of chiefs. Unfortunately, in Botswana, having access to these rights, one must have a recognised chief. Thus all cultural rights have been hidden within the institution of chieftaincy which is discriminatory and by its own right is the least important.

- ◆ Botswana is one situation where the International Community can practice preventive measures with greater success.