

The Evolution of Customary Law Arbitration: A Botswana Practice

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Abstract

Many indigenous peoples and local communities place a strong emphasis on customary laws and procedures as part of their fundamental identities. Several facets of their lives are governed by these regulations and procedures. Members of indigenous and local communities might have their rights and obligations clarified by them. Customary law has on many occasions helped individuals describe or characterize the traits of the community's very identity. It is by definition intrinsic to the life and customs of the indigenous people and even local communities. Custom can be explained as a law of behavior binding on those within its reach, established by lengthy practice. Law is vital in any society that wants to protect human rights. This protection comes in two ways where the first one is being legally guaranteed the protection and the second one is by giving victims of violations a way to get their rights back. In most instances, the penalties imposed in these situations also act as deterrence to future abuse. Before African states were colonized, governance of these states was run by a chief and a council. The village chief was answerable to the headman, who served as the head of the smallest group. As conflict is inevitable in every group of people, Botswana's setup is not an exception however in every community and village there are structures for conflict and dispute resolution among the community. As arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws do not attempt a final definition. It is a practice that has managed to keep most communities intact even in the past after a conflict had occurred. As the world keeps changing and things evolving, in the era of reforms and progressive laws, the paper intends to look into the evolution of customary law arbitration. This is also in light that custom by itself takes time to change and evolve even under newly evolving economic and world environments. Customary law is more on the conservatism nature, therefore how does a progressive legal reform affect the welfare of different sections of the marginalized populations in society? Moreover, the paper looks at dispute

resolution through the eyes of customary law amid the hybrid of other legal systems in the country being the common law and the Roman-Dutch legal systems.

Keywords

Customary Law, Arbitration, Mediation, Reconciliation, Disputes/Dispute Resolution, Restorative Justice

1. Introduction

Law performs a variety of functions in the society. It is concerned with advancing the welfare of the public, resolving disputes, maintaining social control, protecting rights and regulation of politics and the economy, and justice. In some respect, law is a system of rules and procedures which ensure that promises are kept and losses are made good; these rules and procedures are mainly enforced by the court (Boulle, Harris, & Hoexter, 1989: p. 5). Law is the regime that orders human activities and relations through systematic application of the force of politically organized society or through social pressure, back by force in such a society (<https://law.pace.edu>). It is worth noting that law is a general term with different connotations for different people. The object of law is order and the result of order is that men are enabled to look ahead with some sort of security in the future (<https://www.lawyersjurists.com>). Law is not static and it changes with changes in the society and the world around us (<https://www.lawspice.com/>). The nature of law is that it does not stop at just setting rules but secures compliance with them by threatening persons who disregard any rule with some disadvantages or that legal consequences ensue to the one disobeying the law (<http://kretschmer.cc/>). Traditional leadership and structures have played a pivotal role in the political stability of the country during the period of transition from colonial rule to independence (Sharma, n/a).

The basis of this paper is the notion that traditional knowledge and cultural practices and heritage are some of the values that make up the customary law. Botho (humaneness) being one of the grounding factors of a lot of customs in the traditional setup, that “I am a human because you are human” and that one must do what they can to maintain the great harmony which is perpetually undermined by resentment, anger and desire for vengeance. It helps build relationships in the sense that they bring people together to work in harmony (<https://www.mdpi.com/>). Thus, prompting a look into the functions of culture which can be defined as a way to coordinate the actions of its members by aligning or coordinating their perceptions, thoughts, feelings and actions. Customary laws and protocols are an intrinsic part of life, values, world view and the very identity of many indigenous peoples and local communities. A stable culture is considered to be very comforting to the individual member as it reduces uncertainty by giving interpretation and meaning to events and actions

(<https://inis.iaea.org>). The Botswana vision 2036 is a transformational agenda that defines the aspirations and goals of the people of Botswana. Apart from aiming that the country becomes an upper middle-income country it also put forth aspirations of what the future will look like and also creates prosperity for all. This is denoted by pillar 4 under governance, peace and security which recognises the Bogosi (chieftainship) and the kgotla system as a unit that makes part of the governance and security system in the country. The pillar states that Bogosi will be visible, functional and empowered institution of governance contributing to national development (*The Botswana Vision 2036*).

Generally, the notion of arbitration in Botswana has long been into existence as it is a cultural practice grounded on many principles such as, “Molemo wa kgang ke go buiwa” translating that the “healing notion of an issue is to be talked out”. Meaning that there is so much belief in the essence of talking and resolving matters without incorporating any harsh punishments. Whilst on the other hand, the notion of arbitration was seen as an opportunity to attract foreign direct investment and consequently bring in economic benefits for the country, as this was stated by the then Chief Justice of Botswana.

2. Evolution and Recognition of Customary Law in Botswana Constitution

Customary law is by definition intrinsic to the life and custom (It is referred to as a rule of conduct, obligatory on those within its scope, established by long usage.) of indigenous peoples and local communities (*WIPO, 2013*). What has the status of custom and what amounts to customary law will depend as much on how the indigenous people and local communities themselves perceive these questions on how they function as indigenous people and local communities. It makes reference to an established pattern within a society or community which is seen by the community itself as having a binding quality (*WIPO, 2013*). With all these precepts of what customary law is, it can therefore, be defined as locally recognized principles and more specific norms or rules which are orally held and transmitted and applied by community institutions to internally govern or guide all aspects of life (*WIPO, 2013*). There is also a need to differentiate between customary law and traditional norms. Norms are generally described as how people are thinking (shared reality) and behaving and ultimately, they control the behaviour of people. They are therefore, conceptually related to cultural practices. They prescribe certain behaviors and once these behaviors are socially routinized, they become prioritized. Norm structure specifies developmental tasks that are specific to culture (*Frese, 2015*). They are general prescriptions on how to do things right. These offer social standards for appropriate and inappropriate behavior that govern what is and what is not acceptable in interactions among people. These are quite often highly influential over individual behaviour in a broad variety of contexts because they are able to foster an environment of either healthy or unhealthy norms and habits (*Frese, 2015*).

Prior to the establishment of Bechuanaland Protectorate there existed a variety of indigenous legal systems living in tribal areas which is now called customary law (<https://www.nyulawglobal.org/>). The 1891 proclamation instructed the High Commissioner to respect the native laws; the indigenous laws therefore received recognition but did not get to be incorporated into the general law of the country. The Constitution of the country did not change this position and it remains so today (<https://www.nyulawglobal.org/>). To further the establishment and recognition of the customary law, the Constitution further provided for the establishment of the House of Chiefs. The establishment and composition are governed by section 77 of the Constitution. The House of Chiefs also referred to as “ntlo ya dikgosi” acts as an advisory upper body chamber to the Botswana bicameral parliament. It has no legislative or veto power but has power to summon members of parliament (The Constitution of Botswana, 30 September 1966). All bills affecting tribal organization and property, customary law, and the administration of customary courts go through the house before being discussed. The house of chiefs must be consulted when reviewing the Constitution, this emanates from the central role played by the traditional structures in shaping Botswana legal system. Customary law must be recognized as an integral part of the law, and an independent source of norms within the legal system throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its norms and values consistent with the Constitution (<https://www.nyulawglobal.org/>).

3. How Culture Influences Customary Law

There can be no society without a system of law to regulate the relations of its members with one another. Custom which can be also referred to as culture persists and exists throughout the history of the formation and development of various legal systems, plays a large role and has a significant impact on law (in its most general and broadest meaning), is at the origins of developing legal consciousness and legal culture (Mongush, 2021). Custom is a rule of conduct, obligatory to those within its scope and established by long usage. It can be also defined as an established in the course of multifold repetition, model of behavior for individuals, which is of mandatory nature. Customary laws are defined as practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws (WIPO, 2013). Customary law usually makes reference to established patterns within the community which is seen by the community itself as having a binding quality. Law is a foundational component of a society and evolves as a society develops (WIPO, 2013). In any society, norms are formed and have a stable position in the corresponding culture and social organisation of people. Customary law includes the norms of morality, traditions, customs as well as rituals. In order to achieve a harmonious existence of individuals in society, social norms are created (Mongush, 2021). Customary laws and protocol are very intrinsic to the core identity of indigenous

people and local communities. They are not usually recorded in writing but known to all members of the community. Just like legal rules the rules of culture maybe coercive and that's what makes a comparison between culture and law. Unlike statutory laws, customary law does not gain its authority from formal acts such as a vote from an assembly but rather derives its existence and content from social acceptance (Ahren, 2004).

4. Meaning, Basic Features and Advantages of Arbitration

It is worth noting that dispute resolution outside of the courts is not a new phenomenon as societies around the world have used non-judicial, indigenous methods to resolve conflict. Generally, arbitration is one of the alternative early intervention and dispute resolution mechanisms (ADR). The first uses of the ADR processes began experimentally in the 1970s as a potential remedy for disabling court backlogs and as resolution techniques for environmental and natural resource disputes (<https://www.opm.gov/>). The term ADR is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court process. These mechanisms can vary from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process (<https://pdf.usaid.gov/>). Negotiation systems establish a framework to encourage and facilitate direct negotiation between disputing parties, without the intervention of a third party. Mediation and conciliation systems on the other hand are very similar in that they interject a third-party between the disputants either to mediate a specific dispute or to reconcile their relationship. Arbitration systems authorize a third party to decide how a dispute should be resolved (<https://pdf.usaid.gov/>). In terms of binding or non-binding awards, negotiation, mediation and conciliation programs are non-binding and depend on the willingness of the parties to reach a voluntary agreement. Arbitration programs may be either binding or non-binding. the binding arbitration is one where a third party produces a decision that the disputants must follow even if they disagree with the results which is much like a judicial decision whereas the non-binding arbitration produces a third-party decision that the parties may reject (<https://pdf.usaid.gov/>).

Arbitration is one of the most important spheres of activity in the system of administering justice (Lord Denning in *Modern Engineering (Bristol) Ltd vs Miskin and Sons* 1981 1 Llyods rep 135). As conflict is inevitable in every community, people deal with it and react to it in so many different ways but one of the most prominent ways of late has been arbitration. The different ways people deal with conflict can either escalate or prevent a conflict (<https://www.maxwell.syr.edu/>). Arbitration is a procedure in which a dispute is submitted, by agreement of both parties to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court

(<https://www.wipo.int/>). The English Arbitration Act of 1996 sets out clear statements of principle of what was expected from arbitration such as being able to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense and the litigants should be free to agree on how their disputes are resolved, subject only to safeguards as are necessary in the public interest.

There are four fundamental features of arbitration being that it is an alternative to national courts, it is a private mechanism for dispute resolution, it is selected and controlled by the parties and that it is a final and binding determination of parties' rights and obligations (Lew et al., 2014). These features make arbitration far more different from any other form of dispute resolution and also very unique in itself in that it is very private as already mentioned. Parties have the ultimate control of their dispute resolution mechanism as compared to other methods of dispute resolution (Lew et al., 2014). In most instances, national courts are very rigid in the proceedings. Whichever court one goes to, inevitably, there are civil procedural rules or codes or precedent as to the way in which cases are conducted (<https://pdf.usaid.gov/>). The procedural rules or code lay down the basis for the court's jurisdiction, the circumstances in which an action can be brought, which particular national court has jurisdiction over a particular type of dispute, how to initiate proceedings, what documents must be filed, the rights of reply and generally should be conducted. This does not dispute the fact that the form, structure and procedure of every arbitration is very different and will vary according to the characteristics of the case. Markovits (2010) has argued that it is important to recognize that arbitration is not one thing but two, being that it is a private replacement for judging on one hand and a form of contract gap-filling on the other. He argues that arbitration is a replacement for judging in the sense that it tries to relax the laws' scrutiny of the actual problem (Markovits, 2010).

One of the advantages of arbitration is the fact that compared to all the other forms of dispute resolution, it is supposed to be relatively cheap especially in comparison the ones including the national courts. It is also very possible that where arbitrations can be held quickly and the awards issued with little or no delay, the costs maybe significantly reduced in contrast to those of a lengthy court procedure (Mulaj, 2018). One thing to be noted about this arbitration mechanism is that even though it does not include the court proceeding, the award is as binding as the court one. Once the mechanism is agreed upon, neither party can unilaterally withdraw the process. Parties can still settle the disputes themselves but if not, then a binding determination can be made by the expert or an experienced person from the courts. As much as the decision made in arbitration is binding, there is allowance to also appeal the decision (Lew et al., 2014).

Courts in Botswana fall under the Local Government unlike in the common law which comes under the Administrative Justice. The Kgotla or the traditional courts are the core institution serving as a forum for policy formulations, deci-

sion making, economic developmental activities and judiciary on litigations (Moumakwa, 2011). The traditional courts generally reflect the traditions and attitudes of the local communities and they throw quicker judgements because the cases are heard by the local chief or the presiding officer. Moreover, these traditional courts are more accessible to citizens more than the received courts since they are free and trials are conducted in the local language. Unlike arbitration in any other forum, the disputants in the customary setup are unable to choose their dispute resolvers (Onyema, n/a). The traditional leaders derive their authority partly from tradition and partly from the laws of Botswana. As presiding officers in the customary courts, they impart justice following common law as well as customary law. The expectation is that they should be well versed with both laws. It is worth understanding that customary law is by and large non-codified and is derived from oral traditions. In case of any doubts and confusion as to the existence of content of a rule of customary law relevant to any proceedings, there could be consultation of reported cases, textbooks and other sources such as receiving opinions either orally or in writing in order to help arrive at a decision (Sharma, n/a).

5. Characteristics of Traditional Arbitration

Mutual consent is considered one of the fundamental principles of traditional arbitration and is profound to the legitimization of the process (Badiei, 2010). This means that both parties should have agreed to the process of arbitration to some degree because there are instances of “deferring” traditional court cases and instead looking for litigation in the modern courts. For there to be a court case the defendant has to be notified and agree to the notion of showing up in a traditional court system. The summoning to the court either the chief or the elders in the Kgotla setting has to be something that the defendant is aware of and also agrees to participate in the court case.

There are many actors involved in the process arbitration in the traditional setup. The Chief is referred to as the leader of the traditional court and the community. Despite this, the Chief has a delegation that always works with him or even fills gaps in his absence. The delegation of the Chief steps in to assist the community where the Chief is unable or unavailable to offer the assistance (**Interview made with Ms Patriciah Baikakedi, 07/03/2023**). Some of the actors in the arbitration setup include the chief, the headmen and the family leaders especially the uncles in some instances. Specific to arbitral cases, there are instances where cases can be held in the absence of the chief by the elder members of the community who are usually referred to as ‘banna ba lekgotla’. ‘Banna ba lekgotla’ which simply translates to “men of the jury” are not part of the government pay roll but are diligently doing the work in order to promote the customary law and the customs of the traditional setup. (**Interview made with Ms Patriciah Baikakedi, 07/03/2023**).

Process—despite the fact that there is Customary Court Act, different tradi-

tional leaders use their discretion whilst conducting the arbitration case. There is no following the Act to precision but all the while (arbitrators) should bear in mind the fact that they are not infringing on anyone's rights. The process of arbitration in the traditional system may be one of the quickest in the legal sphere as the mandate is always to resolve issues in the fastest way possible. This is because in most instances, the drive is to have peace within the community thereby the quicker the issue is resolved the better for peace to prevail. (Interview made with **Ms Patriciah Baikakedi, 07/03/2023**).

There are no records of arbitral cases. Contrary to the usual procedure with so many other cases in the country and in the court system to register any reported case, cases in the traditional arbitration procedure are not normally registered, which could count as one of the reasons why the process is almost quicker. As any and every cultural custom and practice, the information is rather passed down through word of mouth than any other means such as documentation. Despite the fact that there are no registered cases, there are cases that can be used as precedence. The stored practices and knowledge help the arbitrators to make decisions on the similar newer cases. (Interview made with **Ms Patriciah Baikakedi, 07/03/2023**).

6. Principles of Customary Arbitral Law

According to the Customary Courts Act, customary law means in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not compatible with the provisions of any written law or contrary to any morality, humanity or natural justice. Throughout the African history customary law has undergone significant changes where existing customary frameworks have developed through societal developments brought about by decades of cross-cultural influences (**Obatusin, 2018**). One of the principles of customary law is that (it) customary law is expected to conform to morality as understood by ordinary folk. It is very common in customary law that circumstances can significantly alter cases. Botswana has always been big on the principle of Botho; this encompasses a lot of morality principles and one cannot talk about morality without mentioning the principle of Botho in a Tswana cultural setup. This is a principle that promotes the common good of a society and includes humanness as an essential element of human growth (<http://www.ubotho.net>). The concept disapproves of anti-social, disgraceful, inhumane and criminal behavior and in turn encourages social justice for all. People in Botswana use the term Botho to describe a person who is well-rounded, who is well mannered, courteous and disciplined. Botho is an example of a social contract of mutual respect, responsibility and accountability that members of society have toward each other and defines a process for earning respect by first giving it, and to gain empowerment by empowering others (<http://www.ubotho.net>). The principles of customary law continue to reign supreme in the areas of family and inheritance, since the majority continued to live

a traditional manner of life and urbanization was not as rapid (Sharma, n/a).

1) Restoring social relationships

Restoring social relationships can also be referred to as reciprocity which encompasses the principle of equity and provides the basis for negotiation and exchange between humans. In most traditional setups, disputes are seen as evil forces capable of disturbing or at worse destroying a society's unity and survival and even so, there is the belief that disharmony sparks famine, drought and death which is a proof of the gods' disapproval (Dzivenu, 2008). This has resulted in that every effort be made to ensure the society's peace and unity through negotiation, mediation, arbitration and adjudication often involving community members and institutions. Restoring social relationships can be afforded also in the sense of intervention, where the family feels that their child is being delinquent and they let the traditional court interfere in the internal affairs of the family as a way to instill discipline to the young members of the family. This brings in the notion of restorative justice which is based on the assumption that within society a certain balance and respect exists and it is harmed by crime therefore the purpose of the justice system is to restore the balance and to heal the relationships. It is not so much about the punishment that the offender gets even at the end of the trial but more about healing the wounds caused by the crime and repairing relationships that have broken down in the process (Bwire, 2019).

2) Civil society participation

According to the African Development Bank, civil society is the voluntary expression of the interests and aspirations of citizens organized and united by common interests, goals, values or traditions and mobilized into collective action (AfDB, 2012). This encompasses a spectrum of actors with a wide range of purposes, constituencies, structures, degrees of organisation, functions, size, resource levels, cultural contexts, ideologists, membership, geographical coverage, strategies and approaches (<https://eur-lex.europa.eu/>). It is recognized as a diverse and ever-wider ecosystem of individuals, communities and organisations. Civil society occupies an important position in the development dialogue as it provides opportunities to bring communities together for collective action, mobilizing society to articulate demands and voice concerns at local, national, regional and international levels (Cooper, 2018). If well executed, it has the ability to create positive social changes throughout communities and ultimately the world. In Botswana, public participation is mostly held at the Kgotla and has over the years proven to be a relatively strong agent of the government if it is not done properly. Any project that the government intends to carry out without the consent of the people is usually not well received or sometimes even takes time to start on the project. Successful service delivery depends on the extent to which the communities are involved and informed about developments in their villages (Sharma, n/a). Chapter 41:01 of the Bogosi Act, commits every chief that to the best of his or her abilities should be able to prevent the commission of offences

within his or her tribal area. A Kgosi receiving information that property of any description which has been stolen whether within or outside his or her tribal area, is within such area, shall cause such property to be seized and detained pending the order of a court having jurisdiction in the matter and shall forthwith report such seizure and detention to such court. This shows that the Kgosi has an obligation towards the community as much as the community has the civil responsibility towards themselves and each other. (Bogosi Act) Civil society participation also includes instances where the community takes responsibility in helping to curb unwanted behaviors in the community and includes programs such as neighborhood watch. The forum of the Kgotla meeting has continued to play a role that enables the community to participate in formulating and implementing of development plans and projects (Sharma, n/a). It is in most instances in the contemporary Botswana that government officials, members of Parliament and ministers address Kgotla meetings to explain policies to the community and to receive feedback. The effectiveness of this however remains limited because the attendance of Kgotla meetings fluctuates and is going down in some cases. Even more so the setup of a Kgotla is not for any political or politician to use and have meetings under the banner of any political party (Sharma, n/a).

3) **The traditional courts leadership helps the national leadership in the decision making** of the development of the country. The Vision 2036 recognises the importance of chieftaincy in the national development process. The process of chieftaincy promotes and contributes to Botswana's democratic values because the country's democratic and peaceful values are enshrined in the traditional value system (Moumakwa, 2011). Kgotla is found in every tribal community in the country which goes on to show how important they are considered to be in the structure and the setup of the country. Traditional leaders are expected to cooperate closely with other local government organizations in the process of formulation and implementation of development plans at the local level (Augustine, 2016). There is value given to the traditional leaders' opinions when it gets to the development of the villages and places they lead as they can help bridge the gap between the state and the civil society in the country. Moreover, when traditional leaders and locally elected government officials cooperate on land allocation, dispute settlement, social and cultural and bringing together the civic society and community-based organisation, it in a way helps to bring about community development. Traditional leaders play a social role in rural communities and therefore help in rural community development through stimulating participation in development programs (Augustine, 2016). Chiefs serve their communities in maintaining the best customs and traditions, arranging tribal ceremonies, serving as spokesmen for their tribe on issues of customary nature, presiding over Kgotla meetings where matters of interest to the community are discussed, help in the prevention of offences within their tribal boundaries and encouraging rural development by cooperating with other governmental and non-governmental organisations (Sharma, n/a). Chiefs or traditional leaders are

very instrumental in initiating social change by striking a healthy balance between tradition and modernity.

7. Arbitration in Customary Law

Customary laws can govern many aspects of community life such as dispute settlement, land tenure and other rights, inheritance, family law, and political and social relations generally (WIPO, 2013). The most comprehensive law that regulates customary law is *The Customary Law Act*. By virtue of the Act, all courts in Botswana are empowered, subject to their jurisdiction to apply customary law where it is necessary to do so. There is also a provision in the Act, where there are civil cases which customary law can be applied to whenever an agreement necessitates (Botswana Customary Law Act, 1969). There is a saying in Botswana that the highest form of war is through dialogue. This means that whatever disagreements people have, a resolution can always be attained through dialogue. The concept entails in it the fact that all people have access to the platform used for resolving conflicts being the Kgotla in this manner and are ascertained of fair hearing. According to the traditional custom, the Kgotla is a public meeting, community council or traditional law court in Botswana. It is usually headed by the village chief or headman who in many instances is the arbitrator. The Kgotla plays a role of promoting peace, harmony, unity and democratic values among the local communities in Botswana (Moumakwa, 2011).

The whole process of arbitration in Botswana is governed by the Arbitration Act the courts in Botswana are pro-arbitration including the traditional court (<https://globalarbitrationreview.com/>). While the courts are available to settle any form of disputes, some smaller disputes are better suited to be settled at the traditional Kgotla. For the customary law, tribes' people bring a lot of cases to the Kgotla but due to limited jurisdiction serious criminal cases such as rape, murder are not handled in the customary courts (Moumakwa, 2011). The traditional court deals with civil cases however other civil cases such as divorce are matters under the common law. Cases that can be trialed in the customary court include but are not limited to petty theft cases, fights and public nuisances to destruction of crops by livestock and even failure to pay back a debt (Moumakwa, 2011). However, of late people have the liberty to choose whether to have their cases trialed either in a customary court or the magistrate court. Usually for cases such as these, the punishment may come in the form of communal service to reimbursement to corporal punishment. The issue of corporal punishment has been up for debate a lot more times in this era of rights and what should and should not be done, however people within the community still see it as the right way to integrate the culprits into the society and this is done in place of being sent to jail or sent to rehabilitation centers (Kumar, 2009). As a multi-legal system, Botswana still struggles to strike a balance between guaranteeing the right to culture and that to human rights. As a modern nation that has committed to upholding universal human rights, it continues to struggle to draw the line be-

tween the international obligations and what is cultural (Koboyankwe, 2014).

For the dispute to be resolved in a traditional court, the first thing is that the parties or one of the parties has to visit the main Kgotla to verbally report the dispute to the headman or the chief of arbitration and seek redress. The headman would therefore invite the involved parties to attend the hearing at an agreed date. The parties would then provide the requested information, discussing the issues with the help of the headman and finally with the help of the headman, all parties involved would arrive at an agreement to which they must all adhere to (<https://www.gov.bw/legal/settlement-civil-disputes>). Arbitration in itself is private and usually held in private spaces and excludes strangers from proceedings, however in the customary law, the arbitral proceedings are not held in a private space. This means that anybody can come to the hearing of the matter. This is founded in the belief that the Kgotla is for everyone and anybody can come and listen to the matter and even have a say in the matter according to the saying, “mafoko a Kgotla a mantle otlhe” meaning that every opinion matters. In 1986 the BDP government’s policy accommodation of customary courts of law gave the litigants the right to appeal the chief’s decision in the customary court to a newly created customary court of appeals and either the magistrate or the high courts (Dzivenu, 2008). The government also established the office of a commissioner to supervise the performance of all customary courts in Botswana. In doing this, it means that the case will then be closed in customary courts and no longer be heard or referred there. In most instances, disputes are settled in a single day’s sitting with a verdict announced on the same day.

African traditional justice systems place emphasis on reconciliation as the main mechanism of dispute resolution within the community for both civil and criminal matters. The customary law provides for the arbitration process as a way to resolve issues (Ngwenya & Kgathi, 2011). This helps in promoting offender accountability, reparation to the victim and full participation by all those involved being the victim, the offender and the affected community members. This is still advocated for even today, that instead of going to court, most African communities, opt to resolve internal disputes where possible and when available through traditional justice systems. The same mandate that was implored in the past days for resolving disputes is the same mandate that is implored today. This is that disputes are to be resolved in a way that promotes reconciliation and restitution since both the offender and the victim are to continue living and existing in the same community (Bwire, 2019). The aim is to restore the societal balance that has been disturbed by the unfairness committed either through crime or any other means.

8. Challenges in the Customary Law Setup

In relation to modernity the institution maybe threatened due to global developments that have affected old customs of legitimacy power. However, the government of Botswana has retained and given formal recognition through and by

law to the traditional institution of chieftaincy and its associated traditional structures by realizing that the people in rural areas continue to have respect for and faith in the traditional structures (Sharma, n/a). Moreover, the role of traditional leaders in the country remains pivotal to the developmental process as the principle of consultation continues to be dependent on Kgosi and the Kgotla. This however does not mean that the traditional setup is not under any pressure, the customary or traditional setup is facing a lot of threats due to the transformation of the country and the demands of the world at large (Sharma, n/a). Growth in urbanization, migrations of populations from one place to another, lack of interest in some young people and the aggressive attitude of some political leaders are some of the things that contribute to the depreciation in recognition and relevance of the customary or traditional setups (Sharma, n/a).

Although people in the rural areas continue to have faith and respect for the traditional authorities, the same cannot be said for the young and educated from the urban areas. People from different rural areas are migrating to urban places where people who reside there are of different tribes (Sharma, n/a). This is based on a number of practices that the traditional setup still upholds such as inheriting the office (of chieftaincy) by heredity, gender bias, untrained customary court chairmen, low caliber staff in tribal administration structures and most people who have these differing opinions would like to have the traditional structures done away with or changed significantly (Sharma, n/a). Chieftainship is one of the oldest institutions of traditional leadership, which has enjoyed the glory, powers and prestige of the pre-colonial times, has survived through the vicissitudes of the colonial period, and has reconciled to the new political system of the post-independence period (Ray & Reddy, 2003). The Kgotla system in contemporary Botswana can be said to have at least five purposes being first to be able to provide the community with the means to come to an agreement on the implementation of specific community development programs or projects. The second one is that traditional leaders can use the Kgotla to solicit or discuss views from the community on government policy decisions (Ngwenya & Kgathi, 2011). The third purpose is that government officials being members of parliament and councilors use it to inform the community about new legislation. The fourth purpose is that the Kgotla is a judicial institution in which cases are heard by the chief and his advisors and lastly that the Kgotla has been translated into a site of resistance or a place where voices clash and reach a compromise (Ngwenya & Kgathi, 2011).

The other issue concerning the issue of customary law and courts is the fact that customary courts are said to not afford due process, this is because chiefs who usually act as arbitrators do not have legal understanding as they are poorly trained and ill-equipped to make legal decisions. Moreover, the defendants also are not given any legal counsel and there are no standardized rules of evidence. This is because customary law remains largely unwritten, its precise rules often contested and largely unknown to young Batswana, creates fluidity and uncertainty, which leads to the perception that customary justice is, at best, unpre-

dictable and, at worst, arbitrary (*The Attorney General Botswana Report*). One of the arguments of the customary law being uncoded is that the fabric of the entire institution is based on a mistaken belief. This is based on the notion that it is wrongly assumed that Chiefs whether born or elected are matchless repositories of customary law meaning that they are well-vested in basic principles of customary law in terms of fair decision-making. What makes it even more complicated is the fact that every tribe has its own set of customary laws (Kumar, 2009). This eludes the notion of ethnic homogeneity as there are many tribes with different customs and traditions. Moreover, this questions the fact that the Customary Penal Code is made up of harmonized customary laws (Moumakwa, 2011). As much as there is very limited literature in the area of customary law, there is also very limited research in the area too which makes it difficult for researchers to fully conduct the studies to see how much has changed in the customary law institution.

A distinctive feature of traditional leaders is the ability to associate themselves with custom, as a result their status in their communities is legitimized by something beyond appointment by the state (Baldwin & Raffler, 2017). However, traditional structures have undergone and continue to undergo significant change. The traditional structures together with the traditional chiefs have evolved significantly from their pre-colonial forms in tandem with transformation of the continent's political systems, during the colonial and post-colonial eras (Baldwin & Raffler, 2017). The significance of chieftaincy has merely shifted to being that similar to a civil servant of the colonial state rather than the powerhouse they used to go by with. The form and content of chieftaincy has therefore changed and thus the relationships between chiefs and their communities (<https://repository.uneca.org/>). Chiefs often serve as custodians of customary law and serve as symbols of cultural value and practices they dispense justice and resolve conflicts (<https://repository.uneca.org/>); however as already mentioned customary law is not written down so using personal discretion may get in the way of justice. Moreover, traditional leaders and their delegates are not trained in law so there could be infringement of justice in certain cases (**Drawbacks of traditional authorities**).

9. The Impact of Globalization on Traditional Structures

Globalization typically refers to the process by which different economies and societies become more closely integrated, and concurrent with increasing worldwide globalization, there has been much research into its consequences. The term covers a range of distinct political, economic and cultural trends and also the notion that humanity stands at the threshold of realizing one single unified community in which major sources of social conflict have vanished. Economies, laws, and social movements are forming at an international level (Irani Ali & Noruzi, 2011). Globalization is both a result and a force of modernization and capitalist expansion, entailing the integration of all activities into global

market place (Guttal, 2010).

Discovery—The importance of discovery in culture lies in its use and or when it generates certain challenges to the people, which in turn metamorphose into invention for the development and survival of the society (Idang, 2015). Culture, as it is usually understood, entails a totality of traits and characters that are peculiar to a people to the extent that it marks them out from other peoples or societies. These traits include language, dressing, music, work, arts, religion, norms, laws, taboos and beliefs. Values here are to be understood as beliefs that are held about what is right and wrong and what is important in life. Meanwhile globalization promotes cultural integration that pushes the world to become the global village to inculcate the ideology for universal religion, ideology as well as establish room for a uniform culture that detribalizes other customs and traditions. Globalization has had a very strong impact and effect on a number of cultures and identities. Globalization promotes the integration and the removal not only of cultural barriers but also of the many negative dimensions of culture (Mikail & Abdullah, 2017). It creates a strong link and interconnectedness within communities and associations and consolidates uniformity in governing international community. Language for most of the African states especially has been tampered with as globalization has transformed most Africans into Anglophones, Francophones and Lexiphones and these have left most of them speaking English, French and Portuguese. The dominance of these languages has relegated the domestic indigenous languages in Africa. This has left a lot of Africans more confident in speaking these foreign languages than their own (Mikail & Abdullah, 2017).

Diffusion—Diffusion entails intentional borrowing of cultural traits from other societies with which the beneficiary society comes in contact, or an imposition of cultural traits on one society by a stronger society intending to assimilate the weaker society (Idang, 2015). This could include alternating family structures, even though there is no consensus on how to define families on a global perspective, there is however an agreement that some form of family or kin relationships characterize all societies. Families play a central role in societies as they are they are the primary site for reproduction, in socializing the next generation, in early education and stabilizing adult personality formation. It transmits new concepts gender, work citizenship, familial relationships and women's and children's rights even to very distant places (Trask, n/a). The new ideas brought about by globalization, the new concepts empower individuals and their families to change lives which in some instances can be destructive. These structures have even more so have transformed the families' abilities to maintain and protect their members. The traditional structures of families have been tampered with in the sense of breadwinners in the families have changed, there are unmarried and same sex cohabitation (Trask, n/a). More women are going into full time jobs with benefits for the families, while men lose their primary role as breadwinners of the families. Moreover, the international migration of

people has led to new types of families, which is also known as transformational families which are characterized by retaining roots in their home societies while simultaneously also creating new ties in their host countries. In most instances people migrate to industrialized countries from developing countries. While women are able to earn their own living they tend to refrain to stay in abusive and destructive relationships (Trask, n/a).

10. Conclusion

The establishment of the House of Chiefs by the Constitution of Botswana was a significant mark of respect for traditional leaders. This provided the right platform to cement the customary law into the Constitution of the country and help keep up the national customs. Traditional leaders were provided with a platform where they could articulate their views on national matters and have their opinions heard. From the time the country got its independence, traditional leaders appear to have reconciled to their reduced status and authority. However, despite the fact that there are elected political members and other public servants who have higher positions than them (Chiefs), they still require to be treated with dignity and respect. As the custodians of culture and customs Chiefs feel the need to be given recognition and appreciation. This does not however discard the fact that culture changes and that there are changes that will continuously occur in the customary law. This is because as mentioned the country is slowly moving and shifting towards a global village and through that there is a need for accommodating some changes that come with that. Traditional structures are likely to continue their existence in the country and will not be abolished but will go through transformations. Culture is no longer regarded as a knowledge system passed down from ancestors. As a result, many social scientists now regard culture as a collection of ideas, characteristics, and expectations that shift as people respond to changing circumstances. This has led to instances of “illegitimate leaders” emerging in the selection process of the next chief in line as a way to exercise democracy all the while keeping up the tradition of having a chief in the community. Chieftaincy used to be hereditary in the traditional customary culture however, since there is so much emphasis on the notion of democracy in the selection and election of leaders in the new era, there is a need therefore to practice democratic leadership. Even more so the issue of chiefs only being men has since been challenged by the global village.

One thing that can be noted is that there is no universal legal language but, in most instances, laws are built and also reflect the history from which it comes. Therefore, the customary law of Botswana reflects the society in which it was built and the history of its people. Customary law is a law that has never been written down but has however found its way to stay in the legal system of the country even though it is currently faced with many challenges and developments. This has not stopped the customary law to still be administered where necessary and also to play an important role in the affairs of the country such as

helping build communities. Chieftaincy can and continues to provide a bedrock upon which new governances are built, making it the oldest in history of leaderships.

Arbitration still holds a very important place in the building of many societies in the world. It has even found its way into the economic platforms. Changes that have occurred overtime in the traditional setup of arbitration and law has narrowed down a number of cases that can be handled by the customary courts and also the outlook of what arbitration looks like now.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

- Ahren, M. (2004). Indigenous Peoples' Culture, Customs, and Traditions and Customary Law—The Saami People's Perspective. *Arizona Journal of International and Comparative Law*, 21, 63-68.
- Augustine, M. (2016). *The Role of Traditional Leaders in Post-Independence Countries Botswana, Ghana and Zimbabwe*. <https://hsf.org.za>
- Badie, F. (2010). *Online Arbitration Definition and Its Distinctive Features*. <https://ceur-ws.org>
- Baldwin, K., & Raffler, P. (2017). Traditional Leaders, Service Delivery and Electoral Accountability. *Chapter Prepared for Edited Volume on Decentralization*.
- Boulle, L., Harris, B., & Hoexter, C. (1989). *Constitutional and Administrative Law; Basic Principles*. Juta.
- Bwire, B. (2019). Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example. *Societies*, 9, Article No. 17. <https://doi.org/10.3390/soc9010017>
- Cooper, R. (2018). What Is Civil Society, Its Role and Value in 2018? Knowledge, Evidence and Learning for Development. *K4D Helpdesk Report*.
- Dzivenu, S. (2008). The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana. *Political Perspectives*, Vol. 2.
- Frese, M. (2015). Cultural Practices, Norms and Values. *Journal of Cross-Cultural Psychology*, 46, 1327-1330. <https://journals.sagepub.com/>
- Guttal, S. (2010). Globalisation. *Development in Practice*, 17, 523-531. <https://doi.org/10.1080/09614520701469492>
- Idang, G. E. (2015). African Culture and Values. *Phronimon*, 16, 97-111.
- Irani Ali, H. N. F., & Noruzi, M. R. (2011). Globalisation and Challenges; What Are the Globalization's Contemporary Issues. *International Journal of Humanities and Social Science*, 1, 216-218.
- Koboyankwe, O. K. (2014). *Legal Pluralism and Discriminatory Application of Progressive Laws to Women Subject to Customary Law in Botswana*. <https://www.luc.edu>
- Kumar, R. A. (2009). *Customary Law and Human Rights in Botswana*. Working Paper No. 52. <https://www.legal-tools.org>
- Lew, J. D. M., Mistelis, L. A. et al. (2014). Chapter 1. Arbitration as a Dispute Settlement

- Mechanism. In J. D. M. Lew, L. A. Mistelis *et al.* (Eds.), *Comparative International Commercial Arbitration* (pp. 1-15). Kluwer Law International.
<https://www.pravo.unizg.hr>
- Markovits, D. (2010). Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract. *DePaul Law Review*, 59, 431, 458-469.
- Mikail, K. I., & Abdullah, L. I. A. (2017). The Impact of Globalization on African Culture and Politics. *Journal of International Studies*, 13, 1-13.
<https://doi.org/10.32890/jis2017.13.1>
- Mongush, M. A. (2021). The Role of Customs in the System of Social Norms. *SHS Web of Conferences*, 118, Article No. 02019. <https://doi.org/10.1051/shsconf/202111802019>
- Moumakwa, P. C. (2011). *The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana: Case Study of the Kanye Kgotla*.
- Mulaj, V. (2018). The Advantages and Disadvantages of Arbitration in Relation to the Regular Courts in Kosovo. *Hungarian Journal of Legal Studies*, 59, 118-133.
<https://doi.org/10.1556/2052.2018.59.1.7>
- Ngwenya, B. L., & Kgathi, D. L. (2011). *Traditional Public Assembly (Kgotla) and Natural Resources Management in Ngamiland, Botswana*. Nova Science Publishers.
- Obatusin, S. (2018). Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices Using Lessons from Ugandan and South African Courts. *Columbian Journal of Transnational Law*, 56, 636-679.
- Onyema, E. (n/a). *The Role of African Courts and Judges in Arbitration*.
<https://eprints.soas.ac.uk>
- Ray, D. I., & Reddy, P. S. (2003). *Grassroots Governance? Chiefs in Africa and the Afro-Caribbean*. University of Calgary Press. <https://doi.org/10.2307/j.ctv6gqrdh>
- Sharma, K. C. (n/a). *Role of Traditional Structures in Local Governance for Local Development; the Case of Botswana*. Prepared for Community Empowerment and Social Inclusion Programme, World Bank Institute, World Bank.
- Trask, B. S. (n/a). *Globalization and Families: Meeting the Family Policy Challenge*.
<https://www.un.org/>
- World Intellectual Property Organisation (WIPO) (2013). *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*. <https://www.wipo.int/>

The Bogosi Act:

- Lord Denning in *Modern Engineering (Bristol) Ltd vs Miskin and Sons* 1981 1 Llyods Rep 135.
- Ms Patriciah Baikakedi Conducted on 07/03/2023 Court Secretariat at Magoriapitse Customary Court.
- The Attorney General Botswana Report.
- The Botswana Vision 2036.
- The Customary Law Act.