

INSTITUTIONAL PLURALISM IN SOUTHERN AFRICA: THE INTEGRATION
OF TRADITIONAL INSTITUTIONS IN BOTSWANA AND SOUTH AFRICA

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List of abbreviations

ANC	African National Congress
BBK	Bakgatla-ba-Kgafela
BBKTA	Bakgatla-ba-Kgafela Tribal Administration
BDP	Botswana Democratic Party
CLaRA	Communal Land Rights Act
COBACO	Concerned Bakgatla Anti-Corruption Organisation
CODESA	Convention for a Democratic South Africa
CONTRALESA	Congress of Traditional Leaders of South Africa
CPA	Communal Property Association
DDC	District Development Committee
HDSA	Historically Disadvantaged South Africans
IDP	Integrated Development Plan
IFP	Inkatha Freedom Party
MPRDA	Mineral and Petroleum Resources Development Act
TLGFA	Traditional Leadership and Governance Framework
VDC	Village Development Committee
WDC	Ward Development Committee

Definition of Tswana terms

Bogosi	Chieftainship
Bogwera	Initiation ceremony for males
Bojale	Initiation ceremony for females
Dikgosana	Headman
Dikgosi	Chiefs
Kgosi	Chief
Kgosikgolo	Paramount Chief
Kgotla	Traditional assembly and customary court
Ntlo ya Dikgosi	House of Chiefs

PART I: THE BACKGROUND AND HISTORICAL CONTEXT OF THE RESEARCH

1 Introduction

1.1 The topic of the research – Background and current state of research

1.1.1 Some introductory notes on traditional leadership

In most parts of Southern Africa, traditional institutions still formally and informally persist and have managed to continuously play a vital role in traditional communities. The majority of these traditional institutions receive official governmental recognition and form an integral part of local governance and jurisdiction. The remarkable resilience they have experienced in Southern Africa and the resulting institutional pluralism challenges the state in various contexts – reaching from the local to the national level and in some cases even straddling international borders. Within the context of strengthening democracy and democratic local governance, the dual existence of traditional and governmental institutions and political structures needs to be addressed.

Individual states have adopted a variety of models of integrating and harnessing traditional institutions, or, contrarily, for marginalising and controlling them. The introduction of pluralistic legal and institutional structures has not only affected governance and jurisdiction but has also left a lasting imprint on traditional communities and institutions themselves. Valuable and contrasting examples of the integration of the institution of traditional leadership are provided by Botswana and South Africa. In the course of decolonisation and democratisation, traditional institutions were politically marginalised and lost most of their formal powers in Botswana – a development which had already started in the pre-independence period.¹ In South Africa, traditional institutions have experienced resurgence and resilience after 1994 despite their previous delegitimisation and instrumentalisation during colonisation and apartheid.² Independently of these different approaches at the time of independence and democratisation, traditional institutions are constitutionally

¹ Cf. Lange, Matthew 2009: *Developmental Crises. A Comparative-Historical Analysis of State-*
² Cf. Oomen, Barbara 2005: *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era*, Oxford/New York, pp. 87-115.

recognised in Botswana and South Africa and exert influence both on the formal and informal level of governance and jurisdiction.

The post-colonial and post-apartheid integration of the institution of traditional leadership was joined by extensive debates in the respective countries and within the academic context. The lack of democratic accountability and elections and control of traditional institutions have remained central topics in Southern Africa. Further discussions arose out of colonial and apartheid legacies which had continuously discredited the institution of traditional leadership.³ Particularly in South Africa, but also beyond, the authenticity of tradition and traditional institutions has been questioned with regard to their previous administrative integration and instrumentalisation, as will be shown. Apart from that, other topics like the promotion of economic and social development as well as rural transformation have dominated research in recent years.

The institutional pluralism has produced various patterns of interaction between the local stakeholders. Generally, the relationship between traditional institutions and representatives of the central and local government structures is marked by a natural competition and the requirement to acquire and safeguard influence, legitimacy and resources. Potential scenarios, particularly at the local level, may cover independent co-existence, institutional interdependency or mutual dependency of the different institutions. Consequently, relations between traditional and governmental institutions range along the continuum between cooperation and mutual support and open or hidden conflicts.⁴ To characterise the relationship between the governance stakeholders in the post-colonial state, Sklar introduced the mixed government model in which the state and traditional leadership constitute two different spheres which

³ Cf. Mamdani, Mahmood 1996: *Citizen and subject. Contemporary Africa and the legacy of late colonialism*, London/Kampala/Cape Town.

⁴ Cf. Ntsebeza, Lungisile 1999: *Land tenure reform, traditional authorities and rural local government in post-apartheid South Africa* (Programme for Land and Agrarian Studies: Research Report, 3), Bellville, pp. 96-107; Vaughan, Olufemi 2003: *Chiefs, Power, and Social Change. Chiefship and Modern Politics in Botswana, 1880s – 1990s*, Asmara/Trenton, pp. 73-92; Werbner, Richard 2004: *Reasonable Radicals and Citizenship in Botswana. The Public Anthropology of Kalanga Elites*, Bloomington, pp. 109-130; Williams, James Michael 2010: *Chieftaincy, the state, and democracy. Political legitimacy in post-apartheid South Africa*, Bloomington/Indianapolis, pp. 143-162.

are relatively autonomous and which complement, support and legitimise each other.⁵

In South Africa, another sensitive consequence of the institutional pluralism has gained increasing relevance in recent years: the control over land and mineral resources. The large platinum reserves in Limpopo and North West in particular have shifted the focus of mining operations from urban centres to rural areas. Where land and mineral rights are administered and managed by traditional institutions on behalf of communities, both opportunities and negative consequences could be observed since the 1990s, as the examples of the Royal Bafokeng or the Bakgatla-ba-Kgafela reveal in North West.⁶

These short introductory notes provide a first impression of the range of topics related to the institutional pluralism in the context of the integration of traditional institutions. They serve as a general overview of the academic and practical relevance and interest of research in this field. The current state of research and the actual focus of this doctoral thesis will be presented in the subsequent sections.

1.1.2 Traditional institutions and institutional pluralism – Origins and definitions

The focal point of this doctoral thesis is constituted by so-called traditional institutions and their post-colonial integration. This term was used above without further reference to its origin or meaning. The present section has several objectives: providing a definition and frame of the term ‘traditional institution’ as it is used in this thesis, identifying major debates and concepts of the distinctive content and character of traditional leadership, and presenting background information on the composition, hierarchy and main features of traditional institutions.

In general, ‘traditional institution’ is used as a collective term to introduce an inclusive and neutral formulation which is valid for the Southern African region.

⁵ Cf. Sklar, Richard 2003: *The Premise of Mixed Government In African Political Studies*, in: Vaughan, Olufemi (Ed.): *Indigenous Political Structures and Governance in Africa*, Ibadan.

⁶ Cf. Claassens, Aninka/Cousins, Ben (Eds.) 2008: *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act*, Cape Town; Manson, Andrew 2013: *Mining and ‘Traditional Communities’ in South Africa's ‘Platinum Belt’: Contestations over Land, Leadership and Assets in North-West Province c.1996–2012*, in: *Journal of Southern African Studies* 39, No. 2, pp. 409-423.

Botswana and South Africa, for example, have different forms of traditional leadership and correspondingly diverse titles for leadership positions. In South Africa, the terms ‘chief’ and ‘tribe’ were abandoned in the post-apartheid legislation due to their previous association with colonialism and segregated rule. Originally introduced by the British, they were replaced in favour of the terms ‘traditional leader’ and ‘traditional community’. In Botswana, the respective categories of traditional leadership were designated with their Tswana⁷ equivalents with the enactment of the Bogosi Act in 2008⁸.

In this doctoral thesis, the term ‘traditional institution’ is used to refer collectively both to the leadership positions along the tribal hierarchy and to the related institutions, like traditional councils or traditional courts. For a more detailed reference to individual levels of leadership and to the legal provisions, either the general designation as traditional leader or the hierarchical terms Paramount Chief, Chief and Headman/Headwoman⁹ are applied in a neutral manner. The decision to retain these terms was made due to the lack of joint definitions in Botswana and South Africa and due to the fact that they correspond to those used in secondary literature on traditional leadership. Another peculiar feature of this thesis is the use of the terms ‘chiefdom’ and ‘traditional community’. A part of the analysis was based on empirical research in a cross-border Tswana chiefdom. Therefore, traditional community is used to refer to the actual local community in each country and chiefdom is used for the overall group under the leadership of the most senior traditional leader.

The Tswana constitute the dominant ethnic group in Botswana. The individual chiefdoms share similar internal structures. The regulatory framework provides for the recognition of Chiefs, Deputy Chiefs, Sub-Chiefs, Chief’s Representatives and Headmen of different grades as well as regents.¹⁰ The term ‘chief’ also includes the highest traditional office of Paramount Chief. The heterogeneous composition of tribal groups in South Africa has led to a variety of organisational structures and

⁷ Setswana is a Bantu language that is spoken by most people in Botswana and by a certain percentage of people in South Africa. It is an official language in both countries.

⁸ The Bogosi Act of 2008 is the present legal frame of traditional leadership in Botswana.

⁹ The respective Tswana terms are *kgosikgolo* for Paramount Chief, *kgosi* (pl. *dikgosi*) for chief and *dikgosana* for headmen.

¹⁰ These definitions were laid down in the Chieftainship Act which was replaced by the Bogosi Act in 2008.

respective terms for the individual hierarchical levels. The present legislation in South Africa determines the following categories of traditional leadership¹¹: Kings and Queens, Senior Traditional Leaders, Headmen and Headwomen and Regents. In contrast with the legal provisions in Botswana, a clear reference to female traditional leadership positions is made.

The legal frameworks on traditional leadership and customary law¹² in Botswana and South Africa deliver initial definitions of internal characteristics of traditional institutions and communities. According to the South African Traditional Leadership and Governance Framework Act, traditional leadership is defined as

“[...] the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practised by traditional communities [...]”.

Moreover, a traditional leader is characterised as

*“[...] any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of this Act [...]”.*¹³

The Bogosi Act defines a ‘tribal community’ as

*“[...] any community or ethnic group, whether or not living within a tribal territory, which is organised in a tribal manner [...]”.*¹⁴

Indigenous institutions of leadership have existed world-wide. Traditional institutions in Southern Africa are usually based on ethnic or tribal affiliation. In many countries, their characteristics were modified by external influences. Tradition as a justification and legitimisation of leadership has been questioned due to colonial and post-colonial interventions. It was debated whether the institution of traditional leadership is a genuine and pre-colonial institution which traces its legitimacy from genealogy and tradition or whether it is solely a neo-traditional construct of the

¹¹ Cf. Section 1(1) of the Traditional Leadership and Governance Framework Act No. 41 of 2003.

¹² Usually oral and unwritten rules and practices of indigenous peoples that have become intrinsic to the conduct and custom of peoples and communities.

¹³ These definitions are provided in Section 1(1) of the Traditional Leadership and Governance Framework Act.

¹⁴ Section 2(1) of the Bogosi Act.

modern state.¹⁵ In this context, the notion of ‘invented traditions’, introduced by Hobsbawm and Ranger in 1983, comes into mind. It relates to historical fictions and constructs of the colonial and post-colonial state but also to the revival of ancient traditions within a modern context, as opposed to genuine and ‘authentic’ but adaptive traditions. Although these processes are universal, they are to be found more often during periods of rapid social transformation.¹⁶

Hobsbawm identified three types of invented traditions¹⁷:

“[...] a) those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities, b) those establishing or legitimizing institutions, status or relations of authority, and c) those whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behaviour.”¹⁸

In an article within the same volume, Ranger describes how British rule in the African colonies attempted to introduce a new form of British identity and how it has invented and constructed ethnic identities, tribes and traditions. In addition, identities and traditions were manipulated by Africans themselves.¹⁹ Similar forms of social construction are encompassed by the related concepts of the ‘creation of tribalism’²⁰ and the ‘making of customary law’ with the latter referring to the adaptation and codification of customary law. This trilogy of concepts stresses the approaches used by British and African leaders to establish authority and hegemony. Nevertheless, Ranger himself has presented the modified concept of ‘imagination of tradition’ in a later article which pays tribute to the multi-dimensional and interactive processes in the British colonies, and the constant reform and reinterpretation of traditions and

¹⁵ See Von Trotha, Trutz 1996: From administrative to civil chieftaincy. Some problems and prospects of African chieftaincy, in: Journal of Legal Pluralism, Nrs. 37-38, pp. 79-90.

¹⁶ See Hobsbawm, Eric 1983: Introduction: Inventing Traditions, in: Hobsbawm, Eric/Ranger, Terence (Eds.): The Invention of Tradition, Cambridge, pp. 4-5.

¹⁷ Hobsbawm defines them as “[...] a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with a suitable historic past.” Hobsbawm 1983: Introduction, p. 1.

¹⁸ Ibid., p. 9.

¹⁹ See Ranger, Terence 1983: The Invention of Tradition in Colonial Africa, in: Hobsbawm, Eric/Ranger, Terence (Eds.): The Invention of Tradition, Cambridge, pp. 211-262.

²⁰ Cf. Vail, Leroy (Ed.) 1989: The Creation of Tribalism in Southern Africa, London.

which emphasises the agency of other actors.²¹ Spear has also warned against overestimating the grade of manipulation by the British in colonial Africa and applying an exclusive focus on the retrospective future of colonised custom or ethnicity:

*"[...] tradition was a complex discourse in which people continually reinterpreted the lessons of the past in the context of the present. Colonial power was limited by chiefs' obligation to ensure community well-being to maintain the legitimacy on which colonial authorities depended. None of these institutions were easily fabricated or manipulated, and colonial dependence on them often limited colonial power as much as facilitating it."*²²

In his famous 'Handbook of Tswana Law and Custom', Schapera provides a valuable description of the institutions and hierarchical orders within a Tswana chiefdom.²³ Among the Tswana, each chiefdom constitutes an individual and separate tribe without being subjected to a superior ruling instance like a king or queen. The lowest level of social organisation is constituted by families and households who form so-called family-groups. A collection of the latter living together in a (part of a) village are referred to as wards *"[...] forming a distinct social and political unit under the leadership and authority of an hereditary headman [...], who has well-defined administrative and judicial powers and functions."*²⁴ Each ward has its own kgotla, the traditional place of assembly and jurisdiction. The ward headmen form the advisory council of the chief and are accountable and responsible to him. Moreover, they act as a channel for internal and official communication. In general, the different actors within the tribal hierarchy perform delegated functions and are responsible to the head of the unit which ranks above them, e.g. the Chief is accountable to the Paramount Chief. The central instance of governance is constituted by the chief and

²¹ See Ranger, Terence 1993: *The Invention of Tradition Revisited: The Case of Colonial Africa*, in: Ranger, Terence/Vaughan, Olufemi (Eds.): *Legitimacy and the State in Twentieth Century Africa*, London, pp. 62-111.

²² Spear, Thomas 2003: *Neo-Traditionalism and the Limits of Invention in British Colonial Africa*, in: *The Journal of African History* 44, No. 1, p. 3.

²³ See Schapera, Isaac 1994: *A Handbook of Tswana Law and Custom*. Compiled for the Bechuanaland Protectorate Administration, reprint edition, Münster, pp. 12-24. This handbook has become a kind of codified version of oral customary law that is still used by certain customary courts.

²⁴ *Ibid.*, p. 19.

his councils.²⁵ Despite some elements of delegation, the chiefdom is marked by a high degree of centralisation.

Generally, the position of a chief is based on hereditary succession to office by birth right.²⁶ Depending on the individual chiefdom, matrilineal and patrilineal forms of succession are applied. Among the Tswana, the institution of traditional leadership is passed from the father to his eldest son or his descendants.²⁷ If the current traditional leader dies, his eldest son automatically assumes the throne. If the successor is still a minor or is not available, the royal family installs a regent, who is usually the next male relative in the line of succession. The chief is surrounded by a group of confidential advisers who are mostly agnates and who assist him in ruling the chiefdom. Moreover, he also has to consult them before he makes or communicates any major decisions to his council or the assembly of male community members.²⁸

Schapera summarises the centrality of the chief as follows:

*“He is the symbol of tribal unity, the central figure round whom the tribal life revolves. He is at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people.”*²⁹

Before the British set up colonial rule and before the introduction of democratic governance in Botswana and South Africa, chiefs used to fulfil the following roles and duties:

- acting as the executive head, spokesperson and representative of the chiefdom
- serving as the formal head of the tribal army and being responsible for peace, law and order in the tribal territory
- regulating and taking care of the social and economic welfare of the chiefdom

²⁵ Cf. Ibid., p. 53.

²⁶ The Tswana expression “*Kgosi ke kgosi ka a tsetswe*” states that “*A chief is a chief because he is born to it*”.

²⁷ See Schapera 1994, pp. 54-57. The strict patrilineal character of the majority of Tswana chiefdoms has changed in recent decades as several women have served as regents. In 2002, the Balete in Botswana have even installed their first female Paramount Chief. See Zips, Werner, 2011: Fashion Design under a Leopard's Skin. Emerging Forms of Complementary Governance in Botswana, in: Weilenmann, Markus/Zips, Werner (Eds.): The Governance of Legal Pluralism. Empirical Studies from Africa and Beyond (Ethnologie: Forschung und Wissenschaft Vol. 12), Berlin/Vienna, pp. 181-212.

²⁸ Cf. Schapera, Isaac 1963: Kinship and Politics in Tswana History, in: The Journal of the Royal Anthropological Institute of Great Britain and Ireland 93, No. 2, pp. 160-161.

²⁹ Schapera 1994, p. 62.

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- presiding over council and kgotla meetings
 - consulting and informing the chiefdom on legislation and matters of public relevance
 - conducting traditional ceremonies, initiation schools and rainmaking rituals
 - organising public work for the benefit of the community
 - determining the distribution and use of land
 - serving as the supreme judge.³⁰

Among the Tswana, the kgotla used to play an important role in the organisation and rule of traditional communities and as the headquarters of the traditional leader and tribal administration. The kgotla meetings were an institution which assembled the adult males of the community who could participate in consensual or majority decision-making under the chairmanship of the Paramount Chief or the headmen. The kgotlas still serve as policy forums and courts. They are the core location of the village assemblies and a place for consultation, information, elections, nominations and jurisdiction.³¹ Assemblies take place at different levels: the main kgotla is the seat of the senior traditional leader or Paramount Chief and the village kgotlas belong to the headmen and headwomen.

Traditional leaders are generally traced back to the first and most senior leader of the chiefdom. Accordingly, this part of the royal family is also the Senior Royal House. Exceptions are to be found, inter alia, in South Africa where the apartheid governments tended to appoint more convenient candidates to be traditional leaders instead of the actual heir, irrespective of heritage or origin. The impact of those arbitrary appointments at different levels of the tribal hierarchy is observable today. The institutionalisation of a special commission aims at resolving historical injustice and royal family disputes. Furthermore, historians and anthropologists are mandated by claimants to examine debated family histories and lineages.³²

³⁰ Cf. *Ibid.*, pp. 68-71.

³¹ See Lekorwe, Mogopodi H. 2011: *The Kgotla and Traditional Leadership in Botswana*, in: Ray, Donald I./Quinlan, Tim/Sharma, Keshav/Clarke, Tacita A. O. (Eds.): *Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development*, Calgary, Alberta, pp. 384-385.

³² This procedure was confirmed by an anthropologist of the University of South Africa and by tribal members who had commissioned experts to investigate claims and lineages. The respective talks and interviews took place in Pretoria and the North West province in August and September 2013.

The scope of research on the integration and role of traditional institutions has increased with the ongoing democratisation in Southern Africa and the emergence of new research priorities in recent years. While the outline and impact of the legal pluralism in Southern Africa have been central in the analysis of traditional leadership, equal attention was not paid to the institutional pluralism. The majority of studies focus on the general and formal role of traditional institutions in single or plural states or on in-depth case studies of particular effects at local or national level. There is still a lack of comparative approaches which extend the scope of the research by adding a cross-border perspective to the in-depth analysis of different localities.

The present section introduces representative works on traditional leadership and institutional pluralism in Southern Africa that address the main aspects and reflect the divergent positions of advocates and critics of a formal integration of traditional institutions. The inclusion of indigenous and other non-governmental actors and the harmonisation of democratic and 'non-democratic' governance have been subject of extensive academic and practical debate.³³ Two fundamental perspectives form the cornerstones of the opposing positions, namely the school of democratic pragmatism, or the modernist view, and the school of organic democracy, also known as the traditionalist view.³⁴ The former argues, in line with liberal tradition, that the institution of traditional leadership is not compatible with elected governance systems. Traditional leadership has received its powers from the colonial and apartheid governments and has managed to maintain it through political strategies. It

³³ See for example Logan, Carolyn 2008: *Traditional Leaders in Modern Africa. Can Democracy and the Chief co-exist?* Afrobarometer Working Paper No. 93; Logan, Carolyn 2009: *Selected chiefs, elected councillors and hybrid democrats: popular perspectives on the co-existence of democracy and traditional authority*, in: *The Journal of Modern African Studies* 47, No. 1, pp. 101-128; Weilenmann, Markus/Zips, Werner (Eds.) 2011: *The Governance of Legal Pluralism. Empirical Studies from Africa and Beyond* (Reihe Ethnologie: Forschung und Wissenschaft Vol. 12), Berlin/Vienna.

³⁴ An introduction of the contrary schools of thought is provided by Sithole, Mpilo Pearl 2005: *The Secular Basis of Traditional Leadership in KwaZulu-Natal*, in: *Alternation. Interdisciplinary Journal for the Study of the Arts and Humanities in Southern Africa* 12, Special Edition No. 2, pp. 102-122; Sithole, Mpilo Pearl/Mbele, Thamsanqa 2008: *Fifteen Year Review on Traditional Leadership. A Research Report*, Human Sciences Research Council.

contradicts basic norms and principles of democracy and human rights and should therefore be abolished in the democratic dispensation.³⁵

The school of organic democracy, on the other hand, regards the institution of traditional leadership as a special form of democracy serving alternative needs of the people governed by this system. Representatives of this school have argued that traditional leadership predates colonialism and apartheid and is not an invented, but is rather a persistent institution which has adapted to its changing environment. Emphasis is put on cultural-moral principles and features of traditional leadership which close gaps of conventional Western democratic governance. The institution of traditional leadership is seen as an effective and unique form of democracy at grassroots level which can legitimately exist in a modern democratic society and contribute to development without compromising democracy. Nevertheless, the institution needs to be democratised and developed.³⁶

With his book 'Citizen and Subject'³⁷, Mamdani revived the debate on obstacles to democratisation in Southern Africa and the continuance of colonial legacies in a democratic dispensation. The study deals with the critical dichotomy of civil and customary power and the resulting divergent rule over citizens in the centre and subjects in the periphery, as he describes the prevailing situation. For Mamdani, the present integration of traditional institutions in Southern Africa resembles historical modes and structures, resulting in a continued bifurcation of the post-colonial state and a missing link between the urban and the rural spheres. He labels the institutional pluralism in its contemporary form as decentralised despotism deriving from indirect rule during colonialism and its subsequent apartheid version.³⁸ Many Southern African states have failed to eradicate this decentralised despotism as democratisation has not reached the local level. Other states, however, which have adopted far-reaching reforms, have often created a centralised despotism instead.³⁹

³⁵ Authors and researchers representing this school are, inter alia, Ben Cousins, Thomas Koelble, Mahmood Mamdani and Lungisile Ntsebeza whose assessments and perspectives are included in this thesis.

³⁶ Cf. Dipholo, Kenneth B./Tshishonga, Ndwakhulu/Mafema, Eve 2014: Traditional Leadership in Botswana: Opportunities and challenges for enhancing good governance and local development, in: *The Journal of African & Asian Local Government Studies* 3, No. 2, pp. 19-21.

³⁷ Cf. Mamdani 1996.

³⁸ See Mamdani's description of the colonial and apartheid instrumentalisation of local governance in rural areas: Mamdani 1996, pp. 37-102.

³⁹ Cf. *Ibid.*, pp. 102-108.

While urban areas in South Africa were historically dominated by racial segregation, rule in the rural areas was based on ethnicity or tribalism and characterised by the enforcement of customary law. A continuance of these former ways of domination and a problematic impact of the institutional pluralism is displayed in the post-apartheid dispensation, where rural people are still subjected to the despotic rule of traditional institutions and the urban population is governed democratically by governmental institutions. In this dispensation, Mamdani attributes traditional institutions' legitimacy only to central government providing them with a formal role in a democratic South Africa.⁴⁰

Although Mamdani has contributed a thorough theoretical framework of the contemporary institutional pluralism in post-colonial Southern Africa, 'Citizen and Subject' has also received criticism for being too rigid and lacking originality in certain regards. Additionally, the study fails to capture the exceptionality of the historical and present role of traditional institutions in individual countries.⁴¹

Ntsebeza's research also addresses the post-apartheid dispensation and the critical integration and empowerment of traditional institutions in South Africa. A first impression of his general assessment is given by the title of his book 'Democracy Compromised'. He examines the background of the persistence and strengthening of traditional institutions by the African National Congress (ANC) after 1994 and thereby the transformation of the former apartheid tribal authorities⁴², particularly in rural areas. A major focus of his work lies on the linkage between the role of traditional institutions and control over land.⁴³ In line with Mamdani, Ntsebeza denies the existence of an independent legitimacy basis of traditional institutions and attributes their present role to the power over land and resource exploitation which

⁴⁰ Cf. Mamdani 1996. pp. 284-294.

⁴¹ See for example Austen, Ralph A. 1999: Review of Mahmood Mamdani 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism', in: *Law and History Review* 17, pp. 406-408; Chege, Michael 1997: Review of Mahmood Mamdani 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism', in: *African Studies Quarterly* 1, No. 1, pp. 47-51; Hemson, David 1998: *The Worm in the Bud: The Divided African State*; Mahmood Mamdani: *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, in: *Alternation. Interdisciplinary Journal for the Study of the Arts and Humanities in Southern Africa* 5, No. 1, pp. 240-255; Keulder, Christiaan 2010: *Traditional Leaders*, in: Keulder, Christiaan (Ed.): *State, Society and Democracy. A Reader in Namibian Politics*, Windhoek, pp. 150-151.

⁴² Tribal authorities constituted an essential element of governance in the homelands.

⁴³ Ntsebeza, Lungisile 2005: *Democracy Compromised. Chiefs and the Politics of the Land in South Africa*, Leiden/Boston.

enables them to exercise local authority.⁴⁴ Efficient democratisation in rural areas will only be realised with the exclusion of traditional institutions from political decision-making processes and the banning of a system of indirect rule over subjects instead of citizens. Ntsebeza concludes that the constitutionally provided pluralism of elected democratic and hereditary traditional institutions in connection with land management in the hands of the latter impedes the efficient institutionalisation and functioning of local government in South Africa.⁴⁵

Oomen analysed the national and international context of the resurgence of traditional institutions and the recognition of customary law in South Africa after 1994. She identified political and strategic processes at national level, the international reinforcement of cultural rights as well as internal dynamics and the adaptability of tradition as decisive factors.⁴⁶ At the end of apartheid, traditional institutions were facing potential marginalisation and delegitimation due to their role in the homelands and instrumentalisation of arbitrarily appointed traditional leaders. The strategic work of the Congress of Traditional Leaders of South Africa (CONTRALESA)⁴⁷ and their allegiance with the ANC during the transition period, as well as the commitment of individual traditional leaders, not only contributed to a strengthening of their legitimacy basis in the areas examined but have even brought up forms of retraditionalisation.⁴⁸ On the other hand, Oomen also pointed out the

⁴⁴ Cf. Ntsebeza, Lungisile 1999: Democratization and Traditional Authorities in the New South Africa, in: *Comparative Studies of South Asia, Africa and the Middle East* 19, No. 1, pp. 83-93; Ntsebeza, Lungisile 2003: Traditional Authorities, Local Government and Land Right, in: Ray, Donald I./Reddy, P. S. (Eds.), *Grassroots Governance? Chiefs in Africa and the Afro-Caribbean*, Calgary, pp. 173-225.

⁴⁵ Cf. Ntsebeza 1999: Land tenure reform; Ntsebeza 2003, pp. 173-225.

⁴⁶ Cf. Oomen 2005: Chiefs in South Africa; Oomen, Barbara 2005: McTradition in the New South Africa: Commodified Custom and Rights Talk with the Bafokeng and the Bapedi, in: Benda-Beckmann, Franz von/Benda-Beckmann, Keebet von/Griffiths, Anne (Eds.): *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*, Aldershot, pp. 91-110.

⁴⁷ CONTRALESA is a non-governmental organisation in South Africa, founded in 1987 by some traditional leaders of the former homeland of KwaNdebele and supported by the United Democratic Front and the ANC. CONTRALESA was an initiator of anti-apartheid mobilisation in the homelands and has redefined its role since then to safeguarding and increasing the rights of traditional leaders.

⁴⁸ Cf. Oomen, Barbara 2000: "We Must Now Go Back to our History". Retraditionalisation in a Northern Province Chieftaincy, in: *African Studies* 59, No. 1, pp. 71-95; Oomen 2005: Chiefs in South Africa.

strong differences in the actual level of support of traditional institutions and highlights local conflict scenarios.⁴⁹

Williams focused his research in KwaZulu Natal on additional criteria that promoted the resilience of traditional institutions. He addresses their contribution to the democratisation process, particularly during local elections. He thereby examines the relationship between the state at national level, the institution of traditional leadership and the rural population in post-apartheid South Africa. For him, the legitimacy of traditional institutions is based on performance and the moral attributes of the institution itself, especially as a symbol of unity and harmony. Williams sees the principles and values connected with traditional institutions as the foundation of the compatibility of traditional and democratic governance in South Africa.⁵⁰ Unity as dominating concept not only determines the internal structures of traditional communities, but also the relations between traditional institutions and the respective community members. Williams additionally applies this concept on the political processes and hierarchies of the post-apartheid state.⁵¹

The treatment and formal integration of traditional institutions in Botswana stands in sharp contrast to their situation in South Africa. Sharma and Vaughan both trace the marginalisation of traditional institutions during decolonisation and democratisation and illustrate the dichotomies and tensions in rural and urban areas between governmental and traditional actors.⁵² The lack of incorporation of traditional institutions into governmental structures since independence is, according to Vaughan, one of the reasons for the significant power and authority they can exert at local level. The differences between the formal and informal role of traditional institutions also affect the functioning of and the relation to governmental institutions. Vaughan additionally identifies the strong divergence of state and society, the lacking national unity and the weak civil society in Botswana as factors which contribute to the role of traditional institutions, especially in predominantly

⁴⁹ Cf. Oomen, Barbara 2003: 'Walking in the Middle of the Road'. People's Perspectives on the Legitimacy of Traditional Leadership in Sekhukhune, in: Vaughan, Olufemi (Ed.), *Indigenous Political Structures and Governance in Africa*, Ibadan, pp. 83-131.

⁵⁰ Cf. Williams, James Michael 2004: *Leading from behind: democratic consolidation and the chieftaincy in South Africa*, in: *The Journal of Modern African Studies* 42, No. 1, pp. 113-136; Williams 2010.

⁵¹ Cf. Williams 2010.

⁵² Cf. Sharma, Keshav C. 2005: *Role of traditional structures in local governance for local government. The Case of Botswana*, Community Empowerment and Social Inclusion Program (CESI), World Bank Institute, Washington; Vaughan 2003.

rural areas.⁵³ Despite initial conflicts after independence, Sharma, on the other hand, considers traditional institutions as an integral part of the local governance structures which can contribute to democratisation and development at local level. Due to their vital role in the communities and the respect they still enjoy at grassroots level, they provide valuable services and function as link between government and society.⁵⁴

Following the anthropological research of Schapera in Southern Africa,⁵⁵ Comaroff has, *inter alia*, examined customary law and the internal structures of the Tswana in (post-)colonial Botswana and South Africa.⁵⁶ Together with Roberts he shows how competition, political discourse and transformation determine the legitimacy and authority of traditional leaders. Performance and actions of individual traditional leaders are constantly evaluated by traditional communities. These processes immanent to the political culture of the Tswana not only influence the legitimacy of traditional leaders, but also their scope of action and authority in the community.⁵⁷ Comaroff additionally highlights how this culture has shaped the understanding of democracy in Botswana. Furthermore, in his analysis of the Barolong-boo-Ratshidi, a chiefdom in the borderlands of South Africa, he points to the discrepancy between the political processes inherent to Tswana chiefdoms, like constant succession disputes, and the homeland structures in former Bophuthatswana, where traditional institutions were partly appointed and dependent on government support.⁵⁸ John and Jean Comaroff later addressed another feature that is also of relevance in the context of the two study countries, namely the corporatization of ethnicity and culture. Prominent examples from Southern Africa were the Bafokeng in the Rustenburg area

⁵³ Cf. Vaughan 2003, 167-176.

⁵⁴ Cf. Sharma, Keshav C. 2003: *Traditional Leadership and Rural Local Government in Botswana*, in: Ray, Donald I./Reddy, P. S. (Eds.), *Grassroots Governance? Chiefs in Africa and the Afro-Caribbean*, Calgary, pp. 249-262; Sharma, Keshav C. 2010: *Role of local government in Botswana for effective service delivery: Challenges, prospects and lessons*, in: *Commonwealth Journal of Local Governance* 6, July, pp. 135-142.

⁵⁵ Cf. Schapera, Isaac 1976: *The Tswana*, London; Schapera, Isaac 2004: *The ethnic composition of Tswana tribes*, 2nd edition, Oxford.

⁵⁶ Cf. Comaroff, John L. 1978: *Rules and Rulers: Political Processes in a Tswana Chiefdom*, Man 13; Comaroff, Jean/Comaroff, John L. 1997: *Of Revelation and Revolution: The Dialectics of Modernity on a South African Frontier*, Vol. 2, Chicago.

⁵⁷ Cf. Comaroff 1978; Comaroff, John L./Roberts, Simon A. 1981: *Rules and processes: The cultural logic of dispute in an African context*, Chicago.

⁵⁸ Cf. Comaroff, John L. 1974: *Chiefship in a South African Homeland: A Case Study of the Tshidi Chiefdom of Bophuthatswana*, in: *Journal of Southern African Studies* 1, No. 1, pp. 36-51; Comaroff, Jean/Comaroff, John L. 1997: *Postcolonial Politics and Discourses of Democracy in Southern Africa: An Anthropological Reflection of African Political Modernities*, in: *Journal of Anthropological Research* 53, No. 2, pp. 123-46.

and the San, who form part of the non-Tswana minority in Botswana. The San have inter alia become prominent by capitalizing on intellectual property rights and indigenous knowledge. The Bafokeng have gone further by reconfiguring themselves as tribal holding company and nation that is financed by ethnic capital and that revitalizes group identities.⁵⁹

Another approach has been taken by Gulbrandsen in his book ‘The State and the Social’ in which he traces state formation and its genealogies in Botswana.⁶⁰ In this vein, he discusses how the post-colonial state was strengthened by integrating and controlling ethnicity and traditional leadership. Pre-colonial political and social structures based on tribal entities have facilitated the evolution of a strong central state at the end of colonialism. Gulbrandsen elaborates on the influence and impact of particular traditional leaders of the major Tswana chiefdoms before and after independence. This also includes the royal background and efforts of Botswana’s first President Seretse Khama, who was a driving factor in marginalising chiefly power in the 1960s and 1970s.⁶¹ Traditional institutions have nevertheless managed to retain an important role in the traditional courts, as opponents to government policy and by providing a non-political forum in the village kgotlas throughout the country.⁶²

In his book, Gulbrandsen also makes reference to the social, economic and political features of the Bakgatla-ba-Kgafela, the case study of this analysis. This encompasses a discussion of the cross-border context of the chiefdom and the problematic relationship between government and the present Paramount Chief Kgafela II, as well as the different amount of support traditional leadership receives in Botswana and South Africa. Gulbrandsen’s analysis additionally discusses the role and impact of cattle and mineral resources in Botswana’s state formation process – a topic which is also of major relevance to the Bakgatla-ba-Kgafela.⁶³

It is also important to point to the work of Capps and Mswana of the University of the Witwatersrand, who are members of an extensive research project on mining and

⁵⁹ Cf. Comaroff, John L./Jean Comaroff 2009: *Ethnicity, Inc.*, Chicago.

⁶⁰ Cf. Gulbrandsen, Ørnulf 2012: *The State and the Social: State Formation in Botswana and Its Precolonial and Colonial Genealogies*, New York/Oxford.

⁶¹ Cf. *Ibid.*, pp. 97-104.

⁶² Cf. *Ibid.*, pp. 238-250.

⁶³ Cf. *Ibid.*, pp. 148-161.

rural transformation. They have provided critical empirical results from the platinum mining communities under traditional leadership, among them the Bafokeng and the Bakgatla-ba-Kgafela.⁶⁴

Further reference to particular debates on current research topics and on the institutional pluralism in Southern Africa in general will be made in the subsequent sections. Despite of the far-reaching scope of the studies, certain perspectives and features in this context have not been examined thoroughly yet, as will be shown.

1.2 Main aims of the research – Special focus and guiding hypotheses

The integration of traditional institutions and the establishment and resilience of pluralistic legal and institutional structures in Southern Africa have been a widely debated and analysed part of contemporary academic work. Nevertheless, there is still an even increasing need of comparative empirical research on the formal and informal role of traditional institutions with a clear emphasis on the institutional pluralism. Particularly with regard to specific topics like, inter alia, decentralisation, rural transformation or land tenure, the focus of the research on traditional institutions needs to be shifted from their mere legal integration to the local realities and the consequences of the institutional pluralism. Additionally, a cross-border perspective of the phenomenon is still lacking.

The doctoral thesis will extend the current discussion on the integration of traditional institutions by closing research gaps presented above. Major aims are directed to the analysis of the impact of the formal institutional pluralism on the actual and informal role of traditional institutions at grassroots level and beyond. This will also include the challenges and potentials arising out of these constellations and provisions and the long-term effects for traditional institutions and communities as well as for the local government system. With regard to the cross-border context, the analysis will further focus on traditional communities and institutions which are exposed to divergent legal and institutional frameworks in Southern Africa.

⁶⁴ See for example Mswana, Sonwabile 2014: Mineral wealth – ‘in the name of morafe’? Community control in South Africa’s ‘Platinum Valley’, in: *Development Southern Africa* 31, No. 6, pp. 826-842; Capps, Gavin 2016: Tribal-Landed Property: The Value of the Chieftaincy in Contemporary Africa, in: *Journal of Agrarian Change* 16, No. 3, July, pp. 452-477.

The research will be based on an in-depth case study of a single Tswana chiefdom located in Botswana and in South Africa. Contrasting previous research, the doctoral thesis combines a local and a cross-border perspective. This special comparative approach of conducting research on two different entities of the same chiefdom has been chosen to control factors like ethnicity and the impact of individual traditions and features of tribes which may have an influence on the dispensation at local level and thereby on the outcome of the research. By eliminating these influencing factors and by examining a chiefdom with a common history, ethnic identity and culture, it becomes possible to analyse the impact of the legal and institutional set-up on the formal and informal role of traditional institutions at different levels of the state.

The research will be guided and structured by the following hypotheses which provide the overall frame and which channel the topics that will be analysed. Nevertheless, they shall not limit the research but rather serve as general assumptions as the focus clearly lies on the generation of empirical data.

The first hypothesis is based on the presupposition that the formal set-up and integration of traditional institutions remains the decisive frame of their scope of action. Despite of other influencing factors, it is assumed that they are all of minor relevance in comparison to these formal determinants.

The formal institutional pluralism determines and limits the actual role and influence traditional institutions exert at the local level.

The second hypothesis is motivated by the preliminary assessment that traditional institutions have been modified by the institutional pluralism to an extent which contrasts their customary and traditional roles. The new version of traditional leadership manifested in the legislative frameworks impacts significantly on the internal structures and mechanisms of traditional communities.

The institutional pluralism and formal integration produce altered forms of traditional leadership which eradicate essential features of chiefdoms and endanger the cohesion of traditional communities.

The third hypothesis deals with the plurality of institutions working at the local level. Despite of this increase of contact points and forums down to the grassroots level and the potential closure of representation gaps, it is assumed that the present structures do not improve participatory mechanisms and performance.

The institutional pluralism under the present legal frameworks increases the number of formal actors at local level without enhancing efficiency, consultation and participation of the community.

The fourth and final hypothesis refers to the characteristic features of present leadership. It implies that traditional institutions, while aligning with modernisation and democratic governance, selectively resort to traditional elements and the revival of certain traditional features as instruments to maintain their influence and relevance.

Traditional institutions strategically balance elements of modernisation and retraditionalisation to increase and maintain their legitimacy basis and authority at local level.

In the subsequent sections, the methodological framework will be introduced and the background of the case study of the Bakgatla-ba-Kgafela will be presented.

1.3 Research design and data collection

1.3.1 Design of the research – The framework

Two main research lines will be pursued in this doctoral thesis to examine the hypotheses and assumptions regarding the institutional pluralism and the role of traditional institutions in Botswana and South Africa. The thesis encompasses a theoretical part focusing on the legislation and relevant literature on the institutional pluralism and related sub-topics. In addition, empirical field research in both countries will constitute a second major area of examination.

The analysis of the regulatory framework on governance and jurisdiction in Botswana and South Africa is pivotal to the background and basic part of the research. This refers to the respective constitutional provisions and legislation on local government, traditional leadership, customary law and courts. Furthermore, legislation on related topics, among them land allocation and resource management, is integrated. This part of the doctoral thesis is complemented by the analysis of official governmental documents, like roadmaps, reports of enquiries and programmes. Some of the major studies on traditional institutions and institutional pluralism were already introduced in the section on the current state of research. Further secondary literature will provide the necessary background on the historical

and contemporary dispensation in both countries. Finally, this theoretical analysis will be compared to and set in relation to the data and results generated during the field research in Botswana and South Africa.

The empirical research will form the central part of the doctoral thesis. This approach is attributed to the divergent consequences of the integration of traditional institutions. The institutional design and actual impact of the role of traditional institutions are often the result of particular local constellations which cannot be deduced from the formal legal and institutional set-up, and which have to be analysed in their respective context. Furthermore, informal patterns and structures established at grassroots level might eventually become the basis of rules which are institutionalised and formalised at the national level. Additional factors like the geographical context, leadership qualities and resources of traditional institutions further shape the institutional pluralism in individual countries. A mere analysis of the legal and formal set-up would therefore not be sufficient to record and understand actual developments and local realities.

With regard to the stakeholders involved in and affected by the institutional pluralism in Botswana and South Africa, an approach which covers the different levels of governance and jurisdiction in both countries had to be selected. The choice of the perspective thereby not only determines the range of methodology and the general research design, but also limits its results.⁶⁵ In the case of this thesis, a sole focus on the macro level would have left out local dynamics, the impact of individual leadership qualities and the direct effects in the respective traditional communities. An exclusive focus on the micro level would have also delivered incomplete research results, as certain processes at local level are interlinked with the regional and national level and individual aspects even transcend the national policy-making context. Additionally, the research had to cover multiple localities in urban and rural settings and had to integrate a transnational perspective as well.⁶⁶ Consequently, a

⁶⁵ Cf. Bradley, Jana 1993: Methodological Issues and Practices in Qualitative Research, in: *The Library Quarterly* 63, No. 4, Symposium on Qualitative Research: Theory, Methods, and Applications, pp. 437-439.

⁶⁶ As Marcus states, the concept of multi-sited ethnography not only combines plural research sites but has also initiated a methodological shift and a tendency towards more complex interdisciplinary arenas of research. With this concept, interactions across and connections between multiple and related sites can be embedded. See Marcus, George E. 1995: *Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography*, in: *Annual Review of Anthropology* 24, pp. 95-117.

combination of multiple localities and the macro level – the multi-sited field approach – was chosen.⁶⁷

The empirical research was based on an ethnographic approach. Several reasons have led to the choice of qualitative and ethnographic instead of quantitative methodology. The different aspects of the research topic require a rather open and explorative process to generate data and information on the impact of the institutional pluralism in Botswana and South Africa. The hypotheses and general assumptions presented above have mainly marked the overall frame of the research but have not excluded an extension or shift of the focus.⁶⁸ To this end, the qualitative research design has offered a greater openness towards the research topic and a dynamic inclusion of additional data during the research process. Moreover, this flexibility further included the methodological range of the research. Finally, an ethnographic approach seemed to facilitate the entrance into the research field.

The original research plan combined both participant and non-participant observations and different forms of qualitative interviews.⁶⁹ Qualitative interviews, in particular open and less structured ones, enable the researcher to react in a more flexible way and to integrate new information, while the respondent, on the other hand, may raise own topics which were not considered or which were underrated previously.⁷⁰ Under certain circumstances, however, the researcher might need to prioritise information and to channel the direction of the interview. The timeframe for the empirical research in Botswana and South Africa was restricted to a period of three months in each country.⁷¹ Qualitative research seemed to be more appropriate in getting familiar with processes at local level, identifying potential key informants and respondents, creating confidence and a more open relationship between interviewer and interviewee. Furthermore, certain topics related to the role of

⁶⁷ Cf. Glaser, Barney J./Strauss, Anselm 1971: *The Discovery of Grounded Theory – Strategies for Qualitative Research*, Chicago/New York; Strauss, Anselm/Corbin, Juliet 1996: *Grounded Theory: Grundlagen Qualitativer Sozialforschung*, Weinheim.

⁶⁸ See Bradley on the iterative process of data collection and analysis during qualitative research: Bradley 1993, p. 444.

⁶⁹ Cf. Lüders, Christian 2000: *Beobachten im Feld und Ethnographie*, in: Flick, Uwe/von Kardorff, Ernst/Steinke, Ines (Eds.): *Qualitative Forschung*, Reinbek, pp. 393-396.

⁷⁰ Cf. Heyink, J. W./Tymstra, TJ 1993: *The Function of Qualitative Research*, in: *Social Indicators Research* 29, No. 3, pp. 294-296.

⁷¹ See Horst's discussion of the problems of in-depth research in multiple localities: Horst, Cindy 2009: *Expanding Sites: The Question of 'Depth' Explored*, in: Falzon, Mark-Anthony (Ed.): *Multi-sited Ethnography: Theory, Praxis, and Locality in Contemporary Research*, Aldershot, pp. 119-133.

traditional institutions in Botswana and South Africa, like discrimination or conflicts at local level, were of a sensitive or emotional nature and required a more personal approach.⁷²

Depending on the research field and the respective stakeholders involved, different forms of qualitative interviews formed part of the research design. Expert interviews were planned with representatives of the local government institutions and the local court system. Apart from the local level, the research plan also included interviews with representatives of the relevant ministries in both countries. Further expert interviews were scheduled with researchers from the universities in Gaborone, Johannesburg and Pretoria, particularly with those working on legal pluralism, customary law and history of the Tswana.⁷³

Furthermore, the research design included semi-structured guideline interviews with traditional institutions and with members of institutions representing traditional leadership at regional or national level. They encompassed traditional leaders of the different hierarchical levels of the tribal administration as well as representatives of the Houses of Traditional Leaders.⁷⁴ To cover the experiences and opinions of the local population affected by the impact of the institutional pluralism, ethnographic interviews were planned with members of traditional communities and other relevant stakeholders in Botswana and South Africa.⁷⁵

Additionally, participant and non-participant observations in both traditional communities formed part of the research plan. The observations served a supportive function in the research process. They were scheduled during occasions reflecting the day-to-day life in traditional communities and during particular traditional or public events. With the help of these observations, the interactions and relations of traditional and state institutions as well as the local population were to be analysed.⁷⁶

⁷² See Heyink/Tymstra 1993, pp. 300-302; Schensul, Stephen L./Schensul, Jean J./LeCompte, Margaret D. 1999: *Essential ethnographic methods: Observations, interviews, and questionnaires (Ethnographer's Toolkit, Book 2)*, Walnut Creek, CA, p. 91.

⁷³ Cf. Flick, Uwe 2011: *Qualitative Sozialforschung. Eine Einführung*, Reinbek bei Hamburg, pp. 214-219.

⁷⁴ Cf. Helfferich, Cornelia 2009: *Die Qualität qualitativer Daten. Manual für die Durchführung qualitativer Interviews*, Leverkusen.

⁷⁵ Cf. Flick 2011, pp. 227-238; Girtler, Roland 2001: *Methoden der Feldforschung*, Wien/Köln/Weimar, pp. 147-168.

⁷⁶ Cf. Flick 2011, pp. 281-303; Girtler 2001, pp. 83-106.

They aimed to include the traditional village assemblies in the kgotla as well as local events involving traditional institutions and members of the traditional communities.

1.3.2 The Bakgatla-ba-Kgafela – Introduction of the case study

The doctoral thesis pursues a comparative and cross-border approach and is based on in-depth research in Botswana and South Africa. The Sotho-Tswana chiefdom of the Bakgatla-ba-Kgafela⁷⁷ has been chosen as subject of the case study. Throughout Botswana and South Africa, four additional branches of Bakgatla chiefdoms exist, with the Bakgatla-ba-Kgafela⁷⁸ being the only chiefdom that straddles an international border.⁷⁹ In Botswana, they are one of the eight principal Tswana tribes which used to be constitutionally recognised⁸⁰, whereas recognition of individual tribes is not common in South Africa. The Bakgatla-ba-Kgafela have faced divergent changes and challenges due to their location in two different countries which offer valuable starting points for further research on the institutional pluralism in Botswana and South Africa.

The choice of this particular case study was motivated by the following aspects. Firstly, there are only few cross-border chiefdoms in the Southern African region which are still united and centrally governed by one single traditional leader. Secondly, the subject communities of the case study needed to have a significant size and relevance on both sides of the border, which the Bakgatla do offer. Thirdly, the law of Botswana does not recognise authority of a traditional leader outside the country over a tribe in Botswana while in the case of the Bakgatla-ba-Kgafela, the Paramount Chief rules over a section of the Bakgatla in South Africa.

In addition to those more general features, the Bakgatla-ba-Kgafela illustrate a variety of potential consequences of the institutional pluralism due to their historical and present development in Botswana and in South Africa. The location of the

⁷⁷ Different spellings can be found in historical and contemporary literature, e.g. Bakgatla-Ba-Kgafela, Bakgatla-baga-Kgafela, Bakgatla ba Kgafela. In this doctoral thesis, the spelling Bakgatla-ba-Kgafela is used which is also the official name for the tribal administration in Botswana and South Africa.

⁷⁸ In this doctoral thesis, the short form 'Bakgatla' solely refers to the chiefdom of the Bakgatla-ba-Kgafela.

⁷⁹ The other branches are the Bakgatla-ba-Mmanaana, the Bakgatla-ba-Mmakau, the Bakgatla-ba-Mosetlha, and the Bakgatla-ba-Motsha.

⁸⁰ See Section 78 of the Constitution of Botswana prior to 2008. Further constitutional reference was given to the Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa.

central locus in Botswana enables the analysis to follow the long-term integration and changing nature of traditional leadership in a democratic dispensation. Additionally, the impact of apartheid in the homeland Bophuthatswana and in democratic Botswana can be examined within the cross-border context, thereby contributing to previous research which has predominantly encompassed the role of traditional institutions as part of the homeland structures. Further aspects refer to the official governmental recognition in Botswana as well as to the implications of land rights in South Africa.

In Botswana, the rural Kgatleng District, close to the capital city of Gaborone, is home to the Bakgatla-ba-Kgafela. The tribal administration of the Bakgatla is based in the district capital Mochudi. Mochudi is also the regional headquarters for central and local government and the seat of the Magistrate Court. Since 1871, Mochudi has been the central locus of the chieftdom where both the Paramount Chief and the senior royal family reside. In South Africa, the Bakgatla chieftdom belongs to the Moses Kotane Local Municipality, which forms part of the Bojanala Platinum District in the North West province. The headquarters and tribal administration are located in Moruleng/Saulspoort, around fifteen kilometres away from the municipal capital Mogwase.

The Bakgatla-ba-Kgafela originate from the area of north western Pilanesberg in the former Transvaal. After years of social upheaval and conflict during the period of the so-called Difaqane⁸¹, the formerly scattered parts of the tribe regrouped and strengthened in the early 19th century.⁸² In 1852, the Transvaal became the South African Republic, governed by the Boers.⁸³ Originally, relations between the members of the chieftdom and the Boers in the region were cooperative. The tribal leadership used to provide free labour and support in raids to the Boers and would

⁸¹ The term refers to a period of warfare and forced migration of ethnic communities in the first half of the 19th century. Cf. Lye, William F. 1967: The Difaqane: The Mfecane in the Southern Sotho Area, 1822-24, in: *The Journal of African History* 8, No. 1 pp. 107-131.

⁸² Cf. Morton, R. F. 1985: Chiefs and Ethnic Unity in two Colonial Worlds. The Bakgatla Baga Kgafela of the Bechuanaland Protectorate and the Transvaal 1872-1966, in: Asiwaju, A. I. (Ed.): *Partitioned Africans. Ethnic Relations across Africa's International Boundaries 1884-1994*, London, pp. 128-130; Schapera, Isaac 1980: *A History of Bakgatla-bagaKgafela*, Phuthadikobo Museum, Mochudi, pp. 7-9.

⁸³ See Sand River Convention of 17 January 1852. With this convention, the British granted independence to the South African Republic.

enjoy certain concessions and privileges in return.⁸⁴ In 1869, Paramount Chief Kgamanyane refused to fulfil the forced labour requirement of the Boers for a dam project. As a sanction for his refusal, he was publicly flogged by the Commandant-General of the Transvaal, Paul Kruger. Consequently, the tribal leadership and further members of the chiefdom left the Pilanesberg area to resettle in contemporary Botswana in 1871.⁸⁵

Subsequent to his migration and death, Kgamanyane was succeeded by his son Linchwe I who ruled over both parts of the chiefdom until 1920. In the course of the defeat of the Boers in the South African War, where the Bakgatla had fought on the side of the British, Linchwe tried to receive formal recognition as Paramount Chief of both Bakgatla communities.⁸⁶ His request was denied and he had to appoint a regent in Moruleng to rule on his behalf.⁸⁷

For the context of the analysis, the leadership periods after Botswana's independence in 1966 are of major relevance. They cover the reign of Linchwe II, who ruled the Bakgatla-ba-Kgafela from 1963 until his death in 2007, and of his son Kgafela II, the present Paramount Chief. Apart from his traditional office, Linchwe II served as the Botswanan Ambassador to the US and worked as President of the Customary Court of Appeal from 1991 to 2007.⁸⁸ From 1948 to 1993, Tidimane Pilane acted as regent in South Africa. During their individual periods of leadership, both Tidimane and Linchwe had witnessed the impact of colonialism, apartheid and democratisation.⁸⁹ In 1993, Tidimane Pilane was forced to retire and the appointment of the present leader Nyalala Pilane by Linchwe II started a severe succession dispute which needed to be settled in the High Court of Bophuthatswana. During Tidimane's leadership, formal relations between the Bakgatla-ba-Kgafela in Botswana and South

⁸⁴ Cf. Makgala, Christian John 2009: History of the Bakgatla-baga-Kgafela in Botswana & South Africa, Pretoria, pp. 88-89.

⁸⁵ Cf. Schapera 1980, pp. 10-13.

⁸⁶ For an overview of the role of the Bakgatla in the South African War, see Morton, R. Fred 1985: Linchwe I and the Kgatla Campaign in the South African War, 1899-1902, in: *The Journal of African History* 26, No. 2, pp. 169-191.

⁸⁷ Interview conducted with a senior royal family member and male representative of the tribal administration in Mochudi, 27/06/2013 (INT 05-1).

⁸⁸ During Linchwe's absence from his office as Paramount Chief, Kgosi Mmusi Kgafela Pilane acted as his regent from 1969 to 1972 and from 1991 to 1999. From 1999 to 2007, Kgosi Mothibe Linchwe took over the regency. See Ramsay, Jeff 2006: Kgosi Mmusi aKgafela aLinchwe aPilane (1914-2006), in: *Sunday Standard*, 15 June.

⁸⁹ Cf. Barei, Geoffrey 2000: The decline in the role of chieftainship in elections, in: *PULA: Botswana Journal of African Studies* 14, No.1, pp. 69-72; Setshogo, Tumelo 2007: Royal Burial, in: *Mmegi Online* 24, No. 132, 3 September.

Africa were reduced to a minimum and both parts of the chiefdom were ruled autonomously. Tidimane therefore strongly opposed the intervention by Linchwe II. The High Court denied Tidimane's strive for secession and confirmed Linchwe's authority over the Bakgatla in South Africa.⁹⁰

In the last two decades, the Bakgatla in South Africa have prospered due to large platinum metal reserves and land ownership in the Pilanesberg National Park. Royalties paid by global extraction companies and shares in mining ventures on tribal land have increased tribal funds and generated financial autonomy. Due to the economic wealth, questions of legitimacy and internal checks and balances have become vital in Moruleng in recent years.⁹¹

In 2008, the present Paramount Chief Kgafela II succeeded his late father Linchwe II. Under his reign, the Bakgatla in Mochudi and Moruleng have faced serious changes and challenges which have made the chiefdom even more suitable as a case study for this doctoral thesis. Since Kgafela's installment, three major developments have characterised his leadership: attempts of re-traditionalisation and revitalisation of culture and custom both in Botswana and in South Africa; efforts to re-empower and emancipate traditional leadership in Botswana which resulted in a severe clash with government and finally his de-recognition as Paramount Chief by the line ministry.

The main reason for the conflicting relationship between the Paramount Chief and government was Kgafela's opposition to the present formal legal and institutional framework of traditional leadership and the role of the Minister of Local Government.⁹² As a consequence of his de-recognition and ongoing court cases in Botswana, he moved to the Bakgatla headquarters in Moruleng in 2012. In the vein

⁹⁰ Cf. Molopyane, Omphemetse 2012: Battle for Bakgatla-Ba-Kgafela leadership, in TNA: The New Age, 5 October. This was confirmed by a senior male representative of the tribal administration in Mochudi on 27 June 2013 (INT 05-1).

⁹¹ Cf. Manson, Andrew/Mbenga, Bernard 2012: Bophuthatswana and the North-West Province: From pan-Tswanaism to mineral-based ethnic assertiveness, in: South African Historical Journal 64, No. 1, Special Issue on: Let's Talk About Bantustans, pp. 111-113.

⁹² Cf. Direng, Nelson 2011: Uneasy calm hangs over Kgatleng, in: Mmegi Online 28, No 164, 2 November; Mooketsi, Lekopanye 2009: Civil service trappings not for me – Kgafela, in: Mmegi Online 26, No. 187, 11 December; Mooketsi, Lekopanye 2010: Botswana: Bakgatla Still Unrepresented in Ntlo Ya Dikgosi, in: The Monitor 1, No. 1, 18 January.

of Kgafela's relocation, struggle over the leadership and control over tribal funds in Moruleng has been revived as well.⁹³

1.3.3 Data collection and evaluation – The empirical research

The empirical research and data collection took place during a six month period between April and September 2013. A further short-term visit to South Africa was made in December 2013 to retrieve more background knowledge on community resistance and mining in the Platinum Belt. In Botswana⁹⁴, the research was conducted in the South-East District and in Kgatleng District. Kgatleng District is composed of five clusters: Artesia, Bokaa, Oodi, Mmathubudukwane and Mochudi. According to the 2011 Population and Housing Census, Kgatleng has a population of about 91,660 people.⁹⁵ The district is predominantly populated by the Bakgatla-ba-Kgafela. There are, however, other tribal groups like the Balete in Modipane, Batlokwa in Oodi, Baherero in Pilane and Bapedi in Leshibitse.⁹⁶

The main research locations were the capital city Gaborone, and Mochudi, the nearby district capital of Kgatleng and headquarters of the Bakgatla-ba-Kgafela. Mochudi was selected as a key research area because it harbours the majority of the district's population and institutions. In addition, it was assumed that the relevance of the different stakeholders and the impact of the institutional pluralism would best be observed in an area where they interact more closely and frequently. The majority of the key interviewees during the empirical research were residents of Mochudi and Mokgatla⁹⁷. Further respondents came from the surrounding villages and only a minority came from remote areas of the district.

⁹³ Cf. Gaotlhobogwe, Monkagedi 2010: Thari Pilane wants Bakgatla throne, in: Mmegi Online 27, No. 167, 5 November.

⁹⁴ For Botswana, an official research permit was retrieved at the Ministry of Local Government in Gaborone. Additionally, the Department of History of the University of Botswana offered institutional affiliation and issued an introductory letter which was presented to the potential interviewees.

⁹⁵ See Statistics Botswana 2012: 2011 Population and Housing Census. Population of Towns, Villages and Associated Localities, p. 65.

⁹⁶ See Kgatleng District Council/Kgatlang District Development Committee/Ministry of Local Government 2002: Kgatleng District development plan 6: 2003-2009.

⁹⁷ The term Mokgatla refers to a person who belongs to the ethnic group of the Bakgatla.

In South Africa⁹⁸, the empirical research was conducted in the North West province, encompassing different locations at regional, district and municipal level. The Bojanala Platinum District Municipality consists of five local municipalities: Kgetleng Rivier Local Municipality, Madibeng Local Municipality, Moretele Local Municipality, Moses Kotane Municipality and Rustenburg Local Municipality. The territory of the Bakgatla-ba-Kgafela stretches mostly along the Moses Kotane Local Municipality. The municipality has an overall population of 242.554 people⁹⁹, whilst the Bakgatla community numbers around 350.000 people in 32 villages.¹⁰⁰ The research locations included the provincial capital Mafikeng, the district capital of Bojanala Platinum, Rustenburg, the capital of the Moses Kotane Local Municipality, Mogwase, as well as Moruleng and further villages of the Bakgatla-ba-Kgafela territory. Similar to the research in Botswana, the majority of the interview partners lived in or around Moruleng or came from the main mining areas.

During the field research, modifications had to be made to the original research plan which included different interview forms for the individual stakeholders. In the course of the research, open interviews proved to be more favourable and productive to the generation of data than expert or semi-structured guideline interviews. The open form of the interviews facilitated the entry into the interview situation and revealed further information which had not been considered in advance. In Moruleng, for example, the relevance of mining operations had been underrated during the preparation of the field work. As a result of the adjustments, each interview was conducted openly whilst still following certain guidelines and particular topics, as the next paragraphs will demonstrate. The qualitative methods applied during the field research involved interviews with representatives of the local government system, the tribal leadership and the Bakgatla communities and

⁹⁸ The first part of the empirical research took place in Botswana from May to July 2013. During the research in South Africa from August to September, existing networks were upheld and further visits were paid to Botswana to integrate the data and information retrieved across the border. This procedure combined features of a step-wise approach and a simultaneous matched sample methodology. See Mazzucato, Valentina 2009: *Bridging Boundaries with a Transnational Research Approach: A Simultaneous Matched Sample Methodology*, in: Falzon, Mark-Anthony (ed.): *Multi-sited Ethnography: Theory, Praxis, and Locality in Contemporary Research*, Aldershot, pp. 215-231.

⁹⁹ Cf. Statistics South Africa 2012: *Census 2011 Municipal report – North West*, Report No. 03-01-54, Pretoria, p. 31.

¹⁰⁰ This is the official figure provided by the Bakgatla-ba-Kgafela and applied in reports and secondary literature.

observations.¹⁰¹ Respondents were informed that their interviews would be treated confidentially and would be anonymised for the thesis.

Interviews with governmental institutions included the following topics in Botswana and in South Africa:

- the role and position of the respective institution within the local government system;
- the relationship between the different local government actors;
- the integration of traditional institutions and their contribution to community development;
- an assessment of the present situation in Mochudi and Moruleng; and
- a prediction on the potential future role of traditional institutions.

The interviews with the members of the tribal leadership in Mochudi and Moruleng were mainly focused on the following topics:

- the duties and responsibilities of traditional leaders at their respective level of the tribal hierarchy;
- the relationship between the Bakgatla tribe in Botswana and South Africa at the leadership and community levels;
- the relationship to different local government institutions and the community;
- the contribution of the tribal leadership to community development;
- the impact of the de-recognition of Paramount Chief Kgafela II, the suspension of several members of the tribal leadership and the relationship with government; and
- the relocation of Kgafela II, internal struggles of the tribal leadership and future prospects in South Africa.

¹⁰¹ Initially, entrance to the research fields in Botswana and South Africa was difficult. Both Bakgatla-ba-Kgafela museums in Mochudi and in Moruleng proved to be very helpful. In Mochudi, an international NGO facilitated interviews with various community members. The NGO also helped to get in contact with a member of the Village Development Committee who later on introduced the researcher to Kgafela's Deputy Chief. Like in olden days, this introduction follows a strict protocol. The Chief is still the head of the village in Botswana and visitors have to introduce themselves personally, seek formal approval for the purpose of their visit and will therefore be under the protection of the tribal leadership. In Moruleng, this procedure is no longer practiced. The tribal administration was rather surprised by the attempt. Nevertheless, it offered any support available and also took care of the welfare of the researcher.

The main foci of the interviews with community members and other local stakeholders centred around the following topics:

- the meaning of Bakgatla culture and tradition in a democratic environment;
- the role of the tribal administration in Mochudi and Moruleng;
- accessibility, performance and gender questions related to traditional institutions in both traditional communities;
- preferences towards the individual local government institutions and the tribal leadership as well as their respective legitimacy basis;
- the cross-border relations of the Bakgatla-ba-Kgafela;
- the impact of the relocation of the Paramount Chief and the conflict between the Bakgatla-ba-Kgafela and government in Botswana; and
- the role of Kgafela II in South Africa and the current situation of the tribal leadership in Moruleng.

Despite this general structure, the interview was kept as open as possible to avoid unnecessary influence on the key respondents and a pre-limitation of the focus of the interview. Due to this strategy, the impact of platinum mining in South Africa and the subordinate relevance of gender questions in Botswana could be considered.

During a timeframe of three months in each country, interviews were conducted with members of national and local government institutions as well as with representatives of the local court system. In Botswana, key respondents at national level included a representative of the Tribal Administration in the line Ministry of Local Government, which is responsible for customary courts and for all aspects related to traditional leadership. At local level, interviews were conducted with representatives of central government and each local government institution. Additionally, representatives of the Magistrate Court in Mochudi and of an Urban Customary Court in Gaborone were interviewed. In South Africa, access to the line ministries at national and regional level was not provided. One interview was conducted with a member of the North West Provincial House of Traditional Leaders in Mafikeng. At district and local level, key respondents included representatives of the District Municipality in Rustenburg, of the Moses Kotane Local Municipality and of the Ward Committee of Moruleng.

During the same timeframe, interviews were conducted with members of the tribal administration of the Bakgatla-ba-Kgafela in Mochudi and Moruleng. Respondents

in Botswana were senior members of the tribal leadership and village headmen. In South Africa, interviews were conducted with representatives of the tribal leadership, the traditional council and the royal council¹⁰², related organisations and the business sector¹⁰³, as well as with members of the royal family of the Bakgatla. Additional informal background conversations were held with the mother of the present Paramount Chief Kgafela II, a headman of another ward in Mochudi and a member of the Village Development Committee in Mochudi.

Between May and September 2013, a selection of community members and representatives from Artesia, Bokaa, Mochudi, Morwa and Pilane were interviewed in Gaborone and Mochudi. The age groups represented in these interviews ranged from early twenties to early seventies and encompassed students, employees, business people, unemployed people and pensioners. The ratio of men to women was 3:1. The interviews were held in English. In contrast to the situation in South Africa, where every participant was fluent in English, a student of African languages at the University of Botswana worked as an interpreter during three interviews with Setswana speaking respondents in Mochudi.

The interviews conducted within the Bakgatla community in South Africa included men and women aged between their early twenties and early eighties. The respondents were residents of Kraalhoek, Lesethleng, Moruleng, Mothlabe, Ramoga and Segakwaneng. In addition to the individual interviews, two group discussions were held. One of the groups consisted of five young men aged between 20 and 25 and the other group included a father and son and a member of the Bakgatla royal family. Both group discussions dealt with the relevance, potentials and problems of culture, traditional leadership and democratic governance in South Africa.

Participant and non-participant observations were conducted both in Botswana and in South Africa. Participant observations were made during a kgotla assembly¹⁰⁴ and during a traditional fundraising event with members of the royal family in the

¹⁰² The Royal Council is not a formal traditional institution. It was formed by members of the Bakgatla royal family in South Africa to represent the different houses and to support and supervise the tribal administration in Moruleng.

¹⁰³ Among those representatives were the President of the Bakgatla-Ba-Kgafela Youth Organization (BBKYO) and an employee of the Bakgatla-ba-Kgafela Tribal Administration (BBKTA).

¹⁰⁴ The meeting took place on 6 July 2013, a Saturday, and addressed all traditional community members in the main kgotla. One main topic of the meeting was the current situation concerning Kgafela's relocation to South Africa and the suspension of parts of the tribal leadership in Mochudi.

Bakgatla museum in Mochudi.¹⁰⁵ An additional non-participant observation was made during an official meeting in the main kgotla.¹⁰⁶ Non-participant observations also took place during the field research in South Africa. They included two public campaigns at the tribal headquarters in Moruleng¹⁰⁷ and one of the hearings of the North West Commission on Traditional Leadership Claims and Disputes in Mogwase¹⁰⁸. The degree of participation during the observations was low. During the kgotla meeting and the traditional event, the researcher interacted with members of the audience, but without influencing the ceremony or event itself.

In addition to the actual empirical research, meetings with staff members of the Department of History at the University of Botswana provided background knowledge and facilitated the first contact with the tribal leadership in Mochudi. Similar informal talks were held with researchers of the University of Pretoria, the University of South Africa and the University of the Witwatersrand in South Africa. Moreover, the research was complemented by articles and documents retrieved from the National Archives in Gaborone and Pretoria and from the Historical Papers of the University of the Witwatersrand in Johannesburg.

1.3.4 Limitations of the research

During the empirical research in 2013, great effort was undertaken to cover the relevant stakeholders and topics. Nevertheless, several limitations occurred during the research process, some of them attributed to the research design and some of them only surfacing during the data collection and evaluation. In general, these limitations referred to the language barrier¹⁰⁹, the research focus, the entrance into the field and the selection of respondents as well as to the answers and reactions of key informants. Further difficulties included the emergence of new information and

¹⁰⁵ The event took place in the Phuthadikobo Museum on 10 August 2013.

¹⁰⁶ The meeting took place on 9 July 2013. The purpose of this meeting was a visit of the Minister of Agriculture announcing information to stakeholders of local government and community members.

¹⁰⁷ The campaigns were initiated by the tribal leadership to inform the community about certain infrastructure projects and local initiatives. On both occasions, in August and in September 2013, Nyalala Pilane was present.

¹⁰⁸ These commissions have been set up at national and provincial level to solve claims and disputes arising out of South Africa's colonial and apartheid history. This particular hearing was on leadership claims of the Bakgatla-ba-Kgafela in Moruleng.

¹⁰⁹ This issue proved to be highly problematic during the observations as the dominant language during the majority of events was Setswana.

developments which were not anticipated in the preparatory stages, and finally restrictions due to the methodology and the limited manpower when conducting the empirical research.

Due to the choice of an in-depth case study, the empirical research on the Bakgatla-ba-Kgafela only covered the set-up and local dynamics in the Kgatleng District in Botswana and the Moses Kotane Municipality in South Africa. Consequently, the comparative approach of the analysis had a clear regional focus and a limited scope. Considering the heterogeneous composition and ethnic diversity of South Africa and the variety of Botswana's Tswana and non-Tswana chiefdoms, the findings of the research only allowed basic generalisations.

Some major limitations arose out of the design and context of the field research and restrictions experienced at local level in both countries. Research was conducted over the course of six months, leaving three months of empirical research in each country. During this time, the project had to be introduced in the respective tribal administration and local government institutions, and interviewees needed to be identified and contacted. The reluctance of certain government officials at local and regional level to participate in the interviews, as well as restricted access options, proved to be challenging. Consequently, certain interviews, particularly at ministerial level, could not be realised. Additionally, individual research topics, like the relations between government and tribal administration in Botswana or corruption in the Bakgatla community in South Africa, were sensitive and would not be commented on by some of the respondents. Moreover, some of them were subject to ongoing inquiries and therefore not available to the public.

Further factors aggravating the research situation were the suspensions of members of the tribal leadership in Botswana due to their involvement in illegal activities in Mochudi and a general transformation and upheaval on both sides of the border. At the research stage, final outcomes of the disputes in Botswana and South Africa were not predictable and some of these developments were still pending at the time of writing. Nevertheless, interviews were conducted with the relevant stakeholders of the different traditional hierarchy levels. During the research period, Paramount Chief Kgafela II was not available, neither in Botswana nor in South Africa. Accordingly, his perception on current processes and developments is not represented in the analysis.

An additional point was the gender quota of the key informants. Generally, the relation between male and female respondents was not balanced. It proved to be difficult to approach and gain female interviewees in both countries, which might have been a consequence of the male dominance in traditional institutions and communities. Several of the women requested as key respondents stated that they have “nothing valuable to say” and that they “don’t know anything of importance”. This occurred although the women had been informed previously that the interviews would be merely based on their personal experience and impressions.

In addition to that, the direct comparison of the interview situations in both countries displayed a major disadvantage of the interviews which were conducted in Botswana. The focus on Mochudi, the district capital, limited the scope of the results on the performance of tribal administration and local government as all the relevant institutions were in convenient distance and easily accessible. Furthermore, frequent public transport between Gaborone and Mochudi allowed people to commute and to improve their economic situation. On the other hand, certain shortcomings were also detected in the research in South Africa. Prior to the field research, the impact of land rights and legislation on the exploitation of mineral resources on traditional communities had been underrated. In the case of the Bakgatla-ba-Kgafela, serious effects of these factors on the legitimacy of the tribal leadership and on the cohesion of the chieftdom only became apparent during research in Moruleng. While the topic has formed part of the research it has been to a comparatively lesser extent.

1.4 Structure of the chapters

The initial part of the doctoral thesis gives a brief account of the context of the present institutional pluralism in Southern Africa by addressing the historical role and integration of traditional institutions and the introduction of pluralistic structures in the 19th and 20th. This covers the colonial period, the apartheid years in South Africa with special reference to the predominantly Tswana homeland of Bophuthatswana and an assessment of the democratisation processes in Botswana in the 1960s and in South Africa in the 1990s. This will be an important prerequisite for understanding current debates on their role in the democratic state and the impact of history on their legitimacy.

Chapter 3 analyses the contemporary legal framework and design of the institutional pluralism in Botswana and South Africa. It includes the constitutional foundations and main legislative provisions on local governance, traditional leadership and jurisdiction in both countries. This also encompasses major changes and amendments to the regulatory framework since democratisation. This chapter further introduces the set-up of the institutional pluralism and provides an overview of the different stakeholders working at grassroots and local level.

The third part of the thesis will integrate the results of the empirical research and will analyse the impact of pluralistic structures on different stakeholders, e.g. the institutions of the local government system, traditional institutions as well as traditional communities. Chapter 4 focuses on the role and consequences of the legal framework in the context of land allocation and management of financial and mineral resources. It will show how the balance, position and potentials of traditional institutions and government were altered by present legislation. The formal and informal interactions between the respective stakeholders and their contributions at the local level are addressed in Chapter 5. It will analyse the functioning of the local government system and the efficiency and performance with regard to the plurality of formal actors. Additionally, it gives an assessment of the theoretical and practical potential of participatory and representative local government in Botswana and South Africa. Chapter 6 will examine how previous patterns and preferences were transformed and redirected within the democratic context, and how this has affected the authority and legitimacy of governmental and traditional institutions. It addresses the question of how community members are treated in accordance with formal legislation and whether the present dispensation enables accountable and democratic governance in rural areas.

Part IV discusses the main research results in relation to the conceptual framework and the guiding hypotheses presented in this introductory chapter. To which extent do the legal framework and institutional set-up determine the role and relevance of traditional institutions? Which long-term effects can be identified with regard to democracy and development at the local level? And who are the beneficiaries of the current dispensation in each country? It will examine strategies, decisive factors and potentials of the institutional pluralism in Botswana and South Africa.

Chapter 8 discusses the challenges and chances of the cross-border context of chiefdoms and traditional institutions in Southern Africa, with major reference to the case study of the Bakgatla-ba-Kgafela. It will analyse how the regulatory framework and institutional set-up have affected cohesion and the internal organisation of traditional communities and the role of traditional institutions therein. Finally, an outlook on present developments and future perspectives of the institutional pluralisms and of the case study will conclude the analysis in Chapter 9.

2 Historical integration of traditional institutions in Botswana and South Africa

2.1 Colonial encounters in Botswana and South Africa – The emergence of a pluralistic legal and institutional order

2.1.1 The Bechuanaland Protectorate

International territorial expansion and colonialism brought major transformations to Southern Africa, in particular from the early 19th century onwards. Prior to the arrival of the Europeans, autonomous chiefdoms based on ethnic affiliation and domination had constituted the pre-colonial state. They were divided into hierarchical units and headed by hereditary traditional leaders. These traditional leader received guidance and support by their families. Traditional leaders represented the sole legislative, executive and judicial power within their tribal territories and were organised by internal rules and processes and limited by a prescribed system of checks and balances.¹¹⁰

The subsequent hegemonic competition of the British, Dutch, Germans and Portuguese in Southern Africa affected and transformed the previously independent chiefdoms in various ways. New forms of direct or indirect colonial administration, governance and jurisdiction were introduced and traditional institutions were integrated into a dual or pluralistic legal and institutional set-up.¹¹¹ Additionally, regional and international borders were drawn and shifted – with chiefdoms within those territories either assigned to individual colonial powers or partitioned among several of them.¹¹²

The current chapter provides an overview on the integration of traditional institutions in the Bakgatla-ba-Kgafela territories during the 19th and 20th century. It illustrates how the British governance and judicial system and different forms of colonial rule were merged with existing structures in the area of the Protectorate Bechuanaland,

¹¹⁰ Cf. Comaroff 1978, pp. 1-6; Schapera, Isaac 1963: *Government and Politics in Tribal Societies*, reprinted, London, pp. 67-93.

¹¹¹ Cf. Aguda, Justice Akinola 1973: *Legal Development in Botswana from 1885 to 1966*, in: *Botswana Notes and Records*, 5, pp. 52-63; Lewin, Julius 1938: *The Recognition of Native Law and Custom in British Africa*, in: *Journal of Comparative Legislation and International Law* 20, Third Series, No. 1, pp. 16-23.

¹¹² Cf. Asiwaju, A. I. (Ed.) 1985: *Partitioned Africans. Ethnic Relations across Africa's International Boundaries 1884-1994*, London.

the Transvaal and the Union of South Africa. A comparison of the set-up and development of the colonial and post-colonial state in Botswana and South Africa reveals profound differences, with some of them still having an impact on the current dispensation in both countries. This relates, on the one hand, to the general perception and status of traditional institutions and, on the other hand, to the outline of the institutional pluralism at different levels which was also adapted and intensified in the 20th century.

Botswana's colonial encounters were formalised in 1885 when the territory was placed under British protection. In the previous year, the Southern Tswana territories were claimed as British Bechuanaland which was incorporated into the Cape Colony in 1895. Due to its landlocked geographical location and the lack of mineral resources – diamonds were only discovered after independence –, Botswana had not been the primary focus of the colonial powers. Interference was rather attributed to strategic considerations: restricting the expansion of the Germans and the Transvaal and securing trade routes to the north. Major factors shaping colonialism in Botswana were the constant competition between the British and the Boers, the cooperation and resistance of the Tswana tribes, Cecil Rhodes' attempts to transfer the territory to the British South Africa Company and, finally, the continuous threat of its potential incorporation into the Union of South Africa.¹¹³ Unlike the situation of the other Southern African regions, the major Tswana chiefdoms had explicitly requested British protection. As the first decades of British presence in the Protectorate were limited to the administration of the territory, Botswana had accordingly not experienced the same degree of external intervention and influence as its neighbouring countries.

The territory of contemporary Botswana was settled by Tswana tribes and other ethnic groups like the San when missionaries and foreign traders arrived in the middle of the 19th century. Additionally, some Boer groups of the neighbouring Transvaal had started to move northwards to acquire labour force. In the following decades, Boer, British and German settlement and territorial expansion had increasingly started to affect the Tswana population and culminated in continuous

¹¹³ Cf. Zins, Henryk 1997: The international context of the creation of the Bechuanaland Protectorate in 1885, in: PULA: Journal of African Studies 11. No. 1, pp. 54-62.

petitions for British protection against these aggressions.¹¹⁴ The enduring hegemonic competition between the British and the Boers was only settled with the end of the South African War and the defeat of the Boers in 1902. Even after the establishment of the Protectorate, its territorial integrity and independence were threatened, particularly by ongoing attempts to transfer it to the British South Africa Company or, later on, to integrate it into the Union of South Africa. Strong opposition came from one of the major Tswana chiefs, Khama III, of the Bamangwato. Together with Sebele I of the Bakwena and Bathoen I of the Bangwaketse, he travelled to London in 1885 and 1895 to persuade the Queen to resist Rhodes' ambitions and establish and keep the Protectorate under British control.¹¹⁵

Colonial governance and administration of the Bechuanaland Protectorate passed through three different stages. A first phase of parallel rule¹¹⁶ was followed by indirect rule in 1934 and finally direct rule from 1957 onwards. Whilst parallel rule had left traditional institutions in charge and control of the chiefdoms and meant a minimum interference due to separate lines of administration, indirect and direct rule substantially affected the autonomy and relevance of traditional institutions.¹¹⁷

In the initial years, the Protectorate was ruled by the British government in London. In 1891, it became a high commission territory.¹¹⁸ The 1891 Order in Council and the General Administration Proclamation established a basic form of formal administration and jurisdiction in the Protectorate. The High Commissioner was entitled to regulate by Proclamation which also encompassed the administration of justice. The traditional institutions of the main Tswana chiefdoms were the highest organs representing native interests towards the Resident Commissioner in Mafikeng, who himself acted as the direct link to the High Commissioner for Bechuanaland Protectorate, based in Cape Town and Pretoria.¹¹⁹ While the High

¹¹⁴ Cf. Mogalakwe, Monageng 2006: How Britain Underdeveloped Bechuanaland Protectorate: A Brief Critique of the Political Economy of Colonial Botswana, in: *Africa Development* 31, No. 1, pp. 70-72.

¹¹⁵ See Maylam, Paul 1980: Rhodes, the Tswana, and the British. Colonialism, collaboration, and conflict in the Bechuanaland Protectorate, 1885-1899, Westport, Conn., pp. 149-173.

¹¹⁶ An overview of the situation and the relationship between colonial government and traditional institutions of the individual Tswana chiefdoms during the years of parallel rule is presented by Makgala in: Makgala, Christian John 2006: *Elite Conflict in Botswana. A History*, Pretoria, pp. 20-27.

¹¹⁷ Cf. Makgala, Christian John 2001: The policy of indirect rule in Bechuanaland Protectorate, 1926-1957 (Ph.D. dissertation), Cambridge; Sharma 2003, p. 252.

¹¹⁸ Cf. Foreign Jurisdiction Act of 1890; Order in Council of 9 May 1891.

¹¹⁹ Cf. Vaughan 2003, pp. 27-29.

Commissioner was the direct representative of the crown in London in the Protectorate, the Resident Commissioner acted as the head of the colonial administration. The initially decentralised structure of the Protectorate and the convenient district boundaries allowed traditional institutions to raise concerns of their chiefdoms without being forced to speak with a joint voice with other chiefdoms in the same territory.¹²⁰ The High Commissioner had the powers to appoint magistrates and administrative officers also taking over judicial duties in the Protectorate.¹²¹

In 1899, tribal reserves of the major Tswana chiefdoms were created and their internal boundaries defined.¹²² Inter- and intra-tribal wars and secessionist attempts decreased as territories were officially marked and people within the boundaries subjected to a senior traditional leader.¹²³ Among those initial reserves was that of the Bakgatla-ba-Kgafela.¹²⁴ The formal enhancement and recognition of these formerly multi-ethnic chiefdoms contributed to the post-colonial debate on discrimination of minority tribes.¹²⁵ The introduction of taxation and tax collection by traditional leaders, who also received a share of these taxes as salary, was one of the first interventions into the relations between traditional institutions and their communities as accountability was divided between subjects and colonial administration.¹²⁶ As a further major change, Roman-Dutch law was introduced in the colonies as the common law and complemented customary law.¹²⁷

¹²⁰ Cf. Dundas, Charles/Ashton, Hughes 1952: Problem Territories of Southern Africa. Basutoland, Bechuanaland Protectorate, Swaziland (South African Institute of International Affairs), Cape Town, pp. 46-54.

¹²¹ Cf. General Administration Proclamation of 10 June 1891.

¹²² See Proclamation 9 of 29 March 1899. On the basis of the Proclamation, the Bangwato, Bakwena, Bangwaketse, Batawana and Bakgatla Reserves were created. Cf. Lord Hailey, William Malcolm 1953: Native Administration in the British African Territories, Part V. The High Commission Territories: Basutoland, The Bechuanaland Protectorate and Swaziland, London, pp. 197-201, 205-206.

¹²³ See Schapera 1963: Kinship and Politics, p. 163.

¹²⁴ Cf. Morton, Fred 2009: When Rustling Became An Art: Pilane's Kgatla And The Transvaal Frontier 1820 -1902, Cape Town, pp. 237-238.

¹²⁵ Cf. Molomo, Mpho G. 2011: Widening the Democracy Debate: Bogosi and Ethnicity in Botswana, in: Ray, Donald I./Quinlan, Tim/Sharma, Keshav/Clarke, Tacita A. O. (Eds.): Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development, Calgary, Alberta, p. 442.

¹²⁶ Cf. Makgala 2004; Trevor, Daphne 1936: South African Native Taxation, in: The Review of Economic Studies 3, No. 3, pp. 217-225.

¹²⁷ Bechuanaland Protectorate was associated with the Cape Colony from 1895 until 1909. Order-in-Council of 9 May 1891 and the General Law Proclamation No. 39 of 1909 provided that the laws of the Cape Colony in force on 10 June 1891 should also be applicable in the Protectorate as far as they were not in conflict with any other legal provisions. Thus, Roman-Dutch law became the statutory and common law of the Protectorate Bechuanaland.

Until the 1930s, the engagement of the British in the Protectorate remained limited and focused on the administration of the territory, maintenance of order and the collection of taxes.¹²⁸ This minimal interference left the role of traditional institutions in the respective territories largely untouched.¹²⁹ In 1934, their authority and independence were severely curtailed when the High Commissioner was empowered to appoint, recognise, suspend or remove traditional institutions. Due to the need to collaborate with local stakeholders, however, sanctions like the removal of a leader were only rarely applied by the colonial administration.¹³⁰ As the High Commissioner was not involved in the day-to-day administration of the Protectorate, the permanent administration and relations with the tribal reserves were covered and supervised by the Resident Commissioner with the assistance of Divisional Commissioners, District Commissioners, who had replaced the Magistrates, and Assistant District Officers.¹³¹ Traditional institutions were subordinate to the authority of the Resident Commissioner and had to follow instructions and conduct a prescribed list of duties. The underlying Proclamation also introduced tribal councils.¹³² The Native Tribunal Proclamation of 1934 formally recognised senior (Chiefs') and junior (headmen's) tribunals as part of the judicial system. From 1943 onwards, the recognition, constitution, powers, jurisdictions and administration of justice in the customary courts was regulated by a proclamation.¹³³

Picard refers to the Statute of Westminster of 1931 and the Statute of the Union Act of 1934¹³⁴ as catalysts of the transition from parallel to indirect rule in the Protectorate. With these Acts, the British lost factual control in the Union of South

¹²⁸ Cf. Hall, Kenneth O. 1973: *British Bechuanaland: The Price of Protection*, in: *The International Journal of African Historical Studies* 6, No. 2, pp. 183-197; Makgala, Christian John 2004: *Taxation in the Tribal Areas of the Bechuanaland Protectorate, 1899-1957*, in: *Journal of African History* 45, pp. 279-303.

¹²⁹ Cf. Lord Hailey 1953, p. 195. See also Dundas/Ashton 1952, pp. 49-54; Keulder, Christiaan 1998: *Traditional leaders and local government in Africa: Lessons for South Africa*, Pretoria, pp. 100-102; Myers, J. C. 2008: *Indirect Rule in South Africa. Tradition, Modernity, and the Costuming of Political Power*, Rochester, pp. 1-22.

¹³⁰ Cf. Holm, John D./Botlhale, Emmanuel 2008: *Persistence and Decline of Traditional Authority in Modern Botswana Politics*, in: *Botswana Notes and Records* 40, p. 75

¹³¹ Cf. Picard, Louis A. 1984: *Administration reorganisation – A substitute for policy? The District Administration and Local Government in the Bechuanaland Protectorate, 1949-1966*, in: *Botswana Notes and Records* 16, pp. 87-91

¹³² Cf. Sections 7, 8, 10 and 17 of the Native Administration Proclamation No. 97 of 1934.

¹³³ See Native Courts Proclamation No. 33 of 1943. It was repealed by the African Courts Proclamation in 1961, providing for separate jurisdiction for Africans and Europeans. See Roberts, Simon 1972: *The Survival of the Traditional Tswana Courts in the National Legal System of Botswana*, in: *Journal of African Law* 16, No. 2, pp. 103-129.

¹³⁴ Further information will be provided in the subsequent section.

Africa while the latter gained further autonomy and sovereignty over its own territory. Under these circumstances, the British opposed a potential transfer of its High Commission Territories to the Union and sought greater engagement and the establishment of a bureaucratic and governance system at the central and local levels instead.¹³⁵

In the final years, a separation of governance and jurisdiction of Natives and Europeans was consolidated in the Protectorate, with the local communities still under the leadership of traditional institutions. This was also reflected by the set-up of advisory councils dealing with matters concerning the respective group.¹³⁶ The Native Advisory Council in the Protectorate was formed to offer traditional institutions and local communities a forum to address matters related to their own affairs towards the Resident Commissioner. In 1950, a Joint Advisory Council, consisting of members of the African Advisory Council, members of the European Advisory Council, administrative officials and the Resident Commissioner, was established.¹³⁷

In the 1960s, the British started to promote self-governance of the Protectorate which would eventually lead to independence. The Bechuanaland Protectorate (Constitution) Order in Council provided for the establishment of an Executive Council and a Legislative Council advising the High Commissioner and the Resident Commissioner. In addition, it regulated the future appointment of a Prime Minister, a Deputy Prime Minister and further ministers.¹³⁸

A reform of the system of local governance was introduced in 1957 with the Local Councils Proclamation. These new tribal councils had executive committees with members selected in the kgotla and nominees of the senior traditional leader. The councils provided assistance to the senior traditional leader. These efforts were intensified with the establishment of a local government committee of the Legislative

¹³⁵ Cf. Picard, Louis A. 1985: From Bechuanaland to Botswana: An Overview, in: Picard, Louis A. (Ed.), *The Evolution of Modern Botswana*, London/Lincoln, pp. 11-13.

¹³⁶ Cf. Herbst, J. F. 1930: *The Administration of Native Affairs in South Africa*, in: *Journal of the Royal African Society* 29, No. 117, pp. 478-489; Proctor, J. H. 1968: *The House of Chiefs and the Political Development of Botswana*, in: *The Journal of Modern African Studies* 6, No. 1, May, pp. 59-61.

¹³⁷ Cf. Manungo, Kenneth R. D. 1999: *The role of the Native Advisory Council in the Bechuanaland Protectorate, 1919-1960*, in: *PULA: Botswana Journal of African Studies* 13, Nos. 1 & 2, pp. 24-38.

¹³⁸ Cf. Order in Council No. 134 of 1965, replacing the Protectorate (Constitution) Order in Council.

Council to modernise the existing system. According to the Council's recommendations, local government was to be based on elected District Councils that were indeed elected and instituted in 1966. The local reforms were opposed by traditional institutions as they lost their central role in local government and their functions in the communities were curtailed. They only had ex-officio membership without voting powers in the new councils.¹³⁹

In the first national elections in 1965, the Bechuanaland Democratic Party won the majority of seats in the Legislative Council. After the grant of internal self-government, Botswana gained independence on 30 September 1966 under the presidency of Seretse Khama.¹⁴⁰

2.1.2 The Transvaal and the Union of South Africa

The South African colonial era was divided into two major phases: an initial period of Dutch colonialism which began with the establishment of an outpost of the Dutch East India Company¹⁴¹ at the Cape of Good Hope in 1652 was followed by continuous British dominance from 1806 onwards and Boer leadership claims in different parts of the country. Uniform government and administration was only reached after the formation of the Union of South Africa in 1910. Until then, the history of the colonies of Cape of Good Hope, Natal, Orange River and Transvaal has to be traced separately. The Boer republic of Natal was annexed by the British in 1843. Initially, the territory became part of the Cape Colony before it was governed as independent colony from 1856 onwards. Self-government was granted to Natal in 1897. Orange Free State had also experienced Boer and British governance since 1848. The republic was founded in 1854¹⁴² and became the British colony of Orange River after the South African War.¹⁴³

¹³⁹ Cf. Holm/Botlhale 2008, p. 75; Picard 1984, pp. 93-94.

¹⁴⁰ Cf. Khunou, Samuelson Freddie 2011: Traditional Leadership: Some Reflections on Morphology of Constitutionalism and Politics of Democracy in Botswana, in: International Journal of Humanities and Social Science 1, No. 14, October, pp. 86-87.

¹⁴¹ Vereenigde Oostindische Compagnie.

¹⁴² Cf. Orange River Convention.

¹⁴³ Self-government was granted in 1907.

The Boer Republic of Transvaal, from which the Bakgatla originate, was founded in 1852¹⁴⁴ and officially renamed South African Republic (ZAR) in 1857. British intervention from 1877 to 1880 was ended by the first Boer War and self-government under British leadership remained until the Transvaal finally regained its independence in 1884. As a consequence of the Boer defeat in the Second Anglo-Boer War, the Transvaal and Orange Free State fell again under the sovereign rule of the British in 1902.¹⁴⁵ The Transvaal eventually gained local self-government in 1907.

The South Africa Act of 1909 became the constitution of the Union of South Africa, consisting of the four former colonies Cape of Good Hope, Natal, Orange River and Transvaal¹⁴⁶. The Union was a dominion of the British Empire. It had a three-tier structure with the Governor-General, appointed by the British monarch and representing him in the Union, being the highest body of the executive. The four provinces were ruled by Provincial Administrators and Councils. The lowest level was constituted by local government in the form of municipalities and districts and traditional communities.¹⁴⁷

Procedures and regulations in the Union were adapted to the situation and requirements of each province. Legislation enacted in the subsequent decades attempted to establish uniform administration of native affairs. A clear tendency to limit and control the powers of traditional institutions by vesting authority in the headmen of the chiefdoms at the expense of senior traditional leaders and in the Governor-General emerged. The latter was empowered to appoint, recognise and depose traditional institutions. Accordingly, a new dependence on government developed.¹⁴⁸ The Governor-General established government departments, among them the Department of Native Affairs. Under its authority, the District Magistrates

¹⁴⁴ Cf. Sand River Convention.

¹⁴⁵ The legal foundation of Britain's sovereignty was the Treaty of Vereeniging.

¹⁴⁶ Orange River and the Transvaal (the former South African Republic) were Boer republics annexed by the British after the South African War.

¹⁴⁷ See Chapter V of the South Africa Act of 1909.

¹⁴⁸ According to Section 147 of the Act, traditional institutions and communities fell under the authority of the Governor-General: "*The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General in Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs [...].*" See also Bank, Leslie/Southall, Roger 1996: Traditional Leaders in South Africa's New Democracy, in: *Journal of Legal Pluralism* 37-38, pp. 410-412.

were responsible for controlling traditional institutions and communities. They were nevertheless instructed not to interfere with internal affairs.

With the Natives Land Act of 1913, the boundaries of the African reserves established in the provinces of the Union were defined by national law. These reserves later became the basis of the so-called Bantustans. As a consequence, Africans were only permitted to purchase or lease land from other Africans within the boundaries of these reserves and in certain areas of the Free State. The Act did not prohibit occupation of land outside the 'scheduled native areas'. Derogation clauses took into account the particular situation and requirements of the four provinces. This Act fostered segregation and territorial separation in the Union.¹⁴⁹

In 1920, the Native Affairs Act introduced a system of self-government for traditional communities. This led to the extension of a council system representing traditional institutions and community members to administer local affairs in the reserves.¹⁵⁰ Based on this Act, tribal councils were created in the reserves, and advisory councils were set up in urban areas. These councils were subordinate to the Native Affairs Department and the Prime Minister.

Substantial changes for traditional institutions and local communities were introduced in the Native Administration Act No. 38 of 1927¹⁵¹ that established the principal framework for the governance of the native population in the four provinces. It provided for the instrumentalisation of traditional governance structures by creating tribal divisions under the leadership of tribal authorities as administrative units which would in turn be subordinate to the Governor-General. These tribal authorities were formed by a senior traditional leader and his council. They were responsible for administering the tribal units and additionally served as local government in the homelands during apartheid.¹⁵²

¹⁴⁹ Cf. Beinart, William/Delius, Peter 2014: The Historical Context and Legacy of the Natives Land Act of 1913, in: *Journal of Southern African Studies* 40, No. 4, pp. 667-688; Feinberg, Harvey M. 1993: The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century, in: *The International Journal of African Historical Studies* 26, No. 1, pp. 65-70.

¹⁵⁰ Cf. Herbst 1930, pp. 478-482.

¹⁵¹ Later renamed Bantu Administration Act and Black Administration Act.

¹⁵² Cf. Khunou, Samuelson Freddie/Nthai, Seth 2011: Are traditional councils replicas of tribal authorities or new institutions altogether? In: *De Rebus, South African Attorneys' Journal* January/February, pp. 32.

The Governor-General became the Supreme Chief of the Natives in Transvaal, Natal and Orange Free State.¹⁵³ As such, he gained far-reaching powers which severely damaged the integrity of the institution of traditional leadership and still cause frictions in post-apartheid South Africa. He was, for example, entitled to determine the functions and duties of traditional institutions as well as their conditions of service. In addition, he was empowered to create and divide tribes in the Union and to appoint any person as a chief or headman regardless of hereditary or succession lines or membership of a royal family. This power was also vested in the Minister or Secretary of the Department of Native Affairs.¹⁵⁴ As a consequence, these traditional leaders were only accountable to government and the original system of control from within the traditional community was set aside.

The Native Administration Act provided for a separate governance and judicial system which subjected the native population in the provinces to the executive, instead of the parliament. In Section 11, the Act formally recognised customary law and introduced a dual system of jurisdiction, consisting of the traditional leaders' courts and magisterial courts, for certain civil cases.

The Statute of Westminster of 1931 established legislative equality and independence in the British dominions as British Acts of Parliament no longer extended to the self-governing territories and the repugnancy clause was lifted. In 1934, the South African Parliament passed the Status of the Union Act, declaring

“[...] the Parliament of the Union [to] be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.”¹⁵⁵

The Republic of South Africa Constitution Act ended British monarchy in South Africa in 1961. The country became a republic and withdrew from the Commonwealth.¹⁵⁶

¹⁵³ Cf. Section 1 of the Native Administration Act.

¹⁵⁴ See Sections 2(7), (8) and 5 of the Act.

¹⁵⁵ Section 2 of the Status of the Union Act No. 69 of 1934.

¹⁵⁶ Cf. Republic of South Africa Constitution Act No. 32 of 1961.

2.2 Traditional institutions and the apartheid era in South Africa

In 1948, the National Party won the national elections. From this point onwards, traditional institutions in South Africa faced the manifestation of apartheid and the introduction of the homeland system based on the former native reserves. The subsequent apartheid legislation provided for separate types of government for Whites, Coloureds, Africans and Indians. Governance structures were horizontally and vertically duplicated for each race and level of government, which led to inefficiencies in performance and coordination. The different areas were defined by the Group Areas Act of 1952. White Local Authorities consisted of administrative and political municipal institutions. Local government in the Indian and Coloured areas was mainly covered by Management Boards and Local Affairs Committees. The African population had no elected representation.

Territorial segregation and governance were based on the following legal foundations: the Bantu Authorities Act¹⁵⁷, the Promotion of Bantu Self-Government Act¹⁵⁸, the Native Affairs Act and the Native Administration Act. The Bantu Authorities Act and the Native Affairs Act provided the main framework for the establishment and administration of the reserves. The Bantu Self-Government Act and the Native Administration Act of 1951, on the other hand, regulated the political structures within the reserves and provided for their transformation into Bantustans or homelands. While traditional institutions could exert an enormous amount of power and authority over their communities within the new legal provisions, they were, at the same time, under government control which strictly limited and sanctioned noncompliance and opposition. Later on, this lack of internal control and external dependence and interference led to the erosion of their own legitimacy basis.¹⁵⁹ Still, it would be inadequate to overrate compliance by traditional institutions with the apartheid structures and to underestimate their opposition to the establishment of the Bantustan system. Kelly provides several ambiguous examples

¹⁵⁷ Act No. 68 of 1951.

¹⁵⁸ Promotion of Bantu Self-Government Act No. 46 of 1959.

¹⁵⁹ Cf. Comaroff 1974, pp. 36-51; Murray, Christina 2004: South Africa's Troubled Royalty. Traditional Leaders after Democracy, Centre for International and Public Law (Law and Policy Paper 23), pp. 3-5; Van Kessel, Ineke/Oomen, Barbara 1997: One Chief, One Vote. The revival of traditional authorities in post-Apartheid South Africa, in: African Affairs 96, pp. 563-564.

of traditional leaders who answered apartheid policies along the spectrum of compliance, passivity and resistance.¹⁶⁰

The Black Authorities Act defined different ethnic groups and designated territories to them. The Act stipulated that these reserves would be governed by three tiers of authority, each based on traditional institutions.¹⁶¹ The new structure of local government left the population without elected or accountable representation. Tribal authorities could be established by the Governor-General for any tribal territory or community. They formed the lowest tier of the administrative system and consisted of a traditional leader and his councillors. They were responsible for the administration of tribal affairs and for the provision of support to the higher-ranking authorities.¹⁶² Regional authorities were created for territories with at least two tribal authorities. They were formed by a chairman and members of the tribal authorities who were designated by the Governor-General. Regional authorities were empowered to issue ordinances. In general, they served as advisors to the minister on matters affecting the African population in the region. Additionally, they were integrated in the establishment and maintenance of certain infrastructure, like roads, health facilities or water supply. To fulfil their functions at regional level, these bodies could levy a limited tax.¹⁶³ The highest hierarchical tier was the territorial authority in areas with several regional authorities. Its members were selected from the regional authorities. The territorial authorities had to assist the tribal and regional authorities and were responsible for the functioning of the administration of justice and the courts. Like the regional authorities, they had, inter alia, advisory functions towards government and limited powers of taxation.¹⁶⁴

The Black Self-Government Act defined the original ethnic groups of the reserves as national units. These units consisted of the North-Sotho, South-Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu. Each of them were placed under the authority of a Commissioner-General and assigned their own 'homeland'.¹⁶⁵ The Governor-General was in charge of preparing self-governance of the homelands. Due

¹⁶⁰ See Kelly, Jill E. 2015: Bantu Authorities and Betterment in Natal: The Ambiguous Responses of Chiefs and Regents, 1955–1970, in: *Journal of Southern African Studies* 41, No. 2, pp. 273-297.

¹⁶¹ See Section 2 of the Act. Section 3(3) of the Act provided for the composition of the organs along the administrative hierarchy.

¹⁶² Cf. Sections 3(1) lit a, b and 4 of the Black Authorities Act.

¹⁶³ Cf. Section 3(1) lit c, (3), Sections 5 and 6 of the Act.

¹⁶⁴ Cf. Sections 3(1) lit c and 7 of the Act.

¹⁶⁵ See Section 2 of the Black Self-Government Act.

to forced resettlements and relocations on the basis of the Land Acts of 1913 and 1936, traditional leadership was partly instituted over territories which had not previously been under chiefly control.

On the basis of the Native Affairs Act of 1959, a Native Affairs Commission and a system of local councils were instituted. The Commission had two main tasks: scrutinising legislation and policies and consulting the Minister on African affairs. In urban areas, the Urban Bantu Councils Act No. 78 of 1961 provided for the creation of councils similar to the ones in the rural areas.

The Self-Governing Territories Constitution Act of 1971¹⁶⁶ initiated the dissolution of the territorial authorities whilst the tribal and regional authorities remained part of the homeland administration. It provided for their self-government and independence and the establishment of legislative assemblies and executive councils. On the basis of this Act, the majority of the homelands reached self-government status, among them the Tswana homeland of Bophuthatswana in 1972.¹⁶⁷ Four of the homelands, the so-called TBVC states, became independent, although this status was not internationally recognised. The self-governing Bantustans were: Gazankulu, Lebowa, QwaQwa, KaNgwane, KwaNdebele and KwaZulu. The independent Bantustans were Bophuthatswana, the Ciskei, the Transkei and Venda.¹⁶⁸ In the 1990s, the Bantustans were dissolved and their territories re-incorporated into South Africa.

2.3 Democratisation processes in Southern Africa

2.3.1 Independence and democratisation in Botswana in the 1960s

Botswana gained independence during the first democratisation wave without experiencing internal or external pressure like South Africa. The transition was facilitated by the lack of interest of the colonial powers and the low presence of the British in the country. During the transition period of the 1950s and 1960s,

¹⁶⁶ Self-Governing Territories Constitution Act No. 21 of 1971.

¹⁶⁷ The governmental powers of the homelands were further strengthened by the Bantu Homelands Constitution Act (National States Constitutional Act) No. 21 of 1971. This Act was a major step towards independence of the homelands.

¹⁶⁸ Cf. Khunou, Samuelson Freddie 2009: Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid, in: PER 12, No. 4, pp. 81-125; Khunou, Samuelson Freddie 2011: Traditional leadership and self-governing bantustans of South Africa: Through the eye of the needle of constitutional democracy, in: International Journal of Business and Social Science 2, No. 18, October, pp. 237-252.

Botswana's land-locked location, economic weakness and lack of known resources had made the Protectorate allegedly unattractive to other countries. Despite of that, the external context had shaped democratisation and nation-building.

Independence in Botswana is strongly connected to the personality of Seretse Khama who was the heir of the Bamangwato chieftainship. His decision to marry a white British woman had caused a major succession crisis among the Bamangwato, which also had an external dimension with regarding the incipient apartheid policies in South Africa. Seretse Khama had to spend several years in exile and had to renounce any chieftainship claims before he could return to Bechuanaland Protectorate in 1956.¹⁶⁹ He became the leader of the Bechuanaland Democratic Party and later Botswana Democratic Party (BDP). In the general elections, the BDP won 28 seats while the Botswana People's Party won the remaining three of the 31 seats. Khama became the country's first Prime Minister in 1965 and President in 1966.¹⁷⁰

Lange stresses the centrality of Seretse Khama in the transition and consolidation. He argues that Khama's marriage to Ruth Khama and the negative reception in the segregated neighbouring countries as well as the weakening of the Bamangwato refuelled plans to incorporate Bechuanaland Protectorate as South African homeland. Furthermore, he states that this threat and its external dimension triggered major state reforms, including the transformation from indirect to direct rule, centralisation and the weakening of chiefly powers.¹⁷¹ The subsequent limitation of traditional institutions' powers in the wake of transition and under Khama's presidency thereby stands in contrast to his own tribal origin. While he never acted as traditional leader but his genealogy provided him with popular support and legitimacy.¹⁷²

Traditional institutions were consulted but not actively involved during the independence negotiations. Preparations took place in the Legislative Council, which was instructed to work on the future constitution. The African Advisory Council nominated ten African members of the Legislative Council. Traditional institutions

¹⁶⁹ See Hyam and Wylie on the controversy between Seretse Khama and the regent Tshekedi Khama and on the factions among the Bamangwato. They also highlight the strategies and interventions of the Protectorate and British government as well as the South African perspective. Hyam, Ronald 1968: *The Political Consequences of Seretse Khama: Britain, the Bangwato and South Africa, 1948-1952*, in: *The Historical Journal* 29, No. 4, pp. 921-947; Wylie, Diana 1990: *A Little God. The Twilight of Patriarchy in a Southern African Chieftdom*, Hanover/London, pp. 175-209.

¹⁷⁰ Cf. Picard 1985, pp. 16-19.

¹⁷¹ Cf. Lange 2009, pp. 10-14.

¹⁷² Cf. Gulbrandsen 2012, pp. 201-204.

were thereby integrated in the negotiations but were outnumbered by the new political elite. Although they tried to increase their power position within the future legal framework, they could not compete with modern political structures. Despite their disapproval of the marginalisation of traditional institutions, they reluctantly accepted the draft of the future constitution.¹⁷³

Independence followed a timetable which was set by Great Britain to prepare and train the Protectorate for democratic self-governance. In 1963, the National Assembly replaced the former Legislative Council. Additionally, a Cabinet with a Prime Minister and five Ministers was formed. For the sake of a stable transformation, traditional institutions had to be co-opted in the post-independence system. One option was a fixed number of reserved seats in Parliament. A second option was the creation of an upper House of Lords, following the British example of a bicameral parliament. Instead, a third alternative was implemented, namely the establishment of a national advisory body, the House of Chiefs, which succeeded the former African Advisory Council. Their reduced authority within this body led to serious opposition after independence.¹⁷⁴ Furthermore, governance at local level was transformed with the introduction of a local government system which was based on District Councils and further curtailed the role of traditional institutions in the communities.¹⁷⁵ Although these local government institutions were established country-wide, the independence years were accompanied by strong bureaucratisation and centralisation tendencies which eventually disempowered the grassroots level.¹⁷⁶

The results of the negotiations and legislative deliberations were laid down in the Constitution of Bechuanaland Protectorate of 1965. A modified version was published as the second Schedule to the Botswana Independence Order.¹⁷⁷ It was adopted in February 1966 by the Bechuanaland Independence Conference and entered into force on the 30th September, the day of the country's independence.

¹⁷³ Cf. Makgala 2006, pp. 41-45.

¹⁷⁴ Cf. Proctor 1968, pp. 59-69.

¹⁷⁵ Cf. Griffiths, J. E. S. 1970: A Note on Local Government in Botswana, in: Botswana Notes and Records 2, pp. 64-70.

¹⁷⁶ Cf. Lekorwe, Mogopodi 2000: Governance and elections: Enhancing local democracy in Botswana, in: Pula: Botswana Journal of African Studies 14, No. 1, pp. 23-24.

¹⁷⁷ Botswana Independence Order 1966 (S.I. 1966/1171), 20 September 1966, Schedule 2.

2.3.2 Democratisation in South Africa in the 1990s

At the end of apartheid and in the wake of democratic transition in the 1990s, traditional institutions have experienced resurgence and resilience in several African countries. This occurred within the context of attempts to empower grassroots participation and global strategies to preserve and strengthen culture and custom and to recognise group based-rights.¹⁷⁸

For the unification and democratisation of South Africa, the independent and self-governing homelands had to be dissolved and the territories reincorporated. With the repeal of the Land Act and the Group Areas Act, the basis of territorial segregation was laid in 1991. Under the leadership of its President Mangope, Bophuthatswana had resisted the loss of its independent status for a long time before a shift from regionalism to a national strategy was adopted. Prior to this, the homeland had experienced coup d'états and had claimed a state of emergency against the internal opposition.¹⁷⁹

The South African transition process at national and local level was organised into several phases. The draft framework and future stages were debated and bargained by the Convention for a Democratic South Africa (CODESA 1) in 1991, CODESA 2 in 1992 and the Multi-Party Negotiating Forum in 1993. The Negotiating Council of the latter established the Commission on the Demarcation of States/Provinces/Regions in May 1993 to provide recommendations on the delimitation and demarcation of the fragmented South African territory.¹⁸⁰ Traditional leaders were only integrated in the deliberations of the Multi-Party Negotiating Forum.¹⁸¹ In 1993, an Interim Constitution entered into force, which recognised and protected the institution of traditional leadership according to customary law. Traditional institutions received ex-officio status in the institutions of

¹⁷⁸ Cf. Oomen 2005: Chiefs in South Africa, pp. 87-122.

¹⁷⁹ Cf. Drummond, James 1991: Reincorporating the Bantustans into South Africa: the question of Bophuthatswana, in: *Geography* 76, No. 4, pp. 369-373; Lawrence, Michael/Manson, Andrew 1994: The 'Dog of the Boers': The Rise and Fall of Mangope in Bophuthatswana, in: *Journal of Southern African Studies* 20, No. 3, Special Issue: Ethnicity and Identity in Southern Africa, pp. 447-461.

¹⁸⁰ See Muthien, Yvonne G./Khosa, Meshack M. 1995: The Kingdom, the Volkstaat and the New South Africa: Drawing South Africa's New Regional Boundaries, in: *Journal of Southern African Studies* 21, No. 2, pp. 304-307.

¹⁸¹ Cf. Murray 2004.

the local government system and were eligible to be elected to any office therein.¹⁸² While they were assigned certain functions at local level, only advisory and consultative institutions were established at national and provincial level.¹⁸³ Constitution-making after 1993 proved to be a lengthy debated process on the outline and design of the post-apartheid state and involved various stakeholders.¹⁸⁴ The process was only concluded with the promulgation of the final Constitution of the Republic of South Africa in 1996 which replaced the Interim Constitution in 1997.¹⁸⁵ The provisions on traditional leadership in the Constitutions of 1993 and 1996 mirror the opposing claims of the ANC government, traditional institutions as well as human rights activists and the rural population.¹⁸⁶

During the interim phase, provisions were made for the establishment and transition of local government. The Local Government Transition Act No. 209 of 1993 defined three phases for the transformation:

- The pre-interim phase from 1993 to 1995,
- The interim phase from 1995 to 1999, and
- the last phase from 1999 to the 5 December 2000, the date of the elections.

¹⁸² See Chapter 11, Section 182 of the Constitution of South Africa, Act 200 of 1993. The status of traditional leaders was recognised by the Constitutional Court in *African National Congress and Another v Minister of Local Government and Housing, Kwazulu-Natal and Others* (CCT19/97) [1998] ZACC 2; 1998 (3) SA 1; 1998 (4) BCLR 399 (24 March 1998).

¹⁸³ A National Council of Traditional Leaders as well as six Provincial Houses of Traditional Leaders were established.

¹⁸⁴ Cf. Kaganas, Felicity/Murray, Christina Murray 1994: *The Contest between Culture and Gender Equality under South Africa's Interim Constitution*, in: *International Journal of Law and Society* 21, No. 4, pp. 409-433; Oliver, Nic 2006: *The South African constitutional policy and statutory framework for traditional leadership and institutions*, in: Hinz, Manfred O./Gatter, F. Thomas (Eds.), *Global responsibility local agenda. The legitimacy of modern self-determination and African traditional authority*, Berlin, pp. 213-238.

¹⁸⁵ Constitution of the Republic of South Africa, Act No. 108 of 1996.

¹⁸⁶ Cf. Williams 2010, pp. 84-89.

PART II: THE FRAMEWORK OF THE INSTITUTIONAL PLURALISM IN BOTSWANA AND SOUTH AFRICA

3 The regulatory framework and institutional set-up

3.1 Levels of administration, government and jurisdiction

Since independence in 1966, Botswana is a unitary republic with the State President as the head of the executive. The highest legislative power rests with the unicameral parliament. While the country has a two-tier system of government, it is highly centralised, with most of the powers and control vested in government at national level. The local government structure, operating within central government, is made up of ten rural and six urban districts.¹⁸⁷ Central government is represented in the District Commissioner's offices in each district.

South Africa has adopted a federal system with three tiers of government consisting of the national, provincial and district level.¹⁸⁸ Nine provinces were established throughout the country, partly covering or merging the former homeland territories.¹⁸⁹ These provinces are further sub-divided into eight metropolitan and 44 district municipalities as well as into local municipalities. The previously significant number of communities and local government units in the country was reduced by a government appointed Demarcation Board.¹⁹⁰ The South African parliament is made up of the National Assembly and the National Council of Provinces. The nine provinces have their own executive and legislature. They are entitled to pass their own constitutions¹⁹¹ and are each headed by an elected Premier.

¹⁸⁷ See Chapter 03:02 Administrative Districts: Subsidiary Legislation: Declaration of Administrative Districts Order (2006); Chapter 40:02 Townships: Subsidiary Legislation: Declaration of Townships Order (2004).

¹⁸⁸ The South African Constitution of 1996 does not directly refer to federalism. See Simeon and Murray on the considerations and implementation of multi-level governance after 1994: Simeon, Richard/Murray, Christina 2004: Multi-Level Governance in South Africa, in: Berman, Bruce/Eyoh, Dickson/Kymlicka, Will (Eds.): *Ethnicity & Democracy in Africa*, Athens/Oxford, pp. 277-300.

¹⁸⁹ See Section 103 (1) of the Constitution of South Africa. In the demarcation process, the boundaries of the apartheid development regions of 1982 served as basis of the nine provinces. Due to this spatial resemblance, the distribution of ethnic groups in the provinces is similar to the former Bantustans. See Ramutsindela, Maano F. 1998: The Changing Meanings of South Africa's Internal Boundaries, in: *Area* 30, No. 4, p. 293.

¹⁹⁰ See Municipal Demarcation Act No. 27 of 1998.

¹⁹¹ See Section 104(1)(a) of the Constitution of South Africa.

The pluralistic institutional set-up in the fields of local government and jurisdiction require a sound framework for the allocation of functions and competences. Legislation in Botswana and South Africa has provided the limits of the local stakeholders' authority and additionally has regulated intergovernmental relations. In Botswana, the legal framework stipulates some form of decentralisation, albeit with a clear dominance of central government, and a subordinate role for local government. Central government delegates functions to the subordinate levels, channelled through the line Ministry of Local Government. Within local governance and jurisdiction, functions and powers allocated to each unit do not overlap. As the role of traditional institutions was reduced to a ceremonial, judicial and supportive one, formal interaction with the District Administration and the District Council is covered by joint meetings, committee membership and consultation, as will be shown in the subsequent sections.

The Constitution of the Republic of South Africa allocates functions to the subordinate spheres of government on an exclusive or shared basis. Concurrent legislation was first introduced with the interim Constitution of 1993. The nine provinces act within the framework established by national government. Their exclusive functions are very limited. Once more, it is the national level and the Constitution which set the benchmarks for provincial legislation. A National Council of Provinces (NCOP) with elected members of the provincial legislatures was established to represent them in the legislative process.¹⁹² The different levels of government are interrelated and interdependent. Legislation provides for co-operative government of the national, provincial and local levels and a framework for the establishment of intergovernmental relations.¹⁹³ However, the provincial and local levels are subordinated to national government. This hierarchy is also mirrored in revenue distribution, as the lower levels partly receive funding from central government.¹⁹⁴

With regard to traditional institutions, the administrative division in both countries follows the same structures: Institutions representing traditional leadership which

¹⁹² Cf. Friedman, Steven/Kihato, Caroline 2004: South Africa's Double Reform: Decentralization and the Transition from Apartheid, in: Oxhorn, Philip/Tulchin, Joseph S./Seelee, Andrew D. (Eds.), *Decentralization, Democratic Governance, and Civil Society in Comparative Perspective*, Washington, D. C., pp. 143-144.

¹⁹³ See Intergovernmental Relations Framework Act No 13 of 2005.

¹⁹⁴ See Division of Revenue Act No. 10 of 2014.

correspond to the respective hierarchy of government levels were established in both countries.¹⁹⁵

Table 1: Overview of government and traditional institutions

Level	Botswana		South Africa	
	Government	Trad. Institutions	Government	Trad. Institutions
National	National Government	Ntlo Ya Dikgosi (House of Chiefs)	National Government	National House of Traditional Leaders
Provincial	--	--	Provincial Government	Provincial House of Traditional Leaders
District	District/Local Government Tribal Administration		District Government	Local House of Traditional Leaders
Local			Local Government	Traditional Council/Tribal Administration

Tribal administration forms an official part of local government in Botswana, while traditional institutions are not formally integrated in the municipal and local structures in South Africa.

The relevant line ministries oversee the institutional pluralism in Botswana: the Ministry of Local Government, the Administration of Justice and the Ministry of Lands and Housing. In South Africa, the relevant ministries with regard to traditional leadership, local government and jurisdiction are: the Ministry of Cooperative Governance and Traditional Affairs, the Ministry of Public Service & Administration, the Ministry of Justice & Constitutional Development, the Ministry of Rural Development and Land Reform¹⁹⁶ and the Ministry of Mineral Resources.

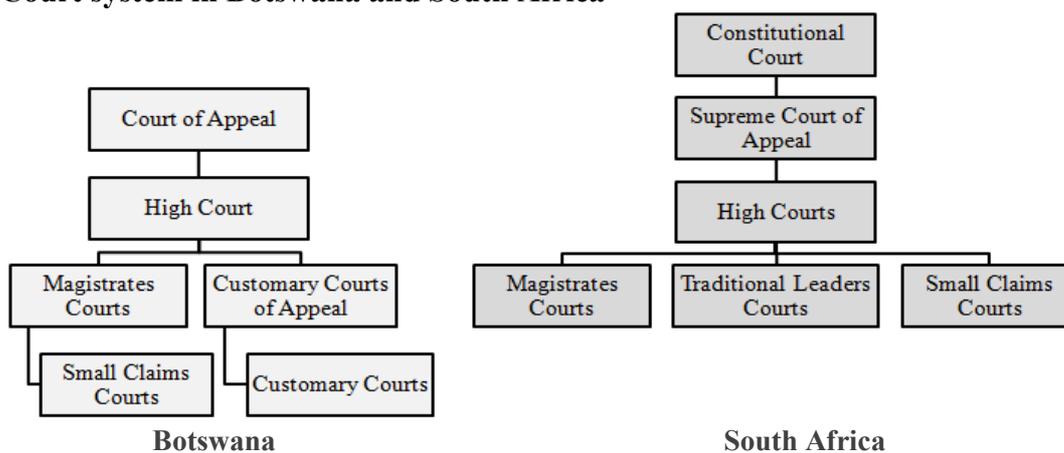
A difference is to be found in the judicial system of Botswana and South Africa. Jurisdiction along the hierarchy of the customary courts in Botswana is not organised under the Administration of Justice, like the common law courts, but falls – like traditional affairs in general – under the responsibility of the Department of Tribal

¹⁹⁵ See Sections 77-85 of the Constitution of Botswana. For South Africa, see Section 212(2)(a) of the Constitution of the Republic of South Africa, Sections 3(1) and 16(1) of the Traditional Leadership and Governance Framework Act of 2003, National House of Traditional Leaders Act No. 10 of 1997. Cf. Bekker, J. C./Boonzaaier, C. C. 2006: Traditional Leadership and Governance, in: Bekker, J. C./Rautenbach, C./Goolam, N. M. I. (Eds.): Introduction to Legal Pluralism, 2nd edition, Durban, pp. 122-123, 125-128; Gulbrandsen 2012, pp. 98-101; Proctor 1968, pp. 61-63.

¹⁹⁶ Since the reorganisation of the cabinet in 2009, parts of the portfolio of the former Ministry of Agriculture and Land Affairs have been transferred to the current ministry.

Administration of the Ministry of Local Government. The Ministry supervises the customary courts country-wide. There is no superior organ at national level coordinating and controlling the work of both ministerial wings.¹⁹⁷ In South Africa, the judiciary is organised independently from central government. The customary courts belong to the lower courts system, which is subordinate to the superior courts. The following graphics illustrate the differences between the integrated and the parallel structure of the judiciary in Botswana and South Africa.¹⁹⁸

Court system in Botswana and South Africa



It becomes obvious that the lower courts in Botswana are organised in a parallel way. The customary courts and their own courts of appeal exist alongside the magistrate courts in a rather independent way. In South Africa, the customary courts, together with the magistrates' courts and the small claims courts, equally fall under the superior courts. The graphical figure only refers to the general structure without expressing hierarchical relations at the lower courts' level. The choice of courts in South Africa is determined by the individual case.

3.2 Institutional pluralism – The legal framework

3.2.1 Constitutional provisions on traditional leadership and local governance

Botswana and South Africa have adopted pluralistic legal and institutional structures and have integrated the institution of traditional leadership after independence and

¹⁹⁷ Interview conducted with the Acting Director of the Department of Tribal Administration at the Ministry of Local Government in Gaborone, 25/06/2013 (INT 03-1).

¹⁹⁸ For the purpose of the current analysis, only the main courts will be listed and specialised courts will be excluded.

democratisation in the 1960s and 1990s. The foundation of the pluralistic order is laid down in the respective constitutions and is concretised by national and sub-national legislation. The Constitution of Botswana of 1966 and the Constitution of South Africa of 1996 provide for the recognition of traditional communities and institutions as well as customary law and jurisdiction. The constitutional integration of traditional leadership extends its capacity and involvement beyond the scope of its own local traditional community. Reference to traditional institutions in Botswana is given in Part III of Chapter V of the Constitution in the context of institutionalised representation at national level. In South Africa, the respective provisions on the framework for the integration of traditional leadership are found in Sections 211 and 212 of the Constitution.

The centralised and unitary structure of Botswana is demonstrated by the lack of any constitutional provisions for local government. The sub-national level does not derive any of its competences from the 1966 Constitution. The foundation for the establishment of the local government system is merely laid down in several Acts of Parliament. In South Africa, the sphere of local government is constitutionally entrenched. Section 40(1) provides that government at national, provincial and local level is distinctive, interdependent and interrelated. Additionally, Chapter 7 (Sections 151 to 164) is dedicated to decentralisation and local government. It regulates the country's subdivision into municipalities, the establishment of municipal councils and their procedures, powers and functions.

Section 77 of the Constitution of Botswana introduces the National House of Chiefs, or Ntlo ya Dikgosi, a consultative body at national level, in which the Paramount Chiefs or senior traditional leaders of the different regions receive official recognition. The creation of a bicameral system with an upper house of traditional leaders was rejected at the time of independence. Therefore, the National Assembly forms Botswana's sole legislative body at this level. The Ntlo ya Dikgosi is a plainly advisory body without any legislative or veto powers.¹⁹⁹ Sections 77 to 85 of the Constitution contain the major provisions on the composition, rules and procedures of the Ntlo ya Dikgosi. An overall number of 33 to 35 members is entitled to represent the different tribal areas and chiefdoms. Except for five of these traditional leaders who are appointed by the President, membership in the Ntlo ya Dikgosi is

¹⁹⁹ Cf. Proctor 1968, pp. 61-63; Vaughan 2003, pp. 97-101

automatically designated to the incumbent senior traditional leader of the respective chiefdom.²⁰⁰ In the exceptional regions Chobi, Ghanzi, Kgalagadi and North-East, where Botswana's so-called minority tribes reside, a representative has to be selected from among the multiple chiefdoms.²⁰¹ In the course of a constitutional amendment based on the recommendations of a Presidential commission of inquiry in 2000, the overall number of members of the Ntlo ya Dikgosi was raised to offer equal opportunities to the minority or non-Tswana tribes.²⁰²

The Ntlo ya Dikgosi is mandated to advise government on any matters related to traditional leadership and customary law.²⁰³ An additional function is the obligatory consideration of bills altering the current legal framework or affecting traditional institutions and customary law. The National Assembly has to present any bill which will affect the following customary and tribal matters to the Ntlo ya Dikgosi:

- “[...] (a) the designation, recognition, removal of powers of Chiefs, Sub-Chiefs or Headmen;*
(b) the organization, powers or administration of customary courts;
(c) customary law, or the ascertainment or recording of customary law; or
(d) tribal organization or tribal property [...].”²⁰⁴

The Ntlo ya Dikgosi is entitled to consult on these matters and submit resolutions to Parliament. It can delay the legislative process, but has no veto powers.²⁰⁵ Additionally, the Constitution allows the members of the Ntlo ya Dikgosi

- “[...] to discuss any matter within the executive or legislative authority of Botswana of which it considers it is desirable to take cognizance in the interests of the tribes and tribal organizations it represents and to make representations thereon to the President, or to send messages thereon to the National Assembly.”²⁰⁶*

The Constitution provides for the recognition and application of customary law but does not explicitly characterise customary courts at district and village level as

²⁰⁰ Cf. Section 77 of the Constitution.

²⁰¹ Cf. Section 78 of the Constitution.

²⁰² The Presidential Commission of Inquiry, the so-called Balopi Commission, was constituted in 2000. Its recommendations and impact will be analysed in detail at the end of this chapter.

²⁰³ Cf. Section 85(4) of the Constitution of Botswana.

²⁰⁴ Section 88(2) of the Constitution of Botswana.

²⁰⁵ See Section 85(1).

²⁰⁶ Section 85(5) of the Constitution of Botswana.

bodies of the judicial system. In Chapter VI on the judicature, the Constitution only names the statutory common law courts. Chapter II, dealing with the protection of fundamental rights and freedoms, refers to customary law in the sections on ‘Provisions to secure protection of law’ and the ‘Protection from discrimination on the grounds of race, etc.’. Additionally, recognition and protection of customary law is given in Section 88 dealing with the introduction of bills which have to be considered by the Ntlo ya Dikgosi.

The Constitution of Botswana further proclaims the clear separation of traditional leadership and active political involvement. Dual membership in the National Assembly and the Ntlo ya Dikgosi and the simultaneous holding of a traditional and a governmental office are strictly prohibited.²⁰⁷

In South Africa, the main provisions on the recognition of traditional leadership and institutions are found in Section 211 of the Constitution which provides as follows:

“211. (1) The institution, status and role of traditional leadership according to customary law, are recognised subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”²⁰⁸

In Section 212, the Constitution of South Africa refers to national and provincial legislation to define the role of traditional leadership and to provide for the potential establishment of representative institutions dealing with matters related to traditional leadership, traditional communities and customary law. Chapter 3 of the Constitution on co-operative government and intergovernmental relations determines that the different spheres of government in South Africa are “[...] *distinctive, interdependent*

²⁰⁷ Cf. Section 62(1) lit. d of the Constitution of Botswana.

²⁰⁸ According to Section 166 of the Constitution, courts included by the provisions in sub-section (3) and therefore obliged to apply customary law are the Constitutional Court, the Supreme Court of Appeal, the High Court, any other high courts of appeal established by an Act of Parliament to hear appeals from High Courts, the Magistrate Courts, and any other court established or recognised in terms of an Act of Parliament which also refers to customary courts.

and interrelated”²⁰⁹. Provided that a role for traditional institutions at local level is created by further legislation, this chapter also applies to them. All government departments and organs of the state are required to interact, consult and co-operate. Item 16(1) of Schedule 6 of the Constitution generally provides for the customary courts to continue to function and to exercise jurisdiction in terms of the applicable legislation.

The relation between the democratic framework and the legal pluralism is mentioned in Section 39 on the interpretation of the Bill of Rights:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum -
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law [...].
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

As the quotation above shows, the institution of traditional leadership is obliged to ensure full compliance with the core constitutional values of human dignity, equality, non-sexism, human rights and freedom.²¹⁰ The integration of customary law and the harmonisation with common law and the Bill of Rights proved to be difficult and has caused discussions and disagreement among several interest groups. One aspect of the debate was shaped by the unique character and historical modification of the indigenous law, as Bennett demonstrated in his analysis of the re-introduction of customary law into the legal and judicial system. Previous attempts to define and codify customary law have led to its distortion. Additionally, the role of living law and its adaptivity and dynamic were not considered sufficiently.²¹¹

²⁰⁹ See Section 40(1).

²¹⁰ This was also confirmed by the Constitutional Court in *S v Thebus* (2003 (10) BCLR 1100 (CC) 1111).

²¹¹ Cf. Bennett, T. W. 2009: Re-Introducing African Customary Law to the South African Legal System, in: *The American Journal of Comparative Law* 57, No. 1, pp. 1-31.

3.2.2 Main legislation on traditional institutions

Traditional institutions in Botswana work within the context of their traditional communities and are integrated into the central government structures. Their role and powers are inter alia defined in the Bogosi Act²¹², the former Chieftainship Act. The Act provides for the recognition of tribes and traditional leaders. Nowadays, they mainly work as institutions of traditional communities performing ceremonial, judicial and administrative tasks. Additionally, they function as mediating and consultative bodies at local and national level, without real decision-making powers.²¹³ While they are constitutionally recognised, most of their former powers and duties were transferred to other local government institutions around independence. These include the District Commissioner's office, the District Council and the Land Boards. Nevertheless, traditional institutions, or more specifically the tribal administrations, are part of the formal local government system.

Under the post-independence framework, authority was vested in the Minister of Local Government to recognise, appoint, suspend or depose traditional leaders. With this empowerment of the Minister, legislation in Botswana has established complete supremacy of central government over traditional institutions.²¹⁴ Their integration also includes administrative affiliation as they have become civil servants. Although traditional leaders are civil servants in Botswana, they are employed under different terms to the public officers. The latter are employed under the Public Service Act, while employment of traditional leaders is regulated by the Bogosi Act.²¹⁵ The Act introduces an age limit for their tenure of office. Exceptions to their automatic retirement have to be approved by the Minister.²¹⁶ Furthermore, traditional institutions receive a salary²¹⁷ and pensions²¹⁸ and depend on an annual budget and further operational resources provided by central government for the tribal

²¹² Bogosi Act of 2008.

²¹³ Cf. Section 17 of the Bogosi Act. Also see Düsing, Sandra 2002: *Traditional Leadership and Democratisation in Southern Africa. A Comparative Study*. Botswana, Namibia, and South Africa, Hamburg, pp. 171-173, 177-186.

²¹⁴ Cf. Sections 5, 13, 15 and 16 of the Bogosi Act. Additionally, Section 23 limits the tenure of office of a traditional leader in Botswana. Also see Jones, David S. 1983: *Traditional Authority and State Administration in Botswana*, in: *The Journal of Modern African Studies* 21, No. 1, pp. 134-136.

²¹⁵ Interview, Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1).

²¹⁶ See Section 23 of the Bogosi Act.

²¹⁷ See Section 2 of the Bogosi (Prescribed Rate of Salary) Order of 1966.

²¹⁸ See Section 23(3) of the Bogosi Act in conjunction with Pensions Act No. 11 of 2008.

administration.²¹⁹ Traditional leaders who represent a chiefdom or a region as chairperson or member of the Ntlo ya Dikgosi are entitled to additional remuneration and sitting allowances.²²⁰

The Bogosi Act presents a list of duties and functions traditional institutions have to fulfil at local level: A traditional leader exercises traditional authority after consultation with the tribe. He arranges tribal ceremonies, assists in preventing crime, promotes the welfare of his tribe and convenes and presides over kgotla meetings and the customary court. In the event of his failure to comply with any directions given to him by the minister, he is liable to be suspended or deposed.²²¹

In their capacity as presidents of the traditional kgotla assembly, they help to provide a forum which links the grassroots level with external representatives like government officials. In the field of local development planning and implementation, traditional institutions support the District Development Committees (DDC), the Village Development Committees (VDCs) and the Ward Development Committees (WDCs) both in their establishment and their work and consultation processes.²²² They are also represented in these committees.

In South Africa, the Traditional Leadership and Governance Framework Act (TLGFA) serves as general frame for further legislation of the provinces in which traditional leadership exists. The Act entered into force in 2003, regulating the duties and powers of traditional institutions.²²³ It took a period of almost one decade to finalise legislation on traditional leadership for the post-apartheid dispensation.²²⁴

The TLGFA recognises kings and queens, senior traditional leaders and headmen as traditional leadership positions. Depending on the hierarchy level, traditional leaders have to be recognised either by the President or by the Premier of the province concerned. The removal of a traditional leader has to be initiated by the royal family and withdrawal of his or her recognition has to be conducted by the President or

²¹⁹ Interview INT 03-1. The tribal administrations of the individual chiefdoms have to submit their estimated budgetary needs and requests annually to the Ministry of Local Government. This encompasses, inter alia, the budget for office buildings and non-traditional staff members.

²²⁰ See Ntlo ya Dikgosi (Salaries and Allowances) Act No. 2 of 2008.

²²¹ Cf. Sections 17, 19 and 20 of the Bogosi Act.

²²² The legal bases of the Committees are Presidential Directives of 1968 and 1970.

²²³ See Traditional Leadership and Governance Framework Act of 2003. The Act provides the framework for provincial legislation on traditional institutions and communities.

²²⁴ The TLGFA is under revision (status: June 2017). Recent proposals included the Traditional Affairs Bill and the Traditional and Khoi-San Leadership Bill.

Premier.²²⁵ The TLGFA refers to further representative institutions, namely to the provincial and local houses of traditional leaders and to the traditional councils. Provincial houses exist in six provinces. The North West House of Traditional Leaders was established in 1995²²⁶ and is now regulated by the North West Houses of Traditional Leaders Act No. 3 of 2009. Local Houses of Traditional Leaders were established in district or metropolitan municipalities with multiple senior traditional leaders.²²⁷ Each traditional community which has received official recognition has to establish a traditional council. These councils are composed of the traditional leaders and selected and elected members of the community, whereby one third of the council members have to be female.²²⁸

The Act also takes account of the debate on the harmonisation of traditional governance and jurisdiction:

“2(3) A traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by -

- (a) preventing unfair discrimination;*
- (b) promoting equality; and*
- (c) seeking to progressively advance gender representation in the succession to traditional leadership positions.”*²²⁹

Most of the functions of traditional institutions set out in the Framework Act are directed towards fostering and promoting development and service-delivery in local communities and cooperation with and support of the local government institutions. Functions inherent to traditional leadership are the administration of “[...] *affairs of the traditional community in accordance with customs and tradition [...]*” and the performance of “[...] *functions conferred by customary law, customs and statutory law consistent with the Constitution.*”²³⁰

²²⁵ See Sections 8-12 of the Framework Act; Sections 13, 14, 19, 20 of the North West Traditional Leadership and Governance Act of 2005.

²²⁶ Cf. The House of Traditional Leaders for the Province of the North-West Act No. 12 of 1994.

²²⁷ See Section 17 of the TLGFA.

²²⁸ See Section 3 of the TLGFA. A balanced representation of women shall also be ensured at provincial and national level. See Section 16(3) of the Act.

²²⁹ Section 2(3) of the Framework Act.

²³⁰ Section 4(1)(a) and (l) of the Act.

At provincial level, the Framework Act was transformed into the respective provincial legislation in 2005 and 2006. In North West, the North West Traditional Leadership And Governance Act No. 2 of 2005 regulates traditional leadership. The functions and duties of traditional councils are listed in Section 9, which also refers to the supervisory powers of the provincial government. Traditional councils are *inter alia* mandated to perform functions conferred to them by tradition and customary law, to administer the community and its finances, to promote the welfare of the community, and to support traditional leaders.²³¹ Furthermore, traditional councils are requested to assist and cooperate with the municipalities, to identify local needs and participate in development planning.²³²

The resilience traditional institutions have experienced in post-apartheid South Africa becomes visible in the transitional arrangements in Section 28 of the Act. These provisions have received broad opposition as they not only strengthen traditional institutions but also continue certain legacies of the apartheid dispensation. The most critical provisions include the recognition of traditional leaders, tribes and tribal authorities created under the Black Authorities Act, the provisional automatic transformation of the previous tribal authorities into traditional councils until the first elections were held, and the maintenance of the former homeland boundaries. In addition, criticism was raised over the mandatory imposition of traditional leadership over communities, particularly in rural areas, and over the disestablishment of elected community authorities.²³³

South Africa had to find a solution to cope with the consequences of arbitrary appointments and dismissals of traditional leaders and creation of tribes by various colonial and apartheid governments. In accordance with Section 22 of the TLGFA, the Commission on Traditional Leadership Disputes and Claims has been established for the investigation of historically or contemporarily disputed leadership positions, recognition of traditional communities and boundaries, as well as the establishment, disestablishment, division or merging of tribes. Additionally, provincial committees

²³¹ See Section 9(1) lit. a-e, (2) of the North West Traditional Leadership And Governance Act.

²³² See Section 9(1) lit. f-k of the Act.

²³³ Cf. Claassens, Aninka 2014: Denying Ownership and Equal Citizenship: Continuities in the State's Use of Law and 'Custom', 1913–2013, in: *Journal of Southern African Studies* 40, No. 4, pp. 769-771.

were set up to investigate disputes and claims in each province of South Africa.²³⁴ These procedures became essential due to the provisions on continued recognition of traditional leaders and the transformation of traditional authorities in Section 28 of the Act.

Representative institutions were established at each government level. In terms of Section 7(1) of the National House of Traditional Leaders Act, the most relevant objectives and functions of the National House and the Provincial Houses of Traditional Leaders are to promote the role of traditional leadership within a democratic dispensation, to enhance unity among different communities, to consider Bills, to consult with government and to assist in development and service delivery. The House may also advise the national and provincial government and make recommendations on matters pertaining to traditional leadership and roles of traditional leaders.²³⁵ Following the criticism of the system of traditional leadership and discrimination against women, a quota of one third was introduced for the members of the National House. Exceptions are granted if there is an insufficient number of women and the minister has consulted with the Premier of the province and the Provincial House of Traditional Leaders.²³⁶ Like in Botswana, traditional and political offices are incompatible in South Africa. No member of a municipal council, of a provincial legislature or of Parliament is allowed to become a member of the National House of Traditional Leaders. Consequently, a person entering public office must vacate his seat in the National House.²³⁷

The salary, benefits and sitting allowances of traditional institutions and representatives of the provincial and national houses are regulated by the Constitution²³⁸ and two Acts of Parliament, namely the Remuneration of Public

²³⁴ See Sections 21-26A of the Traditional Leadership and Governance Framework Amendment Act No. 23 of 2009.

²³⁵ Cf. Section 11 of the National House of Traditional Leaders Act No. 22 of 2009; Section 7(1) of the House of Traditional Leaders for the Province of the North-West Act.

²³⁶ Cf. National House of Traditional Leaders Act of 2009, Section 3(4).

²³⁷ Cf. House of Traditional Leaders Act, Section 5 lit. a; 6 lit. d.

²³⁸ Section 219(1) und (2) determine that national legislation has to establish a framework for the remuneration of certain persons holding public office and an independent commission which makes recommendations on the allowances, benefits and salaries.

Office Bearers Act²³⁹ and the Independent Commission for the Remuneration of Public Office-bearers Act.²⁴⁰

3.2.3 Regulatory framework and structure of the local government system

The local government system in Botswana is constituted by the District Administration, District or Town Councils, Tribal Administration, Land Boards and Development Committees at district and village level. Two major acts provide the framework for local government: the Local Government (District Councils) Act of 1965 and the Townships Act of 1965. Additionally, the Township Act of 1955, the Unified Local Government Service Act of 1973 and the Town Country Planning Act of 1980 regulate matters of local government.

The District Administration represents central government and the Ministry of Local Government and coordinates national and local government activities in the districts. It is mandated to perform executive and administrative tasks, inter alia, to take care of the provision of social services in the districts, ensure community participation and support local institutions. The District Administration is headed by the District Commissioner, who is a senior civil servant appointed by the President. He is the chairman of the District Development Committee, which is responsible for development planning, management and implementation at district level.²⁴¹

District and urban councils are headed by a Council Chairman or Mayor and consist of elected councillors. The legal framework authorises the President to confer the following responsibilities to a District Council: administration of the council and the district, local commerce and licensing, education and health services, rural infrastructure, water and sanitation and social and community development.²⁴² The councils are entitled to allocate resources within their area of jurisdiction. The Kgatleng District Council, where the case study is located, consists of 23 elected

²³⁹ See Section 5 of the Remuneration of Public Office Bearers Act No. 20 of 1998.

²⁴⁰ The Commission is mandated to publish annual recommendations on sums and financial limits for the posts of certain public office bearers. See Independent Commission for the Remuneration of Public Office-bearers Act No. 92 of 1997.

²⁴¹ The committees were established according to a Presidential Directive of 1970.

²⁴² See Sections 31 and 32 of the Local Government (District Councils) Act, First Schedule to the Act.

members, four nominated members and the Paramount Chief of the Bakgatla or his senior representative.²⁴³

Tribal administration is situated at district and sub-district level. It is made up of traditional institutions and non-tribal administrative staff members. The Paramount Chief or senior traditional leader is the head of the Tribal Administration. His authority is subordinated to that of the District Commissioner as representative of the Ministry of Local Government.

Land Boards have been established at district and sub-district level and belong to the Ministry of Lands and Housing. The original number of institutions used to be identical to the eight major Tswana tribal territories. The members of the Land Board are partly appointed by the minister and partly elected in the kgotla.²⁴⁴ Until 1984, the senior traditional leader was a member of the land boards. Meanwhile, he or she participates in individual sessions and, together with the headmen in the villages, advises the board.

Development planning and project implementation is realised with the support of the DDCs, the VDCs in rural areas and the WDCs in urban areas. These committees are in charge of coordinating the activities of the other institutions at village level. A VDC consists of ten members who are elected at the kgotla. The kgotla is also the forum in which the VDC members discuss with community members and further stakeholders and report on development initiatives and needs. In matters related to local development, the VDCs are responsible to the kgotla.²⁴⁵

In South Africa, the varieties of local government systems needed to be deracialised and democratised. The major aims of local government are laid down in Section 152 of the Constitution of 1996:

“[...] (a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

²⁴³ See Section 2(2) of the Establishment of the Kgatleng District Council Order.

²⁴⁴ See Sharma 2010, pp. 135-136.

²⁴⁵ The background information on development planning was provided during interviews conducted with members of a VDC and the District Administration in Mochudi on 5 and 19 July 2013 (05/07/2013: informal talk in Mochudi with a VDC member; INT 14-1).

(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in the matters of local government.”

Aside from the constitutional provisions, the current framework of local government is constituted by the following Acts:

- Local Government: Municipal Structures Act No. 117 of 1998,
- Local Government: Municipal Demarcation Act No. 27 of 1998,
- Local Government: Municipal Systems Act No. 32 of 2000,
- Municipal Planning and Performance Management Regulations of 2001,
- Local Government: Municipal Finance Management Act No. 56 of 2003.

The line ministry that regulates matters of local governance is the Ministry for Cooperative Governance and Traditional Affairs. During the interim phase, provisions on local government and its transition were part of the Local Government Transition Act²⁴⁶.

The Municipal Demarcation Act of 1998 defined the number and boundaries of the future municipalities and their jurisdiction. The concept of ‘wall to wall’ local government, which aimed at providing democratic and elected local government throughout the country, underpinned the approach. In the transitory phase, the number of municipalities was reduced from 843 to 278. The two-tier system at district and local level is supposed to link the urban and rural areas of the country. Together with Sections 151 and 155 of the Constitution of 1996, the Municipal Structures Act provides for the subdivision of the country into three different categories of municipalities. Category A is a self-standing municipality and refers to the metropolitan areas in South Africa. For non-metropolitan areas, shared local government was introduced. At the district level, district municipalities (Category C) were established which cover multiple local municipalities (Category B).²⁴⁷ During the local government elections of 2011, there were 8 metropolitan, 44 district and

²⁴⁶ Act No. 209 of 1993.

²⁴⁷ Section 155(1) of the Constitutions provides the following criteria:

- “[...] (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.*
(b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
(c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.”

226 local municipalities. At the grassroots level, wards were established as the lowest echelon of the system in the metropolitan and local municipalities.²⁴⁸

The functions and powers of municipalities are listed in Part B of the Schedules 4 and 5 of the Constitution of 1996. They are charged with the responsibility for the provision of basic services such as water, electricity, refuse removal and municipal infrastructure. These functions are also performed in accordance with regulatory frameworks set by the national or provincial legislature. In the execution of their mandates, municipalities are overviewed and controlled by national and provincial government.²⁴⁹ The Constitution²⁵⁰, the Municipal Finance Management Act and related legislation also grant certain fiscal authority to the municipalities.

The key actors of the municipal structures are the councils and their speakers, the mayor as the head of the executive and the municipal manager, who is appointed by the council as the head of the administration and accounting officer.²⁵¹ The metropolitan and local councils consist of 50% of ward councillors who are directly elected in the wards, and 50% of members who are elected through a system of proportional representation as party representatives²⁵². In the district councils, 60% of the councillors are appointed by the local municipalities within the district and 40% of the councillors are directly elected through a system of proportional representation.²⁵³

A complex system of municipal executives exists for the different categories of municipalities, including a collective executive system, a mayoral executive system and a plenary executive system.²⁵⁴ A municipal council with more than nine

²⁴⁸ 4392 wards were contested in the municipal elections of 2016.

²⁴⁹ The supervision and subordination of the municipalities is laid down in the Municipal Systems Act and the Municipal Finance Management Act. Due to these powers, local government remains an appendage to the superior levels of government.

²⁵⁰ See Section 229(1) of the Constitution.

²⁵¹ The framework of the role and duties of the municipal manager is provided in the Municipal Systems Act.

²⁵² Following the mode of election, they are called PR councillors.

²⁵³ See Sections 22 and 23 of the Municipal Structures Act.

²⁵⁴ See Sections 7 to 10 of the Municipal Structures Act. In the collective executive system, the municipal council appoints an executive committee. In a municipality which has a mayoral executive system of governance, executive leadership is vested in an executive mayor, appointed by the council, who is assisted by a committee. A plenary executive system is constituted by the municipal council. See Sections 54 and 55 of the Municipal Structures Act.

councillors must have an executive committee.²⁵⁵ The majority of councils have specialised committees.

Each Executive Council of a province has one member (MEC) who is responsible for local government in the province. At the local level, traditional leaders need to be identified by the MEC of local government as such before they are allowed to attend and participate in meetings of the municipal council in the respective area. The maximum number of traditional leaders should not exceed ten per cent of the members of a municipal council. If there are too many traditional leaders in the area of jurisdiction, their membership in the council should be based upon a system of rotation.²⁵⁶ In their role as members of the municipal council at the local level, traditional leaders are bound to the code of conduct laid down in the Municipal Systems Act. In case of a breach of the code, traditional leaders may be excluded temporarily or completely from participating in the council procedures.²⁵⁷

After consultation with the respective House of Traditional Leaders, the MEC for local government in a province is entitled to

*“[...] (a) regulate the participation of traditional leaders in the proceedings of a municipal council; and
(b) prescribe a role for traditional leaders in the affairs of a municipality.”*²⁵⁸

The Local Government Municipal Systems Act defines inclusive community participation as one of its priorities. At community level, traditional leaders are requested to provide and encourage petitions, public meetings and hearings, consultative sessions as well as feedback mechanisms on all important municipal affairs. Special focus should be given to weak or disadvantaged people.²⁵⁹

All institutions of the local government system are involved in development planning, management and implementation. The district municipalities have to provide a binding framework for development planning in the district. The local communities as well as the traditional leaders of the area have to be consulted and

²⁵⁵ See Sections 33(c), 44 of the Municipal Structures Act.

²⁵⁶ Cf. Section 81(1), (2) of the Local Government: Municipal Structures Act.

²⁵⁷ Cf. Section 15 of the Local Government Municipal Systems Act.

²⁵⁸ Section 81(4) lit. a, b of the Local Government: Municipal Structures Act.

²⁵⁹ Cf. Section 17 of the Local Government Municipal Systems Act.

involved in the drafting of the Integrated Development Plans (IDPs) at district level.²⁶⁰

3.2.4 Legislation related to law and the local court system

The legal pluralism and institutional pluralism in jurisdictions in Botswana and South Africa have their foundation in the respective constitutions and Acts of Parliament. In addition to this statutory legislation, it is the unwritten and codified customary law itself which determines content and procedures of civil and criminal jurisdiction.

Botswana has a dual court system consisting of common law courts and customary courts. Customary courts exist in rural and urban areas. Their establishment, recognition, procedures and jurisdiction are regulated by the Customary Courts Act²⁶¹. Under this Act, the previously unlimited jurisdiction of traditional institutions was curtailed and restricted to certain cases and sanctions. Additionally, the Act contains provisions on the appointment of the Director and the Deputy Directors of the Department of Tribal Administration in the Ministry of Local Government.

Until today, the relevance of traditional institutions in Botswana is largely determined by the prominent role customary law and customary courts play.²⁶² Magistrate Courts and small claims courts were established throughout the country. Nevertheless, the majority of civil cases and a significant amount of the criminal cases is still dealt with by traditional institutions.²⁶³ The popularity of the customary courts can be attributed to the following factors:

- Customary courts were established in the majority of villages and are easily accessible,
- everyone can lodge a case at the court,
- the registration and procedures of court cases are free of costs,

²⁶⁰ Cf. Section 27, 29 of the Local Government Municipal Systems Act.

²⁶¹ Proclamation 19 of 1961, as amended last by Customary Courts (Amendment) Act No. 1 of 2006.

²⁶² See Customary Courts Act and Customary Law Act. Jurisdiction of traditional courts is not unlimited as certain cases, listed in Section 13 of the Customary Courts Act, are excluded from their jurisdiction. In Sections 37 to 44, the Act also regulates procedures concerning the supervisory powers of chiefs, the transfer of cases and appeals against judgements of the customary courts.

²⁶³ Interview, Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1). Customary courts in Botswana do not fall under the Administration of Justice but are overviewed and controlled by the Tribal Administration. According to the Acting Director, the around 415 customary courts handle about 80% of the civil and criminal cases in Botswana.

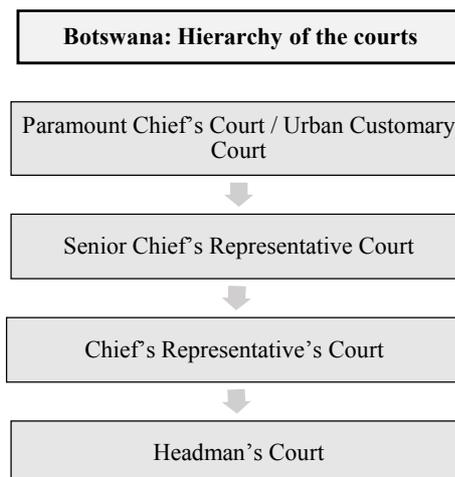
- the courts use simple, non-legal language and follow uncomplicated procedures, and
- attorneys or legal representatives are not required or allowed.²⁶⁴

The customary courts are hierarchically organised with the headmen's courts forming the lowest and the Paramount Chief's Courts forming the highest level of formal tribal jurisdiction. The so-called urban customary courts work under the Department of Tribal Administration. They are not based on traditional leadership positions. They consist of a court president, his deputy and court clerks but no advisors.²⁶⁵ Two Customary Courts of Appeal operate in Gaborone and in Francistown. They receive appeals against judgements of the lower customary courts. Appeals against rulings of the Customary Courts of Appeal have to be addressed in the High Court.²⁶⁶

Customary courts are authorised to impose different penalties, ranging from fines and corporal punishment to imprisonment. Women and persons older than 40 years are excluded from corporal punishment.²⁶⁷

The legislation dealing with customary law in Botswana is the Customary Law Act. It states that customary law “[...] means, in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice [...]”.²⁶⁸ The common law courts and the customary law

courts are requested to apply customary law in the first instance. On the other hand, customary courts have to apply common law when the matter cannot be dealt with



²⁶⁴ These aspects and advantages of customary courts were emphasised by the Acting Director of the Department of Tribal Administration (INT 03-1).

²⁶⁵ Interview conducted with the President of an Urban Customary Court in Gaborone, 31/07/2013 (INT 22-1).

²⁶⁶ Cf. Fombad, Charles M. 2004: Customary courts and traditional justice in Botswana: Present challenges and future perspectives, in: Stellenbosch Law Review 15, No. 1, pp. 166-192.

²⁶⁷ See Section 18 of the Customary Courts Act.

²⁶⁸ Section 2 of the Customary Law Act.

under customary law. This means that a person who has not undergone any legal training in common law has to try such cases.

*“The courts of Botswana shall, within the limits of their jurisdiction, apply customary law in all cases and proceedings in which, by virtue of the provisions of this Act or any other law, customary law is properly applied and where it is not properly applied such courts shall apply the common law.”*²⁶⁹

Despite this provision, the Constitution and the Customary Courts Act curtail the application of customary law in certain criminal cases as they both stipulate that the offence and the penalty have to be defined by written law.²⁷⁰ As only a minor part of customary law was codified and the majority of provisions are based on oral traditions, courts have to apply the Penal Code or further written legislation at the expense of criminal customary law.

In South Africa, the period since 1994 has been marked by debate and struggle on how to deal with traditional institutions and their jurisdiction in the rural areas. Various attempts were undertaken to integrate and harmonise customary law and jurisdiction. The South African Law Reform Commission was initiated and mandated to assess the status quo and to offer recommendations for a future framework for the judicial role of traditional institutions and customary law.²⁷¹ The Commission voted, inter alia, for the repeal of the Black Administration Act.²⁷²

In 2008, a first version of the Traditional Courts Bill²⁷³ was published. Following serious public discontent, the Bill was finally withdrawn from the National Assembly in June 2011. Nevertheless, a similar legislative proposal, the Traditional Courts Bill [B1-2012], was reintroduced at the end of the same year. Both Bills attempted to regulate customary courts which still fall under Sections 12 and 20 of the Black Administration Act of 1927.²⁷⁴

²⁶⁹ Section 3 of the Customary Law Act.

²⁷⁰ See Section 10(8) of the Constitution of Botswana and Section 12(6) of the Customary Courts Act.

²⁷¹ See South African Law Commission 2003: Project 90: Customary Law – Report on traditional courts and the judicial function of traditional leaders, January.

²⁷² See South African Law Reform Commission 2004: Project 25: Statute Law – The Repeal of the Black Administration Act 38 of 1927, March.

²⁷³ Traditional Courts Bill [B15-2008].

²⁷⁴ The Repeal of the Black Administration Act and Amendment of Certain Laws Act No. 28 of 2005 excluded Sections 12 and 20. Since then, the application of these provisions has been extended annually until a final date was removed by the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act No. 28 of 2012.

The 2008 Bill received criticism for reproducing apartheid structures and confirming former homeland boundaries. Executive, legislative and judicial powers would have been concentrated and centralised in the hands of traditional institutions, while traditional systems of checks and balances would have been eroded. Furthermore, the rural population would have been forced under traditional jurisdiction without access to legal representation or to the magistrate courts.²⁷⁵ Additionally, depending on the rules of the traditional community, women are not allowed to approach the traditional courts themselves but must be represented by a male relative.²⁷⁶

The Traditional Courts Bill of 2012 also received far-reaching opposition in South Africa. The Bill lapsed after the National Assembly had passed it on to the National Council of Provinces in 2014.²⁷⁷ Controversies circled around both the drafting process of the Bill and around its major provisions and implications. The people mostly affected by the Bill - the rural population in the areas within the former homeland boundaries, and among them women as a particularly vulnerable group - were excluded from consultation and participation. Additionally, people not belonging to a traditional community and actually not falling under the leadership of traditional institutions were affected alike.

The reform of the traditional courts system strengthened senior traditional leaders by centralising judicial powers, thereby marginalising arbitration and dispute-resolution mechanisms at lower levels and excluding the traditional councils. Additionally, separate jurisdiction would have been manifested within the former apartheid boundaries of the tribal territories exceeding the powers of the customary courts above their historical and traditional role. A further critical issue would have been discrimination and deprivation of basic rights for the population in rural areas and their mandatory subjection to the jurisdiction of these courts.²⁷⁸

²⁷⁵ See Section 20(c) of the Bill.

²⁷⁶ See Section 9(3) of the Bill.

²⁷⁷ See The Traditional Courts Bill (B1-2012) 2012: Negotiation Mandates of the Provincial Legislatures; Thipe, Thuto/Buthelezi, Mbongiseni 2014: Democracy in action: The demise of the Traditional Courts Bill and its implications, in: *South African Journal on Human Rights* 30, No. 1, January, pp. 196-205.

²⁷⁸ Cf. Thipe/Mbongiseni 2014, pp. 196-205.

3.2.5 Legal framework on land rights and mineral resources exploitation

Botswana has three categories of land: state land, freehold land and tribal land. In the pre-colonial period, land was owned by the tribes, was held in trust and was administered and allocated by traditional institutions for the communities. In the colonial period, the tribal land demarcated the boundaries of the native reserves.²⁷⁹ Since independence, Botswana's land policy has undergone major changes. In the wake of reform, Botswana has experienced a shift from communal systems of land tenure, mainly in the tribal areas, to individual tenure. During the transition process, traditional institutions lost their formal authority and control over land allocation. In 1968, land boards were established throughout the country at district and sub-district level. The previous authority of traditional institutions in rights and title to land were vested in these statutory bodies.²⁸⁰ From 1970 onwards, the reform of local government also affected land management. Rural land tenure and administration were democratised and decentralised and, together with the administration of certain communally occupied land, transferred to the land boards.

A significant proportion of land in Botswana is still owned by tribes. Tribal land may be occupied individually or communally under customary law or under common law lease, with a majority of land tenure being held under customary law. Despite tribal ownership and the categorisation into tribal land, state land and freehold land, the role of traditional institutions is reduced to ex-officio membership and mere advice and consultation to the land boards. With the transferral of land rights, traditional institutions have lost another source of income and do not have an independent resource basis.²⁸¹

The candidates to be appointed to the land boards of a tribal area are elected in the main kgotla or in the associated villages. Representatives of local government and the Paramount Chief or senior traditional leader constitute the Land Board Selection Committee, which chooses the candidates who are later appointed by the Minister of Local Government.²⁸²

²⁷⁹ Cf. Molomo, Mpho G. 2011: Dikgosi and the Politics of Land in Botswana, in: Ray, Donald I./Quinlan, Tim/Sharma, Keshav/Clarke, Tacita A. O. (Eds.): *Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development*, Calgary, Alberta, pp. 622-623.

²⁸⁰ Cf. Sections 3, 10, 13 and 19 of the Tribal Land Act No. 54 of 1968.

²⁸¹ Cf. Mineral Rights in Tribal Territories Act No. 31 of 1967.

²⁸² See Section 2 of the Tribal Land Regulations of 1970, S.I. 7, 2004.

While Section 4 of the Tribal Land (Subordinate Land Boards) Regulations of 1973 originally stated that the Subordinate Land Boards comprise inter alia four representatives of the tribe who were to be elected in the kgotla and four tribal members who were to be appointed by the Minister of Local Government, the latter appointments are no longer limited to members of the respective tribe.²⁸³

In Botswana, ownership of the country's minerals and petroleum resources was vested in the state, and the government was mandated to control and verify that the exploitation of the resources benefits the whole country:

“3. Subject to the provision of the Mineral Rights in Tribal Territories Act, all rights of ownership in minerals are vested in the Republic and the Minister shall ensure, in the public interest, that the mineral resources of the Republic are investigated and exploited in the most efficient, beneficial and timely manner.”^{284 285}

Under certain conditions there are exceptions to the strict regulations on the extraction of minerals, which benefit members of a tribe who can claim historical rights:

*“5(3) Nothing in this Act shall prevent a member of any tribe from taking, subject to such conditions and restrictions as may be prescribed, minerals from any land from which it has been the custom of members of that tribe to take minerals and to the extent that this is permissible under the customary law of that tribe.”*²⁸⁶

In contrast to the regulations on mineral and petroleum resource extraction in South Africa, any fees or royalties in the context of mineral concessions or extraction have to be paid to the government.²⁸⁷ All profits derived from mineral exploitation in the country are administered by Botswana's government and invested in the name of the whole country. The original mineral rights, titles and interests in tribal territories were transferred to the state and vested in the President after independence. The tribes or their leadership were not compensated for the transfer. On the other hand,

²⁸³ See Section 3(2) of the Tribal Land (Subordinate Land Boards) Regulations, S.I. 24, 2005.

²⁸⁴ Section 3 of the Mines and Minerals Act No. 17 of 1999.

²⁸⁵ See Section 4 of the Petroleum (Exploration and Production) Act No. 12 of 1981 for regulations on petroleum resources.

²⁸⁶ Section 5 of the Mines and Minerals Act No. 17 of 1999.

²⁸⁷ Cf. Sections 10 and 66 of the Mines and Minerals Act.

the government has to redistribute certain amounts of the money generated with mineral rights and extraction in the tribal territory to the affected districts. The legal provisions on how a mining right is exercised do not include any direct community beneficiation or compensation by a mining operator in the respective areas. The legal framework only refers to environmental obligations.²⁸⁸

In South Africa, the issue of post-apartheid land tenure and administration has not only evoked broad-based resistance but was also challenged in court.²⁸⁹ After 1994, the South African government was confronted with the task of providing the framework for redress, compensation and reform of the communal land tenure system. Within the homeland systems, most of the land was owned by the state and usually allocated by traditional institutions on the basis of the Bantu Authorities Act. As Mather states, the transition period had brought diverse conditions in each homeland: In some of them, broken traditional leadership structures were replaced by committees and democratic structures. In other areas, individuals or households acquired a Permission to Occupy (PTO) permit for land. Additionally, many people were without any documented right to the land or proof of tenure.²⁹⁰

As a preliminary approach, the Restitution of Land Rights Act of 1994²⁹¹ was adopted to redress the dispossession of land of individuals and communities as a result of historical legislation like the Natives Land Act of 1913 and the Development Land and Trust Act of 1936²⁹². The overall aims of the land policy in the 1990s had been restitution of the victims of forced removals after 1913, redistribution of land and a reform of the tenure system. The framework of this approach was the Act of 1994, the Interim Protection of Informal Land Rights Act of 1996, the Labour Tenants Act of 1996 and the Extension of Security of Tenure Act of 1997.²⁹³ Under the Restitution of Land Rights Act, people who were dispossessed of their land on the basis of discriminatory land legislation after June 1913 could lodge land claims until 1998. Under Zuma's presidency, the procedure was re-opened to claimants in 2009. Walker attributes this policy change to "[...] *the ANC's*

²⁸⁸ See Section 65 of the Mines and Minerals Act.

²⁸⁹ See Claassens and Cousins on the problematic communal land tenure reform in post-apartheid South Africa: Claassens/Cousins 2008.

²⁹⁰ Cf. Mather, Charles 2002: The Changing Face of Land Reform in Post-Apartheid South Africa, in: Geography 87, No. 4, pp. 345-348.

²⁹¹ Restitution of Land Rights Act No. 22 of 1994.

²⁹² Development Land and Trust Act No. 18 of 1936.

²⁹³ Cf. Mather 2002, p. 349.

'turn to tradition' and its promotion of traditional leaders as custodians of communal land and customary law [...]'.²⁹⁴

The Constitution of 1996 requires a reform of the tenure system and mandates Parliament to enact legislation in the following fields²⁹⁵:

"25(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

In 2004, South Africa's Communal Land Rights Act (CLaRA) was enacted. The Act aimed at regulating communal land tenure in the former homeland areas. It had, inter alia, vested control over the occupation, use and administration of communal land in traditional councils and had lifted them up to a position as formal representatives of communally owned land.²⁹⁶ This empowerment of traditional institutions further contributed to the insecurity of the rural population and left the administrator of communal land unaccountable to the community.²⁹⁷ Since it entered into force, the Act was repeatedly contested²⁹⁸ and was finally suspended and found

²⁹⁴ Walker, Cheryl 2014: Critical Reflections on South Africa's 1913 Natives Land Act and its Legacies: Introduction, *Journal of Southern African Studies* 40, No. 4, p. 657.

²⁹⁵ Cf. Section 25(5) - (9) of the Constitution of 1996.

²⁹⁶ Cf. Sections 21(2), 24 of the Communal Land Rights Act. The traditional councils take over the functions of land administration committees which are introduced in the Act and are given major powers in land questions. This meant a shift of responsibility from the magistrates and district commissioners during the colonial and apartheid period to the traditional councils after 2004.

²⁹⁷ The Communal Land Tenure Policy (CTLP), introduced by the Department of Rural Development and Land Reform in August 2013, continues to strengthen the powers of traditional leaders in land management and aims at disempowering land tenure by Communal Property Associations (CPAs) [Document retrieved at <<http://www.customcontested.co.za/wp-content/uploads/2013/11/06-AUG-2013-Communal-Land-Tenure-Policy-v2.pdf>> on 13 July 2017]. The CPAs were established according to the Communal Property Association Act of 1996 to enable communities to form juristic persons in order to acquire, hold and manage property.

²⁹⁸ See Cousins, Ben 2007: More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy, in: *Journal of Agrarian Change* 7, No. 3, pp. 289–292.

unconstitutional in 2010 on the ground of procedural omissions.²⁹⁹ Due to the suspension of CLaRA, communal land tenure is still regulated by the Interim Protection of Informal Land Rights Act No. 31 of 1996 and Section 7 of the Land Affairs General Amendment Act No. 61 of 1998.

South Africa harbours valuable mineral and petroleum deposits.³⁰⁰ Prior to 1994, access to the country's mineral resources depended on land ownership and therefore excluded the beneficiation of most traditional communities. The granting of mining rights and further provisions on resource extraction are regulated by the Mineral and Petroleum Resources Development Act (MPRDA), which was enacted in 2002 and amended in 2008.³⁰¹ The MPRDA assigns ownership of mineral resources to the South African nation and determines the state as custodian who should ensure these resources benefit the whole country. The state issues licenses to mine minerals without transferring ownership. The Minister of the Department of Mineral Resources is mandated to act and regulate all matters related to mining and mineral rights in the name of the state.³⁰² The legal framework differentiates between land or surface rights and mining rights. Landowners no longer own mineral resources on and below their land, and were stripped of their previous right to decide upon mining activities on their territory. The introduction of these provisions under the ANC government has been criticised as an attempt to nationalise the resources.³⁰³ Communities on whose land mining operations take place are entitled to receive royalty payments. The right to continuously receive these payments after the enactment of the MPRDA was preserved in the transitional arrangements in Schedule II of the Act. A part of these royalties has been converted into equity stakes.

²⁹⁹ See *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010). Also see Murray and Stacey on the problematic classification of the Bill by Parliament and the failure of the National Council of Provinces to enable proper public consultation. Murray, Christina/Stacey, Richard 2008: Tagging the Bill, gagging the provinces: the Communal Land Rights Act in Parliament, in: Claassens, A./Cousins, B. (Eds.): *Land, Power & Custom: controversies generated by South Africa's Communal Land Rights Act*, Cape Town, pp. 72-91.

³⁰⁰ The analysis of the framework will be dedicated to mineral rights as they are pivotal in the context of the case study.

³⁰¹ Mineral and Petroleum Resources Development Act No. 28 of 2002, amended by the Mineral and Petroleum Resources Development Amendment Act No. 49 of 2008.

³⁰² Section 3(1) of the Act.

³⁰³ Cf. Van der Schyff, Elmarie 2012: South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals, in: *New Contree*, No. 64, pp. 131-133.

In Section 2, the MPRDA introduces the main objectives of the regulatory framework on mineral and petroleum resources. Among more general provisions on the state's role, the following aims are of major importance to the applicants or owners of mining rights and to communities:

- “2 [...] (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;*
- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons³⁰⁴, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;*
- (e) promote economic growth and mineral and petroleum resources development in the Republic;*
- (f) promote employment and advance the social and economic welfare of all South Africans;*
- (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;*
- (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and*
- (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.”*

The Minister of the Department of Mineral Resources is authorised to develop a Charter that provides the framework for increasing the participation of historically disadvantaged South Africans (HDSA) and communities in the mining industry.³⁰⁵ This Mining Charter determines the conditions which mining operations have to fulfil at local level and how they have to contribute to the enhancement of communities. One of the objectives established in the Charter is to provide ownership in mining companies for HDSAs. By 2014, a minimum target of 26% was

³⁰⁴ In the aftermath of apartheid, the term ‘Historically Disadvantaged South Africans’ (HDSA) was created to refer to people who suffered from official racially motivated discrimination and economic deprivation.

³⁰⁵ See Section 100(2)(a) of the Act. The Broad Based Socio Economic Empowerment Charter for the South African Mining Industry was published in 2002 and amended in 2010 (Government Notice No. 838).

set to the mining companies, which was reached according to the Chamber of Mines of South Africa.³⁰⁶ Further targets encompass the contribution to local development and infrastructure, employment of HDSAs, human resources development, a certain quota of local procurement and facilitation of local beneficiation of mineral commodities.³⁰⁷

In the context of this thesis and with regard to the case study of the Bakgatla-ba-Kgafela, another provision of the MPRDA is of importance. The Act provides communities with a preferent right to apply for a prospecting or mining right of any mineral and land which is registered or to be registered in the name of the community concerned.³⁰⁸ The preferent right is granted under the condition that

“104 (2) [...] (a) the right shall be used to contribute towards the development and the social upliftment of the community;
(b) the community submits a development plan, indicating the manner in which such right is going to be exercised;
(c) the envisaged benefits of the prospecting or mining project will accrue to the community in question [...].”

Under this condition, communities can directly participate in mining and contribute to local development and the generation of funds.

³⁰⁶ See Chamber of Mines 2015: Summary of Chamber research report on progress on ownership, 15 May.

³⁰⁷ See Sections 2.1, 2.2, 2.3, 2.4 and 2.6 of the Charter.

³⁰⁸ See Section 104(1) of the Act.

3.3 Major changes to the legislative framework since democratisation – Origins and implications

The institutional pluralism and the role of traditional institutions in Botswana and South Africa have not been static, but rather have been subject to a dynamic and changing legislative framework since democratisation in both countries. This is partly the result of adaptation to political and social developments and changing realities but also initiated by interventions and lobbying by incumbent governments, civil society and pressure groups and traditional institutions themselves. The present section will concentrate on the origin and consequences of major legislative changes in recent decades. It will seek to explore the general development which lies behind these adaptations affecting the institutional pluralism: Is there a tendency to grant more powers and rights to traditional institutions or are there hints of a gradual marginalisation?

Due to the relatively short period since the end of apartheid, the legal framework is not yet finalised in South Africa. One legal change which is of relevance to the situation of the Bakgatla-ba-Kgafela is the 2009 amendment of Section 26 of the TLGFA. Prior to the amendment, the Commission had the power to issue independent decisions on disputes and claims at the end of its investigative process. Since 2009, the Commission can only publish recommendations which the provincial government can either accept or reject.

Apart from that, no major amendments or changes to legislation have been enacted since 1996. On the contrary, communal land tenure and customary courts are still awaiting valid regulation. Moreover, a new Bill which is set to replace the TLGFA was only published in October 2015, after more than five years of preparation.³⁰⁹ Due to some critical provisions which are in line with the debated Customary Courts Bill of 2012, it is likely to lead to major objections in the public hearings. In general, the relevant regulations and Bills on traditional leadership and jurisdiction reveal a steady development towards empowering traditional institutions in rural areas.

In Botswana, the Tribal Land Act has been amended several times since 1968 as a consequence of deficits in the operation of land allocation and administration.

³⁰⁹ Traditional and Khoi-San Leadership Bill [B 23-2015]. See Chapter 9 where a brief outlook is given.

Profound changes were introduced by amendments in 1993. Prior to 1993, the senior traditional leader had the authority to directly appoint one of the land board members. Meanwhile, he is a member of the Land Board Selection Committee which preselects the candidates to be elected in the kgotla.

Further amendments to the legal framework were the result of an in-depth review of the constitutional provisions on the national representation of traditional institutions. The initial foundation of these amendments was a report by the so-called Balopi Commission³¹⁰ – a Presidential Commission of Inquiry instituted in July 2000 – which was established to investigate potential discrimination and inefficiencies with respect to traditional institutions in the Constitution of Botswana. The Commission was named after the former Minister for Domestic Affairs and President of the Commission. The review aimed to create a new designation system of the members of the House of Chiefs and to review the constitutional provisions on chiefs and tribes in Botswana. Although many of the Commission's recommendations were not implemented in the aftermath, some of them have led to changes of Part III of Chapter V.

In 2005, Sections 77 to 79 were amended and the composition of the House of Chiefs was changed and enlarged. The former constitutional recognition of the eight major Tswana tribes in Botswana, namely the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa, was reversed. Until this point, the senior representatives had ex-officio been members of the House of Chiefs.³¹¹ This preference towards the main Tswana tribes had fuelled debates on the discrimination of the remaining minority and non-Tswana tribes in Botswana. As a consequence, the Constitution now only lists the respective districts in the country as reference for membership in the House of Chiefs. In addition, membership was raised to 35 representatives, including the eight senior traditional leaders of the major Tswana tribes, 22 members elected from the regions, either by a Regional Electoral Committee or from among the senior traditional leaders of the district, and five members who are nominated by the President. However, the imbalanced representation of chiefdoms has remained because certain Tswana dominated regions may send several representatives while other regions have to select a representative

³¹⁰ Presidential Commission of Inquiry into Sections 77, 78 and 79 of the Constitution of Botswana.

³¹¹ See Sections 77(2) lit. a and 78 of the Constitution of 1966 as amended by Act 12 of 2002.

for the whole area.³¹² The recommendations of the Balopi Commission also affected the Chieftainship Act which was repealed by the Bogosi Act in 2008.³¹³ Under this Act, the nomenclature introduced Tswana terms for leadership positions and the House of Chiefs, namely the Ntlo ya Dikgosi. Taking into consideration that the Balopi Commission was instituted to render the Constitution ethnically neutral, the introduction of Tswana terms is a further discriminatory move against the non-Tswana minorities.

The most astonishing aspect of the work of the Balopi Commission was the obvious dissent between the recommendations of the Commission and the vote of the members of the House of Chiefs. Although the Commission proposed amendments which would have enhanced the efficiency, influence and authority of the House, its members proved to be closer in line with government, and were content with the status quo. They rejected recommendations which included improved financial and personnel capacities, an institutional linkage with the National Assembly and the authority to initiate legislation.³¹⁴

³¹² The Barolong and Bangwaketse are both located in the Southern District and have permanent seats in the Ntlo ya Dikgosi.

³¹³ See Section 39 of the Bogosi Act.

³¹⁴ See Sharma, Keshav C. 2011: The Role of the House of Chiefs (Ntlo ya Dikgosi) in Botswana, in: Ray, Donald I./Quinlan, Tim/Sharma, Keshav/Clarke, Tacita A. O. (Eds.): *Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development*, Calgary, Alberta, pp. 493-494.

PART III: SELECTED CONSEQUENCES OF THE INSTITUTIONAL PLURALISM

4 Land and mineral resources – Impact of the regulatory framework

4.1 The changing resource basis of traditional institutions in Botswana

In the pre-colonial and colonial eras, traditional institutions in Botswana and South Africa used to generate their revenues and resources from multiple internal and external sources. Over the years, potential resources of tribal income were transformed by the legislative framework and by internal revisions. Due to their formal integration, traditional institutions nowadays either receive a general salary and/or sitting allowances for their membership in representative institutions, like the Houses of Traditional Leaders. They have a different range of options for revenue collection and generation from within or outside their communities, some formal and others informal.

Traditional institutions in Botswana used to receive a commission of tribal taxation as well as fees and voluntary payments by community members. Taxation was first introduced by the Protectorate administration in 1899 in the form of the so-called hut tax. As traditional institutions were mandated to collect taxes from their subjects, they were awarded a percentage of the overall amount. In 1932, the native tax was introduced. An additional source of capital for the investment in community development was the Native Fund, which was financed by a certain percentage of tribal taxation.³¹⁵ Further contributions to the funds were made by community members in the form of livestock and crops and through the collection of matimela. The term matimela is used to describe stray livestock. Originally, the collection and disposal of stray cattle in tribal territories as well as the collection of the arising fees had been the prerogative of the Paramount Chief. Since 1968, this authority has been transferred to the District Councils.³¹⁶

Prior to the establishment of the Protectorate administration and transformation of the local economy, Paramount Chiefs received payments and in-kind tributes which

³¹⁵ Cf. Makgala 2004, pp. 279–303.

³¹⁶ See Matimela Act No. 25 of 1968.

they would administer and allocate for the beneficiation of the whole chiefdom. In addition, they were entitled to request labour from community members, either on a voluntary basis or as sanction in line with customary jurisdiction. The communal work was often performed by the age regiments of the initiation schools that would contribute to the extension of local infrastructure and facilities. Initiation schools are traditional Tswana rites of passage for males (*bogwera*) and females (*bojale*) in which the participants are grouped into separate regiments that also continue to persist after graduation.³¹⁷ Apart from these tribal services, revenues could be collected for the allocation of tribal land and the exploitation of mineral resources. Since independence, this major income and revenue basis was taken away from traditional institutions and traditional communities have ceased to be self-sustaining entities.³¹⁸

4.2 Financial dependence and governmental control of traditional institutions

The legal framework in Botswana restricts the generation of own sources of revenue by traditional institutions. As they mainly rely on government salaries and subsidies, they have become increasingly dependent. At present, there is no alternative to the civil service status and to government payment of traditional institutions. Unlike in South Africa, traditional institutions no longer play a decisive role in land administration or allocation. Moreover, Botswana's mineral resources were nationalised and used to generate national income for the benefit of the whole country. Consequently, there are only limited ways that traditional leaders can get access to resources to cater for themselves and to become financially independent of government.³¹⁹

Due to their civil servant status and the provisions of the Bogosi Act, traditional institutions are not allowed to have another professional occupation apart from their duties in the kgotla and the Ntlo ya Dikgosi. During their term of office, they receive

³¹⁷ Cf. Mosothwane, Morongwa Nancy 2001: An ethnographic study of initiation schools among the Bakgatla ba ga Kgafela in Mochudi (1874-1988), in: PULA: Botswana Journal of African Studies 15, No. 1, pp. 144-145.

³¹⁸ The information was provided by a senior representative of the tribal administration in Mochudi, 27/06/2013 (INT 05-1).

³¹⁹ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

a salary from the government. After their retirement, they live on pensions. In the majority of cases, traditional institutions have to rely completely on government when it comes to salary, staff and budget for the administration of tribal affairs. Accordingly, they become subjected to government control and accountable to the Ministry of Local Government.

Kgafela II attempted to lift this form of exclusive dependence after his installation in 2008. He is an educated lawyer and founder of his own law firm called Kgafela Law Practice in Gaborone. He continued to work there until he was reprimanded by the line ministry. When he started to work as Paramount Chief, he tried to evade the strict regulations of the Bogosi Act and to establish an alternative solution in Kgatleng District. Kgafela preferred to retain his non-tribal occupation as a lawyer and to limit his engagement in the tribal administration to certain ceremonial and representative duties. The day-to-day tasks in the kgotla and community, like presiding over court sessions or participating in committee meetings of the district institutions, were to be performed by a representative. Kgafela's preferred tasks included presiding over the main kgotla meetings in Mochudi and representing the Bakgatla-ba-Kgafela in the Ntlo ya Dikgosi at national level.³²⁰ Based on his income as a lawyer and the financial support provided by the Bakgatla in South Africa, Kgafela II refused to be paid by government and to be bound to the civil service status which characterises contemporary chieftainship and its reliance on government in Botswana. Consequently, he has been involved in a long dispute with the Ministry of Local Government over the basic legal provisions. His non-compliance fuelled the already existing conflicts with the Ministry and led to his exclusion from the Ntlo ya Dikgosi. According to the Minister, the Bogosi Act requires a full-time occupation in the kgotla and the sub-ordination under government.³²¹

The previous chapters have shown that revenue sources are restricted and that the budget for the tribal administration needs to be approved and granted by government annually. These limitations and dependence prove to be difficult as the relevance of traditional institutions is partly assessed on the basis of their local performance. This causal link will be explored in more detail in one of the subsequent sections on the

³²⁰ Cf. Mooketsi 2010.

³²¹ Cf. Kelebonye, Greg 2011: Will 2011 see closure to the Bakgatla case? In: Mmegi Online 28, No. 4, 13 January; Mooketsi 2009; Mooketsi 2010.

power basis and legitimacy of the local actors. Without an independent budget and the possibility to request communal labour, traditional institutions are not able to initiate projects and development initiatives in their communities. The Bakgatla-ba-Kgafela in Kgatleng District gained a certain degree of financial independence through regular contributions by the Bakgatla in South Africa. The tribal headquarters in Moruleng also paid a monthly salary for the Paramount Chief in Mochudi. Additionally, donations were made for the construction of a new office building for Kgafela. Apart from the regular financial contributions, he also received financial support for his legal fights.³²² They included charges he was facing for the illegal flogging of community members without trial and his subsequent legal challenge of the Constitution of Botswana.³²³

Despite Kgafela's ambitious plans after his installation, the Bakgatla leadership in Botswana was not actually successful in initiating development projects. Due to the legal framework and the cross-border context of the chieftdom, those projects would have relied on financial support by the tribal administration in Moruleng. Instead of benefitting local projects in Kgatleng District, a lot of money accrued from the mineral wealth of the Bakgatla in South Africa was used to cover the costs of Kgafela's court cases.³²⁴

In 2009, Kgafela attempted to generate additional income by starting to commercialise Bakgatla-ba-Kgafela culture to increase the tribal funds. He registered a communications company and sold the broadcasting rights for the 2009 female initiation ceremony. According to Gaotlhobogwe, the tribe received 400.000 Botswana Pula as an upfront payment for the television and radio broadcast. Moreover, Christian John Makgala of the University of Botswana, a Mokgatla himself, has written a book on the history of the Bakgatla-ba-Kgafela [author's remark: the book was also used in this thesis] which is inter alia sold in the tribal administrations and museums in Mochudi and Moruleng. Further books and communications activities were supposed to follow.³²⁵

³²² Representatives of the tribal leadership in Mochudi and Moruleng have confirmed the payments that were made to Linchwe II and Kgafela II.

³²³ Interviews with a male community member, Mochudi, 18/06/2013 (INT 02-1), and with a traditional leader, Mochudi, 27/06/2013 (INT 05-1).

³²⁴ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

³²⁵ Cf. Gaotlhobogwe, Monkagedi 2009: Bakgatla Bag P400,000 In TV Rights, in: Mmegi Online, 22 June.

One interviewee from the tribal administration has stated that other traditional leaders in Botswana have surrendered to government control because they do not have an alternative form of payment or additional financial resources.³²⁶ Another respondent emphasised the positive effects of this kind of control via the government's payroll. It helps to supervise traditional leaders who might abuse their powers and who act recklessly.³²⁷

As Chapter 8 will show, intra-tribal relations of the Bakgatla-ba-Kgafela have become complicated since 2012. Moreover, due to Kgafela's relocation to South Africa, allegiances have further shifted. It needs to be seen how the situation is going to further develop without financial contributions from Moruleng.

4.3 Platinum mining, local transformation and adaptation in rural South Africa

South Africa harbours, processes and exports great amounts of mineral and petroleum resources. The country has majority shares of certain precious metal reserves worldwide and the mining industry significantly contributes to South Africa's GDP. The mineral resources, among them chromium, gold and platinum, are mostly extracted by global companies which work either independently or in cooperation with national stakeholders. Official calculations state that between 80 to 90% of worldwide platinum deposits are located in South Africa.³²⁸

The deposits are found in the so-called Platinum Belt that stretches along the provinces of Limpopo and North West. Due to technical progress, platinum mining has grown from the 1960s onwards and has reached several traditional communities in the two provinces. In the past two decades, it has become a key economic sector and has shifted the previous geographical focus of mining activities from the urban and industrialised centres to more rural and often underdeveloped areas.³²⁹

³²⁶ Interview with a senior representative of the tribal administration (INT 05-1); male interviewee, Mochudi, 27/06/2013 (INT 04-1).

³²⁷ Interview with a male community member, Mochudi, 12/07/2013 (INT 13-1).

³²⁸ Cf. Statistics South Africa 2012: Mineral Accounts for South Africa: 1980–2009. Discussion document: D0405.2, February; U.S. Geological Survey 2017: Mineral commodity summaries 2017: U.S. Geological Survey.

³²⁹ Cf. Pogue, Thomas E. 2000: An Overview of Producer Services in the Mining Industry in South Africa, DPRU Working Paper No. 00/35 (Development Policy Research Unit, University of Cape Town), pp. 2-12.

Communities that are affected by mining operations in the Platinum Belt either take part in mining activities and/or benefit from mineral resource extraction in their territories. The present South African legal framework enables individuals and communities to participate in the mining industry. Local communities, among them the Bakgatla-ba-Kgafela, have also benefitted from the policy of Black Economic Empowerment (BEE). BEE was introduced by the ANC government to advance black ownership and economic control through political pressure, government procurement practices and legislation³³⁰. Special focus was laid on empowerment in the energy, financial and mining sectors, for which specific charters were drafted.³³¹

Since apartheid, a potential nationalisation of mineral resources, like the diamond industry in Botswana, has been a topic of debates and national strategies. They were reinvigorated after 1996 and were finally settled in favour of the beneficiaries and supporters of privatisation. After the enactment of the MPRDA, the original version of the charter for the mining industry was published with reduced targets.³³² The Mining Charter not only provides for ownership and community involvement but also for the contribution of mining operations to local development and transformation. The acquisition of new mining rights or licenses to mine is bound to detailed plans, covering the commitment of mining companies to contribute to the economic, social and environmental development of the communities. Additionally, activities in local processing and marketing are to be enhanced.³³³

In certain cases, the mining areas are on the land of traditional communities that are represented by traditional institutions. Due to land ownership, communities are entitled to receive royalties or shares in mining operations. In the former Transvaal, a particular role in land allocation and land tenure was already attributed to traditional institutions in 1881 by the Pretoria Convention. Within a system of trusteeship, land

³³⁰ See the Broad Based Black Empowerment Act No. 53 of 2003.

³³¹ The Broad Based Black Economic Empowerment Act has introduced ten codes of good practice to which sectoral charters would have to conform: conceptual framework of BEE, measurement of ownership, measurement of management and control, and interpretations of the individual statements, employment equity, skills development, preferential procurement, enterprise development, residual matters, and measurement of qualifying small enterprises.

³³² Cf. Southall, Roger 2007: Ten Propositions about Black Economic Empowerment in South Africa, in: Review of African Political Economy 34, No. 111 (Debates on the Left in Southern Africa), pp. 67-78.

³³³ Cf. Danserau, Suzanne 2010: Comparing Dueling Approaches to the Transformation of South African Mining: Corporate Social Responsibility or Labour Restructuring? In: Labour, Capital and Society 43, No. 1, pp. 70-73.

had to be bought in the name of a recognised traditional leader and held in trust by a state authority. This form of trusteeship was confirmed and developed further by subsequent legislation in the 20th century, as the previous chapters have stated. Groups of land buyers had to register their acquisitions in the name of a traditional leader. Due to this legal history, land ownership and authority of traditional institutions became intertwined.³³⁴

As Beinart and Delius have summarised, it was officials of the Department of Native Affairs who, on the basis of the Land Acts of 1913 and 1936, promoted ethnicity and tribalism as a concept to define rural communities and determine land acquisition by their members. The authors show the differences between the actual wording of the legal acts and the results of their interpretation by officials. Traditional leaders became central figures in the process of land purchase and registration in the communities. They were awarded with greater authority, as individuals or groups depended on them to access land in the reserved areas for land purchase by Africans defined in the Land Acts.³³⁵ In the territory of the former homeland Bophuthatswana, traditional institutions often act as the representatives of the local communities and are mandated to administer land and intermeditate with external actors on behalf of the community. Despite this, the question of land ownership has remained controversial and contested in many traditional communities of the Platinum Belt.

Prior to the enactment of the present MPRDA, royalty payments to communities with mining rights were made to the President of Bophuthatswana. Regulated by Section 11(2)(d) of the Bophuthatswana Traditional Authorities Act, the money was collected in the so-called ‘D account’ on behalf of the traditional communities. The supervision of these accounts was transferred to the provincial premier under Sections 30(1) and (3)(d) of the North West Traditional Leadership and Governance Act.³³⁶ Potential irregularities and the lack of auditing of these accounts have proved to be problematic in the mining communities of North West, as will be illustrated in the following section.

The shift of mining into the rural areas has initiated processes of adaptation and transformation and has sustainably and significantly altered local power relations and

³³⁴ Cf. Manson 2013.

³³⁵ See Beinart/Delius 2014, p. 678.

³³⁶ Royalties are classified as “[...] any other amounts derived from any sources whatsoever for the benefit of a traditional community.” Section 30(3)(d) of the TLGA.

socio-economic conditions. Traditional communities might benefit from mineral wealth in three different ways: by receiving royalty payments, by holding shares in mining operations or by contributions by the companies and the community representatives. Within this context, traditional institutions take on new functions at the local level. They work as gate keepers and intermediaries between global companies and the communities. In the case of the Bakgatla-ba-Kgafela, mining was seriously advanced under Nyalala Pilane at the end of the 1990s, although major transformations of the leadership structures and at local level were only initiated in recent years.

The most prominent traditional mining community of the Platinum Belt are the Bafokeng in the Rustenburg municipality. The present leader King Leruo Molotlegi took office in 2000. Since then, major community and business projects have been launched with the revenues accrued from royalty payments, investments and economic activities of the Bafokeng.³³⁷ The leadership has established the Royal Bafokeng Administration and the investment company Royal Bafokeng Holdings for their economic operations. As Manson has stated, the Bafokeng work as a non-profit organisation for the benefit of the community and combine traditional leadership and corporate governance. Revenues gained from the economic activities are reinvested in community infrastructure and social development.³³⁸

The Bafokeng were the first chiefdom to benefit from platinum mining in the Bushveld complex and are therefore an early example displaying the impact of mining operations in traditional communities. Before this could happen, they were caught in a long-lasting economic and legal battle with Impala Platinum Holdings³³⁹ about mining rights and royalty payments, which was only resolved in the post-apartheid period. This battle also involved the former President of Bophuthatswana, Lucas Mangope, who used his political influence against the Bafokeng leadership. Manson and Mbenga have traced the effects of the upheaval in Phokeng through the 1980s and 1990s. Chief Lebone Edward Molotlegi was forced to leave the country and was only able to return from Gaborone in 1994. In the meantime, President

³³⁷ Cf. Cook, S. E. 2013: Community management of mineral resources: the case of the Royal Bafokeng Nation, in: *The Journal of The Southern African Institute of Mining and Metallurgy* 113, January, pp. 63-65.

³³⁸ Cf. Manson 2013, pp. 414-416.

³³⁹ South African producer of platinum and associated platinum group metals.

Mangope intervened in the internal affairs of the Bafokeng leadership by rejecting the regent chosen by the chiefdom and by appointing an ‘Acting Chief’ in 1988 who was more favourable to him. While the subsequent court case was terminated by the end of Mangope’s rule, the legal battle over the amount of royalty payments by Impala Platinum Holdings was settled in favour of the Bafokeng in 1999 by granting them fair royalty rates and shares.³⁴⁰

The interaction of historical trajectories, the legal framework and local realities reveal the potentials and challenges in the Platinum Belt. Due to legal obligations, mining operators have to promote the expansion of local infrastructure. In addition, communities receive funding to foster development projects and improve living conditions. The infrastructural enhancements comprise, inter alia, electricity, roads, housing, health services and shopping facilities. While some of these developments were initiated by the mining companies, others are the result of community contributions. Further changes refer to enhanced employment and business opportunities for local people. These opportunities increase the attractiveness of living in the rural areas and set incentives for the younger generation to earn their living in or close to their home villages. On the other hand, traditional institutions have sometimes perceived themselves as owners of the tribal land and of the shares and royalties. There are several cases where they have failed to consult their traditional communities and to account for revenues and actions.

4.4 Mineral wealth and resource extraction in traditional communities

The Bafokeng and the Bakgatla-ba-Kgafela have benefitted economically from the mining activities in their areas. Backed by the legal framework, their leaders have received royalty payments and acquired shares in mining operations that have increased the tribal funds. In the context of this thesis, it is not possible to trace all of the investments and the shares that the Bakgatla hold. Due to this, only few exemplary deals and shares are provided. The numerous investors with whom the Bakgatla cooperate include Anglo American Platinum, Sedibelo Platinum Mines (up to 2013 Platmin Limited) and Pallinghurst Resources Limited. In 2006, the Bakgatla

³⁴⁰ Cf. Manson, Andrew/Mbenga Bernard 2003: 'The Richest Tribe in Africa': Platinum-Mining and the Bafokeng in South Africa's North West Province, 1965-1999, in: *Journal of Southern African Studies* 29, No. 1, pp. 25-47.

traditional community acquired a 15% equity stake in Anglo Platinum's Union Section Mine.³⁴¹ The Bakgatla's entitlement to royalties that they have held since 1982 was transformed into equity stakes in line with the present legislation.³⁴² According to the annual financial statements for 2015, the Bakgatla hold 25.7% of the shares of Sedibelo Platinum Mines.³⁴³ Moreover, Pilanesburg Platinum Mines is an operating asset of Sedibelo Platinum Mines. In a joint venture, Bakgatla Pallinghurst owns 25.96% of the shares.

Blessed with mineral wealth, both the Bafokeng and the Bakgatla have developed long-term plans and future visions for the transformation of their traditional communities.³⁴⁴ The plans determine investment and development priorities and form the guidelines for external investors and business partners. The Bakgatla Master Plan sets the framework for a long-term vision over 30 years. The economic strategy of the Bakgatla-ba-Kgafela is based on four pillars which mirror the intention to diversify the business activities of the chiefdom. The pillars are mining, tourism, industrialisation and trade and services. Investment priorities include the development of high class local infrastructure, improvement of the social sector and the diversification of economic activities.³⁴⁵ The major objective is to create a stable economy which will be sustainable after the end of platinum mining in the area.

In the first phase, the revenues generated from the platinum reserves were used to develop the basic infrastructural pre-conditions to attract investors and business operators. A strong focus was laid on Moruleng as the centre where the first post-apartheid city is supposed to be created. Therefore, the tribal leadership invested large sums of money for the so-called Moruleng Boulevard, the main road in Mochudi, and for representative office buildings which form the headquarters of the

³⁴¹ Officially, it was stated that the community gave its consent during an AGM. Several interviewees have pointed to the problem that technical and financial aspects of the transaction were too complex to be treated in a mass meeting.

³⁴² Interview with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

³⁴³ See Sedibelo Platinum Mines Limited 2015: Consolidated and separate financial statements for the year ended December 31, 2015.

³⁴⁴ The Bafokeng have published a 30-year plan in 2006 which supports the implementation of their Vision 2020. See <http://www.bafokeng.com/sites/default/files/Masterplan%20Factsheet.pdf> (last accessed on 14.06.2017). The Bakgatla Master Plan provides a similar vision and partly targets identical fields of action as has been shown above. See bbkta.net/web/wp-content/uploads/2013/05/My_Home_City_Future.pdf (last accessed on 03.04.2017).

³⁴⁵ Projects aim at developing and improving educational, social, health and recreational facilities and services, infrastructure, transport and housing. Additionally, they cover the fields of agriculture, manufacturing, technology, tourism and culture.

Bakgatla.³⁴⁶ Starting from Moruleng, development is to be spread to the outlying villages in the long run. *“It’s like in other places. We build first the main town, then we go to different villages and make small towns. That’s the vision.”*³⁴⁷

Interviews with community members and representatives of the tribal leadership have shown that many people in the Moruleng area had been sceptical about the transformation plans. Both economic diversification and targeted urbanisation seemed to be unrealistic objectives in the former homeland area. Despite the initial reluctance, the Bakgatla-ba-Kgafela leadership is trying to realise Nyalala Pilane’s vision of turning Moruleng into a vibrant city with the help of tribal capital and external investments.³⁴⁸ Pilane himself has pointed to the need for the Bakgatla to become active, to adjust and to start to compete globally in economic terms. In his view, traditional leadership has to focus on sustainable socio-economic development for its own sake and for the benefit of the traditional community.³⁴⁹

Similar to the Bafokeng, the Bakgatla have started to corporatize their operations. In 2010, they founded the Bakgatla-Ba-Kgafela Strategic Investment Company (BBKSIC) to manage the assets and investments of the traditional community. On their website, the Bakgatla-ba-Kgafela Traditional Authority (BBKTA) lists examples of Bakgatla owned companies and stakes in joint ventures or other business operations. BBKSIC has a 51% equity share in Bakgatla Tshipi (Pty) Ltd, a steel fabricator in Mogwase that also provides engineering services for mining and construction industries. Moreover, the BBKSIC has an 80% stake in a company for compressed biomass logs called Bioflame and holds 40% of the pay TV channel Siyaya Free To Air. The Bakgatla have also shares in a holding that owns two lodges in the Pilanesberg Game Reserve.³⁵⁰

As the actual economic activities and diversification are not part of the analysis, those shares and projects are simply examples of the broad range of initiatives and investments of the Bakgatla. There are diverse projects that the Bakgatla leadership has implemented with the help of the revenues generated from mining activities and

³⁴⁶ Interview with an employee at the tribal administration, Moruleng, 12/09/2013 (INT 38-1).

³⁴⁷ Interview with a headman in Moruleng, 12/09/2013 (INT 37-1).

³⁴⁸ Interview with Nyalala Pilane (INT 40-1); interview with a respondent at the tribal administration, Moruleng, 12/09/2013 (INT 38-1).

³⁴⁹ Interview with Nyalala Pilane (INT 40-1).

³⁵⁰ Information on the structure and business of BBKSIC is provided on the website <http://bbksic.co.za/>.

the land of the community. Projects that were already completed include a big soccer stadium, a shopping mall in Moruleng and a water reservoir. Moreover, Pilane has introduced training programmes, scholarships and bursaries to promote education of community members.³⁵¹ In addition, the Bakgatla have opened a Mining Academy in 2009 and offer media traineeships to young community members.³⁵²

Apart from the contributions made by the Bakgatla, there are further development initiatives that are implemented as part of the social plans that are mandatory for mining operators. In the Platinum Belt, the Social and Labour Plans that mining companies have launched in line with the requirements of the MPRDA have brought several beneficial projects to the local communities. They cover the fields of infrastructure, health, education and poverty alleviation as well as initiatives that help to create employment opportunities.³⁵³ Anglo American Platinum has inter alia built a community clinic and the Sefikile Community Centre that offers access to business, social and recreational facilities and administrative and government services. Moreover, they have supported local schools. The BBKTA has also launched collaboration with Sedibelo Platinum Mines in 2015. Projects were identified in line with the priorities set in the Master Plan. They encompass, amongst other targets, road construction, water supply and housing as well as agriculture and food security.³⁵⁴

Despite the positive developments, further research by other scholars and the interviews conducted in 2013 have pointed to the problems arising out of mining and of the prominent role of traditional institutions as community representatives. During the empirical research, a significant number of the interviewees have criticised the limited effects of the tribal wealth and the exclusion of people from decision-making. According to them, the tribal leadership in Moruleng unilaterally decided the investment priorities without consulting the communities.

³⁵¹ Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1); interview with a male community member, Moruleng, 06/09/2013 (INT 34-1).

³⁵² Interview with a male community member and trainee of the media company, Moruleng, 06/09/2013 (INT 34-1).

³⁵³ Anglo American Platinum has published a factsheet in March 2016 on projects that were implemented within the framework of the Social and Labour Plan for the Union Mine [<http://www.angloamericanplatinum.com/~media/Files/A/Anglo-American-Platinum/annual-reports/union-jv-mine-social-labour-plan-projects-fact-sheet.pdf>] 14.06.2017].

³⁵⁴ In July 2015, the BBKTA has issued a special edition of its newsletter Bua Kgabo that provides information on the collaboration with SPM. [www.sedibeloplatinum.com/downloads/sedibelo-bua-kgabo-july15.pdf] 14.06.2017]

“Nyalala Pilane sold mineral rights and got billions of Rands. But these rights fall under different communities. But who gave him the right to do sell the mineral rights of the communities?”³⁵⁵

Moreover, people were dissatisfied with the geographical focus of the projects. Despite the wealth mining was bringing, people were not seeing improvements in their areas. Additionally, some of the projects neither generated direct nor indirect benefits to them and failed to meet local needs. A senior community member from one of the outlying villages has sharply criticised the focus on Moruleng and the neglect of the peripheral areas.

“We cannot wait another 50 years to benefit out of our project as Bakgatla community, while at Moruleng they benefit today. When Nyalala came on the throne as a chief, we expected that ... why can't he give us an allocation of funds? Should we keep on waiting for his project to benefit out of them? That's what I can confront him on it. We can't wait. Why he decided to take a stadium that doesn't benefit anybody and put it in Saulspoort? Why couldn't he allocate those millions in 32 villages? [...] Since for 17 years, we have enjoyed nothing. Why do you dream of building a golf club with the standards of Sun City when you don't have one Mokgatla who is playing golf? The chief has ideas and visions but we don't want them. We want food on the table and we want to be shareholders.”³⁵⁶

The mining operations in the Moruleng area have brought infrastructural improvements and new facilities to the communities. While many local people were able to find jobs during the construction period and some of them continued to work in the mines, the general assessment of the situation was rather critical. Many of the residents from Moruleng complained about limited employment opportunities in the mining sector during the interviews. A significant number of the local people failed to get a job because they were either not qualified enough compared to external applicants or did not have the right connections to decision-makers. Moreover, bribery seemed to be a strong deciding factor for employment in the mines. According to the official policy, Bakgatla residents should receive preferential treatment when it comes to employing workers for the mines. As a pre-condition for

³⁵⁵ Interview with a male senior respondent, Mothlabe, 16/09/2013 (INT 42-1).

³⁵⁶ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

getting a job, they had to go to their local headman to retrieve a letter which confirms that they are residents of the respective area. Afterwards, they have to bring it to the tribal administration to receive a formal proof of residence. This proof of residence was the requirement to be eligible to be selected for a job. Several residents have reported cases where headmen were bribed by foreigners and non-Moruleng residents to get the confirmation letter.³⁵⁷ These proofs of residence were issued to people who were willing to pay 5.000 Rand.³⁵⁸

In addition to the lack of shared benefits, some of the villagers have complained that the mines in their areas have disrupted their land and have destroyed their farming spaces where they used to plough. The affected people have lost the basis to provide for themselves and have not yet received any form of compensation.³⁵⁹ One of the respondents has pointed to the lack of consultation by the tribal administration about how the land of the Bakgatla is used.

“As the mines are located on the land and farms of people, their source of income has vanished. They used to plough there. The chief is not negotiating with the people. He just takes the land.”³⁶⁰

Other respondents from outlying villages have strongly criticised the way the tribal administrations in Mochudi and in Moruleng have abused their land rights. The respondents came from communities that originally did not fall under the leadership of the Bakgatla-ba-Kgafela. They opposed the fact that their land was sold by the tribal administration and that they also had to rebuy portions of their own land from them. They used to be independent tribal groups with their own land and leadership and due to the Native Land Act of 1913 and apartheid legislation of the 1950s, they needed to be placed under a recognised traditional leader who also had to sign title deeds for the land. Because of these historical developments, these formerly independent tribes still fall under Bakgatla leadership and have lost control over the land which was originally purchased by them. The communities are now

³⁵⁷ Interviews conducted with a male community member, Moruleng, 26/08/2013 (INT 27-1), with a senior female community member, Moruleng, 27/08/2013 (INT 29-1), with a senior male community member, Moruleng, 27/08/2013 (INT 30-1), and with a younger male community member, Moruleng, 16/09/2013 (INT 42-1).

³⁵⁸ Interview with a male community member, Moruleng, 26/08/2013 (INT 27-1).

³⁵⁹ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

³⁶⁰ Interview INT 27-1.

complaining that they are not consulted or involved and, most importantly, that they are not benefitting from tribal funds.³⁶¹

“I talked to Kgafela's father. After Nyalala has taken the chieftainship in 1996, I stood up and rise with other men of Pilane families who were cautious and disturbed, especially about these activities, not giving financial reports to the tribe, not being transparent, his activities of working alone, by failing to involve the tribe, his activities of signing deals with mining companies, his activities with government, he was acting [...] like a monarch.”³⁶²

Several interviewees have pointed to the role of money and wealth in dividing people. In the case of the Bakgatla-ba-Kgafela, the competition for funds and greed has created local and cross-border factions.³⁶³ Moreover, respondents have confirmed that the nature of leadership quarrels among the Bakgatla-ba-Kgafela has changed over the years. The fight over chieftainship has also become a fight over wealth. As one of them has said, it is a common development in all villages which have got mining operations.³⁶⁴ Another important aspect which will form part of Chapter 6.1.3 refers to the accountability of traditional institutions. Particularly in the light of the growing tribal funds, the complexity of the business relations, the lack of control mechanisms and of regular audits is becoming increasingly problematic. The alleged mismanagement of funds and corruption culminated in the formation of a grassroots organisation by community activists. Nyalala Pilane and three of his tribal councillors were charged with corruption and fraud in the Mogwase Regional Court in 2006. The court case focussed inter alia on loan agreements Pilane had signed on behalf of the Bakgatla community although he was not mandated to do so by the community. The judgement of the regional court against Pilane was successfully overturned in 2010 by the North West High Court in Mafikeng.³⁶⁵ Detailed information on the question of accountability and the management of tribal funds will be given in Chapter 6.1.3.

In the Moruleng area, several key interviewees cited the example of the Royal Bafokeng in the Bojanala Platinum District around Rustenburg. Although the tribal

³⁶¹ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

³⁶² Interview INT 44-1.

³⁶³ Interview with a male community member, Mochudi, 08/07/2013 (INT 09-1).

³⁶⁴ Interview with a local government representative, Moruleng, 12/09/2013 (INT 39-1).

³⁶⁵ Interview conducted with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

administration was struggling to meet community demands, its performance and progress was rated much higher by outsiders.³⁶⁶ Moreover, the communication between community members and the traditional leadership was positively emphasised. According to one of the key respondents, the leadership reacts more inclusively and punctually when it comes to claims and requests that are raised by the community. In addition, they inform the persons concerned about the status of their request. The Bakgatla leadership, on the other hand, was criticised for becoming more and more secretive to the community.³⁶⁷

The positive assessment of the performance of the Bafokeng actually contrasts with research findings from the Bafokeng area. Joseph Mujere has shown that other communities in the Platinum Belt are similarly affected by questions of contested land ownership, traditional leadership, community control of funds and resources, and lack of service delivery in the mining areas. He concluded that wealth generated from mining operations in traditional communities was only benefitting a small elite instead of bringing sustainable change to the wider communities. People from Luka who were subjected to the rule of the Royal Bafokeng have voiced their discontent in several community protests directed against mining operations, local government and traditional leadership. Apart from that, local residents have complained about the loss of arable land and environmental degradation.³⁶⁸

Like the Bakgatla, the Bafokeng have invested parts of their mining revenues in community funds to improve local infrastructure and access to services, and to create and support education facilities and programmes. Despite that, they have experienced discontent and opposition from within the royal family and the community. As outlined by Andrews and Mbenga, land ownership and alienation, labour unrests, overlapping competences with local government, alleged abuse of power by the leadership and misuse of tribal funds were controversial topics in this context.³⁶⁹

Where mining activities take place on land which belongs to traditional communities, the respective municipalities do not benefit directly from the mines. The

³⁶⁶ Interviews with two male community members Moruleng, 26/08/2013 (INT 46-1), and with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

³⁶⁷ Interview with a community member, Moruleng, 26/08/2013 (INT 27-1).

³⁶⁸ Cf. Mujere, Joseph 2015: Platinum, poverty and protests: Platinum mining and community protests around Rustenburg [unpublished paper, presented at a seminar at the Society, Work and Development Institute (Swop), University of the Witwatersrand], Johannesburg, 5 August.

³⁶⁹ Cf. Manson/Mbenga 2003, pp. 46-47; Manson 2013, pp. 4016-417.

communities and their leaders are the ones who interact with the mining operators and who receive beneficiation. The only matters where the municipalities engage with the mines are the social labour plans which need to be developed according to the Charter.³⁷⁰ A local government representative has indicated that the tribal leadership claims to support development with the help of the mining royalties. But in reality, they were not investing the funds for overall community development as they were supposed to do in line with the legislation.³⁷¹

When asked about the probable reasons why Mochudi and Moruleng have experienced such a different development paths, a respondent from the tribal administration in Moruleng has named the legal framework and the type of leadership as decisive factors. The Constitution in Botswana makes it difficult for traditional institutions to engage in business and economic activities. Therefore, a leader needs a vision and must be creative to detect opportunities in his area. In addition, traditional institutions in Botswana are dependent on the government for survival and therefore need to take directives from government.³⁷²

³⁷⁰ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

³⁷¹ Interview with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

³⁷² Interview with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1).

5 Impact of the integration of traditional institutions on local governance

5.1 Efficiency in the provision of infrastructure, services and development initiatives

5.1.1 Botswana

Botswana has established a local government system which largely relies on central government with regard to policy formulation, implementation and financial and human resources. Throughout the independence years and beyond, the country had suffered from its weak economic position which partly resulted from the lack of investments and development initiatives by the Protectorate administration.³⁷³ Due to this, Botswana faced an overall shortage of resources and high rates of underdevelopment. South Africa, on the contrary, had to overcome its apartheid heritage and the lack of non-racial local government structures, in particular in the poorly developed rural areas of the former homelands. Since democratisation, both countries have been challenged to prioritise local needs, to establish infrastructure and to provide basic services. The formal and informal contribution of traditional institutions to local governance and service delivery, as well as the impact of their involvement, vary in both dispensations. The analysis will therefore consider two different aspects: the general status and performance of local governance and service delivery on the one hand, and the potential effects of the institutional pluralism on the other hand.

District Councils, the core institutions of local governance in Botswana, provide infrastructure and basic and social services to the communities and also coordinate the allocation of services by external providers.³⁷⁴ The districts receive around 90% of their budgets from central government. Due to financial restraints, the ministry sometimes has to cut budgets and force districts to pause or stop projects which were planned for the respective financial year.³⁷⁵ The District Commissioner acts as the representative of the State President in the district. He or she coordinates all government activities and sits on several district committees. The District

³⁷³ Cf. Mogalakwe 2006, pp. 66-88.

³⁷⁴ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

³⁷⁵ Interview INT 17-1.

Commissioner attends the monthly meetings in the main kgotla and addresses and consults community members on government programmes and initiatives.³⁷⁶

There is a clear formal and actual separation of the duties of the District Commissioner, the District Council and the tribal administration in Kgatleng District. They are not redundant institutions but essential players to manage the number of customers at district level.³⁷⁷ Local government functions are therefore allocated to different institutions. One of the headmen has stated that this variety makes it possible to reach more people and to offer a broader range of services. In an ideal set-up that is marked by cohesion and mutual support of the institutions, functions are not supposed to overlap and progress is to be realised down to the grassroots level.³⁷⁸

The district councils and tribal administrations rely heavily on central government's budgetary grants and coverage of local expenditures. In addition, the system of the Unified Local Government Service has created a similar strong position of central government in the employment, selection, training and transfer of staff members. This also refers to accountability and control of the local government staff.³⁷⁹ The Botswana Public Service employs a significant amount of the country's workforce and numbers have been growing continuously since independence. Members of the local government and public service institutions learn skills and receive management trainings. Despite this, most of the highly-qualified staff are employed at central government level while the remote rural institutions suffer from a shortage of qualified workers.³⁸⁰

Traditional institutions in Botswana operate down to the grassroots level. They provide various administrative services for the communities, like issuing certificates and identity documents.³⁸¹ This makes certain services easily accessible for community members but also contributes to overlapping competences. Some of these services are not additional offers but require people to approach the District

³⁷⁶ Interview with a male representative of the Kgatleng District Commissioner's office, Mochudi, 19/07/2013 (INT 14-1).

³⁷⁷ Interview DC office, INT 14-1.

³⁷⁸ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

³⁷⁹ The relations and responsibilities are laid down in the Unified Local Government Service Act.

³⁸⁰ Informal talk with a District Council representative in Mochudi, May 2013.

³⁸¹ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

Administration and their traditional leader. In certain cases, people who are no longer living in their formal traditional community have to go back to retrieve documents.³⁸²

In Botswana, obstacles and constraints to service provision can be grouped into three categories: limited financial resources, lack of qualified personnel, and a strong dependence of the local institutions on central government. Botswana's government still leads on the setting of district priorities and in implementing development plans. Local government is only founded on Acts of Parliament and has no constitutional guarantees. Despite continuous attempts to foster decentralisation, the local level institutions have remained dependent with regard to their constitution as well as personnel and financial capacities.³⁸³ The Ministry of Local Government remains central in allocating, coordinating and controlling competences and powers at local level. Moreover, central government also has supervisory powers over the budgets and spending of revenues of the local government units.³⁸⁴

Advocates for traditional institutions playing a strong role tend to emphasise their potential to compensate shortcomings and a lack of service provision by local government. This argument needs closer examination. In many cases, traditional institutions in Botswana do not have sufficient resources to take care of service delivery.³⁸⁵ Moreover, their legal status confines their responsibilities to a clearly designated field of action and a predominantly supportive role. Since independence, traditional institutions were stripped of their executive functions, as the previous analysis has shown. Due to this, their role tends to be limited to mediation, representation and dispute resolution. Additionally, it is central government that provides for the financial endowment of traditional institutions. Despite shortcomings in active service delivery, traditional institutions play a pivotal role by channelling information. The kgotla system was transformed in the post-independence period. It now serves, *inter alia*, as a communication facilitator and has become a non-political forum in which communities receive information about government and local policies, either from traditional leaders, from government

³⁸² Interview conducted with a male informant in Mochudi, 18/06/2013 (INT 02-1).

³⁸³ Cf. Maundeni, Zibani/Suping, Kekgaoditse 2013: The politics of exclusion in Botswana: A creation of the independence constitutional talks, in: PULA: Botswana Journal of African Studies 27, No. 2, pp. 332-333.

³⁸⁴ See Local Government (District Councils) Act. Interview with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1).

³⁸⁵ See The Botswana Press Agency (BOPA) 2015: Ministry tackles tribal administration challenges, in: Botswana DailyNews, 10 August.

officials or from politicians. On the other hand, traditional leaders consult community members on certain issues and community needs. This consultation process is also a source of input for development planning. Moreover, the kgotla provides people with a communication channel through which they can receive local and national information first-hand without being dependent on media coverage of certain topics.³⁸⁶

Data from the Afrobarometer³⁸⁷ is integrated in this section to get a better impression of the performance ratings of local government and traditional leadership in Botswana and to put the empirical research findings into context with quantitative results. During the 6th survey round, respondents were asked about their assessment of the performance of local councillors and traditional leaders in the past year. The following answers were given:

Table 2: Performance of local actors

	Elected Local Government Councillor	Traditional Leader
Strongly Disapprove	19	7
Disapprove	24	12
Approve	39	52
Strongly Approve	14	23
Don't know/Haven't heard enough	4	7

Source: Own presentation, based on Afrobarometer 2014, p. 44.

The results show a higher grade of approval for the work of traditional leaders in Botswana. 75% of the respondents gave them a positive score, while councillors only received 53% positive votes. Moreover, the responses reveal that 43% of the people were actually dissatisfied with the performance of their local government councillors.³⁸⁸

During earlier survey rounds, people from 34 countries were asked about government's performance in providing water, sanitation services and reliable electricity between 2011 and 2013. While Botswana was ranked among the best performing countries, there was still a high number – 31% – of respondents who said

³⁸⁶ This was confirmed during an interview with a middle-aged male community member in Mochudi, 12/07/2013 (INT 13-1).

³⁸⁷ See <http://www.afrobarometer.org/> for further information.

³⁸⁸ Cf. Afrobarometer 2014: Botswana Round 6, 2014. Summary of results (compiled by Star Awards), p. 44.

that government was performing fairly or very badly.³⁸⁹ In line with the information provided in the Afrobarometer survey, the respondents in Mochudi have specified similar priorities that government needs to address in Botswana. Among the most relevant problems indicated in the survey rounds 3 and 6 were the fight against unemployment, in particular youth unemployment, the high levels of poverty, education and the level of education standards, water shortages and the high rates of AIDS and HIV.³⁹⁰

When assessing the performance of government in poverty eradication in the districts, the picture is bipartite. On the one hand, government is active in initiating programmes and offering support to people. On the other hand, a certain dependence of the people is created which prevents becoming self-reliant. Botswana's government has undertaken long-term efforts to initiate employment and training options throughout the country. Various programmes support people who want to improve their economic position by opening their own businesses.³⁹¹ These programmes include consultation, skills training and financial and operational support. Some interviewees have pointed to the negative aspects of this form of support. People tend to expect the government to provide for them. Moreover, without a proper monitoring system, lots of funds were misspent or wasted. One of the key interview partners stated that people in the communities were waiting for the government to provide assistance. He criticised the fact that the poverty eradication programmes sponsored by government were designed in a way that made them an option available to everyone and increased acceptance of public hand-outs.³⁹² Another respondent characterised the relationship as akin to one between parents and children. He describes that most people accept it as a given fact that the government in Botswana controlled most programmes.³⁹³

Unlike other traditional communities in Botswana, the Bakgatla-ba-Kgafela are located close to the capital Gaborone. Because of this proximity, many people from Mochudi and Kgatleng do not relocate to Gaborone but rather commute. Therefore,

³⁸⁹ Cf. Asunka, Joseph 2013: What People Want From Government. Basic Service Performance Ratings, 34 Countries (Afrobarometer Policy Paper No. 5), pp. 4-5.

³⁹⁰ Cf. Afrobarometer 2005: Botswana Round 3, 2005. Summary of results (compiled by Lekorwe, M.H./Molomo, M.G./Molefe, W.B./Sebudubudu, D./Mokgatlhe, L.L./Moseki, K.K.), pp. 36-39; Afrobarometer 2014: Botswana Round 6, pp. 36-38.

³⁹¹ This was reported by several people whom the author met during the research.

³⁹² Interview with a male community member, Mochudi, 19/07/2013 (INT 15-1).

³⁹³ Interview with a male community member, Mochudi, 26/07/2013 (INT 04-2).

people are moving between rural and urban settings and are able to compensate shortcomings in service delivery.³⁹⁴ Moreover, Mochudi has become a fast-growing town because of the spill-over from Gaborone. Many people prefer to settle there because rent, school fees and food are much cheaper than in the city.³⁹⁵ This growth and urbanisation adds another component to infrastructure and service provision. Land allocation and the provision of electricity and water are becoming increasingly challenging and the Kgatleng Land Board has a long waiting list of applicants who are looking for a serviced plot in the district. This has created competition between locals and non-residential applicants.³⁹⁶

Residents from Mochudi have not voiced direct criticism on the performance of local government and traditional leadership. Nevertheless, several key interview partners have addressed the obvious gap between the potential of Mochudi and its actual development status. The background is partly related to the previous paragraph: A major hindrance to progress seemed to be the close distance to Gaborone and its infrastructural amenities and facilities. The respondents felt that fewer investments were made because people had the additional possibility to go to the capital city within a short period of time. On the other hand, the convenient distance between the district and Mochudi also creates opportunities for Gaborone which have not been capitalised upon. These include the further commercialisation of cultural practices to promote tourism but also the establishment of a suburban area. Respondents have reported a difference between the activities and measures taken in the past and the present ones.³⁹⁷

In this context, the lack of actual cooperation between government and traditional leadership was discussed as one of the origins as to why development in the district has not met expectations. Many public buildings needed to be renovated and infrastructural projects needed to be extended. It used to be the traditional leader who identified needs and projects for the communities and who would then seek the support of local government and further partners.³⁹⁸ Moreover, traditional institutions

³⁹⁴ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

³⁹⁵ Interviews with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1) and with a male community member, Mochudi, 08/07/2013 (INT 09-1).

³⁹⁶ Interview with a representative of Kgatleng Land Board, Mochudi, 29/07/2013 (INT 20-1).

³⁹⁷ Interview with a young male community member, Mochudi, 19/07/2013 (INT 15-1).

³⁹⁸ Interview INT 15-1, and interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

were active in diverse village affairs and community projects, before certain tasks were reallocated to central and local government and community cohesion was weakened. As the previous chapter has indicated, community members who underwent initiation were organised in so-called age regiments which provided volunteer work both for the senior traditional leader and for the community, and thereby contributed to local development. Moreover, tribal levies were raised to finance projects. This included public infrastructure like roads, public buildings or schools and education programmes. Due to commercial labour and the declining influence of traditional institutions, this volunteer form of community labour has ceased.³⁹⁹

While traditional institutions were stripped of their formal powers in land allocation and management, they still play a vital advisory role in the villages, as respondents have confirmed during the research. Traditional institutions know the people and family structures in their areas and are familiar with who owns or occupies a piece of land. The first-hand information and advice they give to the land boards helps to reduce conflicts. Moreover, land board officials do not need to undergo the time-consuming process of addressing kgotla meetings themselves.⁴⁰⁰ Formally, traditional leadership is represented in the land board structures. Under Kgafela II, no representative of the Bakgatla has attended meetings or has represented the traditional community. As one of the headman has said: *“So anything that has to do with him [author’s remark: Kgafela], is affecting any function in the area.”*⁴⁰¹

With regard to the institutional pluralism and the dispute between central government and the tribal administration, the quality of service delivery and progress was assessed critically in the district. The de-recognition and relocation of Kgafela II and the suspension of several members of the tribal administration in Mochudi have caused a standstill in Kgatleng District and have made it impossible for the tribal administration to implement any projects and initiatives since 2011. Kgafela II had announced in public what kind of development projects he intended to bring to the district after his coronation. They included the commercialisation of Bakgatla culture, business activities and special support for younger community members. In

³⁹⁹ Interview conducted with a male community member in Mochudi, 18/06/2013 (INT 02-1). See also Makgala 2009, pp. 204-213.

⁴⁰⁰ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁴⁰¹ Interview INT 21-1.

the end, none of the envisaged projects could be sustainably implemented during his short period of rule in Mochudi.⁴⁰² Moreover, the problems he was facing in South Africa have prevented him from starting any initiatives since then.

Although the existence of plural institutions at local level could theoretically enhance service delivery and access options for community members, the situation in Kgatleng has displayed the flipside of the concept. In the struggle for dominance and influence in Kgatleng, certain services could no longer be provided to the people. One of the representatives of the Bakgatla leadership has complained about Kgafela's failure to deal with the suspensions of the members of the tribal administration in a proper way. In his view, Kgafela should have taken care of appointing someone to temporarily replace the suspended leaders until their cases were decided in the courts. This was not a context in which government must become active, but the Paramount Chief had to. The interviewee was concerned about the fact that productivity and service delivery to the community were compromised. Without an official senior traditional leader, people were not getting assistance and certain services. Additionally, court cases which fell under the jurisdiction of a senior traditional leader could not be dealt with.⁴⁰³ During the time of the suspensions, people who wanted to have their cases heard had the option to go to the Magistrate Court in Mochudi or to the Small Claims Court in Gaborone. Consequently, people had to travel longer distances, had to wait for the judgement of their cases and pay money for lawyers.⁴⁰⁴

When community members were asked specifically about the impact of pluralistic structures on local development and access to services, some of them have pointed to this critical situation which resulted from the dispute between government and the tribal administration in Mochudi. They saw the negative effects of the institutional pluralism for development and the provision of day-to-day services. Several community members in Mochudi have voiced their concern that Kgatleng District was facing shortcomings and a lack of service delivery due to Kgafela's opposition. A representative of the District Council was not supportive of this statement and has categorised it as the '*opinion of ordinary people*'. On the contrary, he has argued that

⁴⁰² Interview with Kgosi Bana Sekai, Tribal Administration, Mochudi, 24/07/2013 (INT 18-1).

⁴⁰³ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁴⁰⁴ Interview INT 21-1.

the district was relatively developed and offered tarred roads, electricity in the villages, good water services, street lights and schools. The district still needed a lot of development, but in comparison to other areas in the country, Kgatleng has experienced a lot of progress and was on its way to further development.⁴⁰⁵

5.1.2 South Africa

The institutions at district and municipal level were mandated with the task of establishing and extending local government mechanisms and implementing the national development goals country-wide. The municipalities are the principal agents and first port of call for service delivery in the communities.⁴⁰⁶ To cite Pretorius and Schurink⁴⁰⁷, the following factors determine and regulate municipal service delivery at present:

- (1) the Integrated Development Plan (IDP)⁴⁰⁸ and the Performance Management System for the public service;
- (2) intergovernmental relations which are regulated by the Constitution and the Intergovernmental Relations Framework Act;
- (3) the Expanded Public Works Programme⁴⁰⁹;
- (4) Batho Pele, a political initiative⁴¹⁰;
- (5) the budget of the municipality; and
- (6) policy and procedure.

Many rural areas and territories which were part of the former homelands still face a broad deficit in infrastructure and service delivery. This is an additional challenge to the limited annual budget of the local municipalities. Government has a three-year planning cycle, so that municipalities can plan ahead. Additionally, there are IDPs for long-term projects which exceed the five-year term of office of the municipal

⁴⁰⁵ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

⁴⁰⁶ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁴⁰⁷ Cf. Pretorius, Dalené/Schurink, Willem 2007: Enhancing service delivery in local government: The case of a district municipality, in: SA Journal of Human Resource Management 5, No. 3, p. 22.

⁴⁰⁸ Section 25(1) of the Municipal Systems Act orders municipal councils to adopt a strategic development plan for the municipality for a period of five years.

⁴⁰⁹ This is a government programme with the objectives to foster sustainable development and to promote economic growth.

⁴¹⁰ The initiative was established to enable more efficient and accountable delivery of goods and government services to the public. It is based on the Batho Pele White Paper of 1997.

council. A representative of local government in Mogwase has stated that coping with the annual budget was often a struggle, especially as there were long shopping lists with local requests.⁴¹¹

Impact assessments and surveys in recent years have produced a set of common challenges and problems in South Africa which have led to unrest and sometimes even violent protests against the quality of service delivery. The following sample aspects were identified as hindrances to efficient local governance working patterns and are the origins of serious service shortcomings:

- The problematic co-existence and cooperation of political and administrative actors at municipal level,
- the lack of separation of the legislative and executive at district and municipal level,
- insufficient formalised relations and communication channels between municipalities and wards in day-to-day routines,
- municipal representatives' inadequate accounting and reporting mechanisms and their use of resources, or, more plainly expressed, high levels of corruption,
- the enormous workload in remote, rural communities to establish basic infrastructure and access to services,
- restricted resources, the financial dependence of municipal and ward institutions and limited revenue generation through payments,
- a lack of experienced and qualified staff in the initial post-apartheid years, and
- a lack of public participation in decision-making.⁴¹²

The South African Institute of Race Relations has published a report that was based on the 2011 census. By taking 80 different indicators into account, it has examined long-term shifts and municipal performance in local governance since democratisation. The report shows that service delivery has largely improved over the last two decades. Education levels have increased and a high number of

⁴¹¹ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁴¹² Cf. de Visser, Jaap 2009: Developmental Local Government in South Africa: Institutional Fault Lines, in: Commonwealth Journal of Local Governance 2, January; Ministry for Cooperative Governance and Traditional Affairs 2009: State of Local Government in South Africa: Overview Report. National State of Local Government Assessments (Working Documents, COGTA 2009); The Presidency 2014: Twenty Year Review, South Africa 1994-2014.

households had access to electricity, piped water and lavatories. Nevertheless, the total numbers of households and the overall population have grown alike. According to the report, the majority of the best performing municipalities were located in the Western Cape, while the majority of the worst performing municipalities were located in the Eastern Cape. The municipalities in Bojanala Platinum District were placed in the middle range.⁴¹³

The 2013 report provides a general summary of the hindrances and challenges local government faces in South Africa. Firstly, criticism does not centre on service delivery, but rather the way local government operates in the municipalities. Challenging factors were inter alia political appointments of office holders, a lack of skills and capacity, budgetary restraints, unwillingness or incapacity to pay for services, lack of accountability and the prevalence of corruption, fraud and nepotism without serious sanctions. Certain negative assessments of the performance of municipalities seemed to be the consequence of unrealistic promises that the ANC has made since 1994. The populace was therefore inter alia expecting free housing, electricity and water.⁴¹⁴

In the Afrobarometer survey 2011, respondents were asked to evaluate the performance of their elected local government councillors during the past year. In North West, councillors were rated negatively by an overwhelming majority. 68% of the respondents disapproved of the councillors' performance, compared to an overall percentage of 51% throughout the whole country. Only 23% of the respondents in North West gave a positive vote.⁴¹⁵ As indicated by the recent results of the 2015 Afrobarometer, government performance was rated lowest in fighting corruption and social inequalities, improving the living standards of the poor and creating jobs. The number of people who gave the government a negative score in those fields ranged between 69% up to 80% of the respondents. In North West, particularly high rates of disapproval were shown for government performance in the following areas:

⁴¹³ Cf. South African Institute of Race Relations (SAIRR) 2013: The 80/20 Report: Local Government in 80 Indicators After 20 Years of Democracy, Johannesburg.

⁴¹⁴ Cf. *Ibid.*, pp. 23-32.

⁴¹⁵ Cf. Afrobarometer 2011: Round 5 Afrobarometer Survey in South Africa. Summary of results (compiled by Citizen Surveys), p. 71.

reducing crime (80%), keeping prices down (81%), fighting corruption in government (81%), and narrowing the gaps between rich and poor (85%).⁴¹⁶

Key interview partners from the local and district municipalities in Bojanala Platinum District have pointed to the rather young history of local governance in rural areas. In their view, a lot of progress has been made since 1994 and basic infrastructure has been provided even to remote areas, although this does not imply that the present status is sufficient.⁴¹⁷ The municipalities were still working to overcome their apartheid heritage and to democratise local governance. Moreover, the qualifications and intentions of the local actors remained critical hindrances to progress. One representative of the Moses Kotane Local Municipality has given her assessment of the present state of affairs.

*“Personally, for me, the separation into different levels is the best thing we can have. Our population is big and diverse and this requires different levels, institutions and foci. Considering the various interests that individuals have, for us to have one stream of government, I don't think it's gonna work for us. I think we're gonna take a knock for some time, ten, fifteen years before we stabilise. It requires people with integrity that are objective. And I don't think we have that now. I think we have leadership that is more focused on what they have in their radar, not beyond, and where their interests are best served.”*⁴¹⁸

This transitional period has proven to be challenging, as local municipalities have inherited communities which lack basic infrastructure, local income and qualified staff. Limited resources lead to unserved communities and this was subsequently attributed to the weak performance of local councillors.⁴¹⁹ Due to the mining operations in the different local municipalities, like in the Rustenburg area, towns and villages were growing fast and were becoming increasingly attractive to foreign workers. Consequently, demand for housing, infrastructure and services were rising alike.⁴²⁰

⁴¹⁶ Cf. Chingwete, Anyway 2015: South Africans disapprove of government's performance on unemployment, housing, crime (Afrobarometer Dispatch No. 64), pp. 4, 8.

⁴¹⁷ Interviews with a representative of the district municipality, Rustenburg, 03/09/2013 (INT 32-1), and with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁴¹⁸ Interview INT 43-1.

⁴¹⁹ Interview conducted with a local councillor in Moruleng on 27 August 2013 (INT 28-1).

⁴²⁰ Interview INT 32-1.

Representatives of Moses Kotane have reported that the municipality is suffering from a lack of bulk infrastructure and is facing a serious shortage of water. In addition to long periods of drought, the municipality inherited a plant from the former homeland government which needed a lot of maintenance and refurbishment work, which drained large amounts of the municipal funds. Moreover, the general infrastructure of the municipality was not sufficient to cope with the challenges of providing water to growing communities. There were not even enough tanks to save any water in the wards.⁴²¹

Different planning circles have also affected the assessment of local government in Moses Kotane in comparison to the performance of the tribal administration. The limited period of future planning due to the legislative terms of local government poses further challenges to progress. To reach greater efficiency in long-term development and rural transformation, a member of local government in Mogwase stressed that the municipalities should have multiyear plans instead of having each council or administration set its own development priorities. The respondent cited the example of the Bakgatla and their Master Plan to emphasise the need for local government to provide for the continuance of projects and to have similar planning circles.⁴²²

According to one representative, the district municipality initiates evaluations on the perception and performance of local government in Bojanala Platinum District. The results of these evaluations were very mixed. As described by the key interview partner, there were a lot of people who perceived the district and the local municipalities to have certain shortcomings. People have criticised deficiencies in service delivery, fraud and corruption as major problems. Communication was another critical factor at local level. The key interview partner has noted that many people were not aware of the duties and responsibilities that the local government bodies fulfil.⁴²³

Several interviewees have stated that the relatively short history of local government in South Africa's rural areas was still visible. In their view, the people who were taking over leadership roles in government also play a key role. One local

⁴²¹ Interviews with a local government representative, Mogwase, 18/09/2013 (INT 43-1) and with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

⁴²² Interview INT 43-1.

⁴²³ Interview INT 32-1.

government member has given a short summary of some of the problems they face as a local municipality in this context:

“You know there is this thing of still having people that are not competent to their jobs. You have a certain number of councillors being elected to office and they put in whoever they prefer in administrative positions. Because they think they can work better with those people and that they can get things right, not having consideration of what legislation says of what the job requirements are.”⁴²⁴

The majority of interviewees in the Moses Kotane Municipality stated that they had a good relationship with the local government institutions and that they can approach them easily. Furthermore, they expressed their satisfaction with the institutions’ reactions when dealing with individual requests by community members.⁴²⁵ Despite the rather positive image of the Moses Kotane municipality, the situation at the grassroots level was assessed differently. The work of the ward councillors was reviewed in a very negative way. They are responsible for bringing development to the communities and for directing municipality resources. A local government employee has pointed to the problematic lack of proper oversight over the work of the councillors. This was a consequence of staff shortages and political affiliations in the municipality. Apart from administrative positions, like the one of the Municipal Manager, there were the ‘political administrators’ who work in the offices of the mayor and the speaker.⁴²⁶

Several reasons were elaborated upon by key respondents from Moruleng and from further Bakgatla villages for their critical assessment of the councillors: According to the institutional set-up and the responses of the interviewees, local councillors are supposed to be in direct contact with community members to consult with them, talk about their requests and problems and work as a communication channel with the local government in Mogwase and Rustenburg. In contrast to these tasks, one of the ward councillors interviewed in 2013 has complained about the lack of equipment, transport and office facilities that limited the potential to interact with community

⁴²⁴ Interview INT 43-1.

⁴²⁵ Group interview with two male community members Moruleng, 26/08/2013 (INT 46-1).

⁴²⁶ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

members.⁴²⁷ On the contrary, a member of the local municipality has criticised the claims that some of the ward councillors were bringing forward. According to the interviewee, they do not need offices as they were supposed to be ‘foot soldiers on the ground’ who interact directly with their communities. Moreover, the office of the speaker is available to receive and consolidate reports for the administration, the political leadership in the mayoral committee and the speaker. So, it is the main duty of the councillors to engage with the people and to bring their requests to the local municipality.⁴²⁸

Another hindrance was the fact that some of the councillors in Moses Kotane were not involved by the local stakeholders and were not treated as a formal community representative. The failure of councillors to implement projects at the local level and to bring visible progress to the villages also negatively impacts their reputation within the communities. Many people perceive them as being powerless and without significant influence.⁴²⁹

As in other contexts, corruption among certain office holders was cited as a serious problem. This might go hand in hand with the small budget and salary and material support local councillors receive. Some of the respondents from the Bakgatla villages outside Moruleng have reported incidents where money which was supposed to fund local infrastructure projects was used for the personal benefit of the parties involved. These reports were confirmed by respondents from North West in the 2008 Afrobarometer survey. People were asked about the performance of their local council in guaranteeing that local government revenues were used for public services only and not for private gain. Only 26% of the respondents evaluated the councils’ performance positively, while 54% said that the councils were performing badly.⁴³⁰

Traditional institutions and the local municipalities are mandated to fulfil similar tasks: enabling and promoting development. In the case of the Bakgatla-ba-Kgafela, traditional institutions have taken over certain areas of service delivery which usually lie within the scope of municipal responsibilities. With the help of mining revenues, the tribal administration has started to compensate local government budget

⁴²⁷ Interview with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

⁴²⁸ Interview INT 43-1.

⁴²⁹ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

⁴³⁰ Cf. Afrobarometer 2008: Round 4 Afrobarometer Survey in South Africa. Summary of results (compiled by Citizen Surveys), p. 55.

shortages by initiating and financing their own development projects.⁴³¹ Nyalala Pilane has pointed to another important aspect. The work of the tribal administration in the field of development also benefits the municipality. As people are being serviced at the local level, the municipality was no longer exposed to pressure or strikes from those communities.⁴³²

In July 2016, the Bakgatla leadership and the local municipality in Mogwase signed a Memorandum of Understanding, the first inter-institutional development partnership of this kind in South Africa. Both parties have agreed on a close cooperation in the fields of housing, infrastructure and business development and the creation of the Central Business District.⁴³³ This partnership displays the positive synergetic opportunities of the institutional pluralism.

Despite positive contributions, the performance of the tribal administration in Moruleng was critically assessed by many community members, as the previous chapter has revealed in more detail. In general, certain recent infrastructural projects were highly valued because they improve living conditions by establishing services and facilities in convenient locations so that people could save time and travel expenses. Moreover, people acknowledged that the area was becoming more attractive to investors and tourists. On the other hand, lots of local people were getting increasingly impatient with the slow progress. According to key respondents, nothing had been done by traditional institutions to promote development before the first major stages of the Master Plan were implemented.⁴³⁴ The villagers have expressed their dissatisfaction in a series of riots and strikes in 2012. Roads were blocked and people entered the compounds of the tribal administration.⁴³⁵ Younger people have complained that development projects were only initiated after those kinds of protests and strikes. People have the feeling that they have to fight for progress and projects like the shopping mall or the soccer stadium in Moruleng. In their view, the tribal administration could do much more with the money from the

⁴³¹ Interviews conducted with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1), and with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁴³² Interview INT 40-1.

⁴³³ See news sections on <http://www.moseskotane.gov.za/mklim-and-bbкта-joins-hands-in-bringing-developments/> and <http://bbкта.net/web/mklim-bbкта-sign-a-historic-memorandum-of-understanding-mou/> [last assessed 09.04.2017].

⁴³⁴ Group interview INT 46-1 and interview with a male community member, Moruleng, 06/09/2013 (INT 34-1).

⁴³⁵ Interview INT 34-1. Female respondent interviewed during a group interview in Segakwaneng, 09/09/2013 (INT 49-1).

mines. They make promises but do not deliver. Still, the respondents stated that traditional institutions were powerful because they control the land and the funds.⁴³⁶

When comparing the assessments of the performance of traditional institutions and of the local government institutions in the municipality, the opinions of the key respondents varied a lot. Some voices saw traditional institutions as major actors in the rural areas while government remained underrepresented and not visible enough in the villages. In their view, traditional institutions should be responsible for improvements and services at village level. One interviewee even stated that the people in Moruleng were ‘under the leadership of a chief’ and that local government was only working in the urban areas.⁴³⁷ One criterion that was raised by the respondents with regard to performance was the ability to create job opportunities for the population and to combat youth unemployment. While some of the respondents praised the positive results of government in this field, others emphasised the role of traditional institutions and criticised government for failing to deliver.⁴³⁸

Despite this, local government has improved living conditions in the rural areas by implementing certain infrastructure projects and by bringing electricity and water to more households.⁴³⁹ Still, local councillors and the municipality were criticised for being too slow in bringing about these developments.⁴⁴⁰ It must be noted that the conditions varied within the different villages. Villages located at the boundaries of the municipality or in very rural areas continue to face shortcomings. A key respondent has criticised the fact that ANC politicians always point to the need to assist the rural communities, without actually generating development in them. He stated that people in the remote villages were still living the same primitive life they used to live since the 1950s without major progress.⁴⁴¹

This goes hand in hand with critical statements by several respondents who stated that both the local municipality and the tribal administration only promote areas which are close to their own headquarters, namely Mogwase and Moruleng. Key respondents from the Bakgatla villages in South Africa have therefore expressed

⁴³⁶ Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1).

⁴³⁷ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

⁴³⁸ Interviews conducted on 26/08/2013 and on 05/09/2013 (INT 33-1 and INT 46-1).

⁴³⁹ Interview 33-1.

⁴⁴⁰ Interview with a male community member, Moruleng, 06/09/2013 (INT 34-1).

⁴⁴¹ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

their discontent over the lack of overall development and the performance of the formal actors at local level. Remote villages were neglected by both types of institutions in terms of access to services, infrastructure, representation and general service provision.⁴⁴² Revenues from the mines have not trickled down beyond the immediate area around the tribal administration. Phokeng, in the Bafokeng area, was named as a positive example which displayed the wealth and potential development of a mining community.⁴⁴³ Meanwhile, Bakgatla respondents from more peripheral villages have pointed to the lack of water, roads, electricity and housing. Moreover, there are not sufficient employment opportunities for residents. Those complaints were directed against the tribal leadership and against the municipality, as it was also the responsibility of the latter to provide services and development initiatives which would foster employment. The criticism regarding the lack of service provision by the tribal administration was based on the impression that money from the tribal funds was not flowing back to the villages and benefitting the people at the grassroots level.⁴⁴⁴

One community activist has given a clearer picture of the shortcomings in the peripheral areas of the municipality and the tribal territory:

“The fact remains that if I become a mayor, I am staying in Kraalhoek. Where do you think I am going to develop first? Here. Better services will come here because I'm staying here. Even president Zuma is doing the same thing. You develop where you come from. Here, maybe after two to three years is when people start enjoying the first RDP houses. All the Bakgatlas, where the tourists are coming, in Saulspoort they have got few, in Sandfontain they have got few because they are near the chief's place. But the most rural people far away, we don't get services. We have got a councillor for this area, about three or four villages under him. But we don't get any deliveries. They just supply toilets. Their main services here is to deliver toilets. No other thing. Since we have got electricity, electricity we have got all of us, but apart of that there is no other serious delivery amongst us. Despite the fact that we are a platinum

⁴⁴² Interview INT 44-1.

⁴⁴³ Interviews conducted with a male community member, Moruleng, 26/08/2013 (INT 27-1), and with two male community members Moruleng, 26/08/2013 (INT 46-1).

⁴⁴⁴ Interviews INT 27-1 and INT 44-1.

producing community, there is nothing that is happening, from Moses Kotane and from the chief's administration himself."⁴⁴⁵

One of the key interview partners from Moruleng has summarised the present status succinctly by stating that in assessing the performance of the local stakeholders, one could find arguments for both sides. Generally, conditions have improved a lot compared to 1994. Major improvements were realised in the field of democratic rights, local infrastructure and safety.⁴⁴⁶ The contribution of government was valued, although there still remain many fields of action and improvement. Nevertheless, local residents have also realised that it takes a lot of time to foster long-term development. Furthermore, the funds available to the district and local municipalities were not sufficient to address all the deficiencies at once.⁴⁴⁷

5.2 Stakeholder relations at local level

5.2.1 Botswana

The previous sections have introduced the overall frame of inter-institutional relations at local level and have indicated the spheres of governance. In Botswana, the local government and tribal administration stakeholders formally and informally work together in various forums and institutional arrangements. Legislation assigns overall responsibilities and hierarchies but does not regulate inter-institutional relations. The individual pillars of the local government system are closely related in their day-to-day activities. Firstly, they are represented at each other's meetings. Secondly, traditional leaders and other governmental actors can initiate kgotla meetings, albeit government has to act through the traditional leader as president of the kgotla. Finally, the different actors are represented in joint committees and boards, e.g. like local development committees or the specialised working committees of the district council.⁴⁴⁸

A member of the District Council has given a clearer picture of the relations of the different institutions in the districts. The Council, as an elected institution, is the

⁴⁴⁵ Interview INT 44-1.

⁴⁴⁶ Interview with a younger male community member, Moruleng, 16/09/2013 (INT 42-1).

⁴⁴⁷ Interviews with a senior female community member, Moruleng, 27/08/2013 (INT 29-1), and with a male community member (INT 42-1).

⁴⁴⁸ Interview with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1).

most senior level of local governance in Botswana. It accounts to the ministers and the president. The different departments of central government and the other local institutions report to the council committees. While the District Commissioner is a government employee, the Chairman of the District Council is the political leader.⁴⁴⁹ The District Commissioner, the Paramount Chief and the Land Board Chairman all sit in the full council and are represented in the chambers and committees. In their daily functions, the institutions complement each other.⁴⁵⁰

Village Development Committees (VDCs) in rural areas and Ward Development Committees (WDCs) in urban areas are involved in development planning and are local partners of the kgotlas. They are the ones who immediately interact with traditional leaders. These committees are elected in the kgotla and are subordinated and responsible to the latter. The respective senior traditional leader and councillor of that area enjoy ex-officio membership.⁴⁵¹ Traditional institutions support VDCs and WDCs both in their establishment and in their work. In Kgatleng, close cooperation and exchange takes place. In the urban areas, the presidents of the urban customary courts take over some of the functions of traditional institutions in the villages. They attend WDC meetings and preside over kgotla meetings.⁴⁵² According to a respondent of the tribal administration, it lies within the responsibility of the leader to make sure that the committees work and that they perform their duties. The leader should also take part in the meetings and deliberations to receive and distribute information.⁴⁵³

Legislation on local government and traditional leadership provides the formal framework for the interactions between district and local institutions. The Bogosi Act places central government and the Ministry above tribal administration. As stated in Chapter 3, the Department of Tribal Administration plays a vital role for traditional institutions. It is responsible for overseeing the operations of the customary courts around the country. It grants the budgets for the courts, provides them with the necessary resources and also facilitates the employment or appointment of traditional

⁴⁴⁹ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

⁴⁵⁰ Interview INT 17-1.

⁴⁵¹ Cf. Lekorwe 2011: The Kgotla and Traditional Leadership, pp. 387-391.

⁴⁵² Interview conducted with the President of an Urban Customary Court in Gaborone, 31/07/2013 (INT 22-1).

⁴⁵³ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

institutions.⁴⁵⁴ The Minister of Local Government is authorised to withdraw formal recognition and to suspend or depose traditional leaders. These sanctions are based on requests by members of the chiefdom or Ministerial assessment that the respective traditional leader is not capable or willing to fulfil his functions and obligations or directions issued by the Minister. The benchmark for such a derecognition or suspension are public interest and order and good governance.⁴⁵⁵ In the case of Kgafela II, the decision was based on his refusal to subject himself under the Bogosi Act and under government control.

The empirical research in Kgatleng District has revealed the interactions between main stakeholders take place with varying degrees of success and cooperation. The institutional pluralism and its legal framework have produced both positive and negative consequences. Despite the dispute between Kgafela II and government, relations between traditional and governmental institutions were not assessed as being competitive or joined by confrontations. According to a representative of the District Commissioner's office, the local stakeholders were "[...] *working harmoniously, just one big family. We are enlisted to do checks and balances, to point out to mistakes but not to accuse each other. We ought to be a team. We are serving the same master which is the government of Botswana.*"⁴⁵⁶

This statement illustrates two important aspects. On the one hand, it shows that there is cooperation at the formal and informal level in the district. On the other hand, it clearly emphasises the hierarchical subordination of traditional institutions under government. Formally, they are not serving the community in the role of a master but as government servants. A representative of the District Council has expressed similar reasons for the cooperation of the stakeholders, but from a more local and customer-orientated perspective. The institutions were working together because all of them aim to benefit the same district and local communities.⁴⁵⁷

⁴⁵⁴ Interview with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1).

⁴⁵⁵ Cf. Sections 13 and 15 of the Bogosi Act. Also see Sharma, Keshav C. 2011: The Role of Traditional Leaders in the Administration of Customary Courts in Botswana, in: Ray, Donald I./Quinlan, Tim/Sharma, Keshav/Clarke, Tacita A. O. (Eds.): *Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development*, Calgary, Alberta, p. 519.

⁴⁵⁶ Interview with a male representative of the Kgatleng District Commissioner's office, Mochudi, 19/07/2013 (INT 14-1).

⁴⁵⁷ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

Irrespective of the dispute between Kgafela II and government, the different local stakeholders have emphasised the importance of a collaborative and supportive relationship between the governance institutions in the district, as they all serve the same people. Traditional leaders were not in a position to ignore other actors who were vital to provide services and infrastructure, like clinics or water supply. The work at local level requires frequent meetings and discussion about policies. Due to the interdependence of traditional institutions, the District Council, the District Commissioner's office and the Land Boards, each of them has to ensure that the relationship remains amicable and cooperative. A major asset of traditional institutions was their ability to assemble the different interest groups in the village to inform them and to enable them to benefit from government initiatives.⁴⁵⁸

Interactions and relations between traditional leadership and government were mutual and two-fold in Kgatleng District. Both groups relied on each other for the proper fulfilment of their formal duties, a fact which was also recognised by community members. The majority of interviewees have voiced the need to have mediating channels so that the community can be involved in decision-making. Therefore, they favoured a traditional leader who can connect them with government, who can communicate their needs and problems to the district and national institutions. On the other hand, community members have also stated that traditional leaders depend on their advisors and on government to be able to represent the villages and to deliver services.⁴⁵⁹

The relations between members of the tribal administration and central government, represented by the Ministry of Local Government and the District Commissioner, were indeed marked by the dispute with Kgafela II and the suspension of tribal officials. Interviews with different stakeholders have confirmed that the formal and informal relations between the tribal administration, the District Council and the land boards in Kgatleng District were generally good and cooperative. The dispute with the Ministry and the District Commissioner has not affected the other stakeholders in their daily interactions. Representatives of each pillar of local government mutually participated in committee meetings and assemblies. These forms of cooperation at local level also continued during the suspensions and the dispute between

⁴⁵⁸ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁴⁵⁹ Interview with a young male community member, Mochudi, 10/07/2013 (INT 10-1).

government and tribal leadership in Mochudi.⁴⁶⁰ Several interviewees have reported that the stakeholders still communicated with each other and relied on the advice of one another. One respondent of the tribal administration in Mochudi who was still on suspension has stated that even the minister who was involved in his suspension used to call him from time to time for assistance.⁴⁶¹ Another one was suspended, without a contract and payment by government, and was still acting as traditional leader.⁴⁶²

One of the traditional leaders in Kgatleng has criticised the actual influence government can exert on tribal leadership. Any attempts to restructure the leadership in Mochudi were impeded by the present Bogosi regulations which determine that the Minister of Local Government has to agree to the appointment of the respective candidate. As government had refused to renew the contract of Kgafela's deputy, it has fuelled the standstill in Kgatleng. With Kgafela abroad and members of the tribal leadership suspended, a variety of functions could no longer be performed in 2013, which comes at the expense of community members.⁴⁶³ The shortage in service provision was not based on the character of the relationships, but on the limited capacity to fulfil certain functions due to sanctions.⁴⁶⁴ Several interviewees expressed their concern that the district had to bear the consequences of the protracted conflict between tribal administration and government. In their personal opinion, initiatives and investments in the district had been neglected and stopped. Key respondents of the Districts Commissioner's office and the district council have not confirmed those subjective perceptions. Quite the contrary, those interviewees emphasised that the district budget and projects have remained the same throughout the dispute.

Certain changes have occurred during the last decades that have transformed local relations. Traditional institutions used to play a central role as spokespersons and mediators of communities. Originally, the senior traditional leader was the one who would link the people with government. According to the formal procedures, government had to contact and inform the head of the chiefdom or the ward first before it could start any activities in the district or the villages. A

⁴⁶⁰ Interview with a representative of Kgatleng Land Board, Mochudi, 29/07/2013 (INT 20-1).

⁴⁶¹ Interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

⁴⁶² Interview with a traditional leader at the Tribal Administration, Mochudi, 24/07/2013 (INT 18-1).

⁴⁶³ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁴⁶⁴ Interviews with a representative of the Kgatleng Land Board, Mochudi, 29/07/2013 (INT 20-1), with a traditional leader (INT 18-1), and with a male representative of the Kgatleng District Commissioner's office, Mochudi, 19/07/2013 (INT 14-1).

Bakgatla-ba-Kgafela leader has stated that in his view government was clearly undermining this chiefly prerogative. Government officials and stakeholders have started to bypass them in the recent years.⁴⁶⁵

Apart from the example of the Bakgatla-ba-Kgafela, there have been other cases where government has displayed its dominant role. This does not refer to the stakeholders at local level but to the relations between central government and individual leaders. One informant has cited the example of the Paramount Chief of the Bangwaketse, who was very aggressive and vocal in expressing his discontent about government, even in other countries. According to the informant, the government stopped funding the area to sanction that form of non-compliance and Kanye, the administrative capital of the Southern District, did not get further infrastructure projects and certain social services. After Paramount Chief Seepapitso stopped his opposition and open criticism, the town received tarred roads, streets light and other benefits.⁴⁶⁶

In 2012 and 2013, the difficult situation between traditional leaders and government in Kgatleng created a stalemate among the stakeholders. As a consequence of the assumed lack of cooperation by central government in dealing with the local disputes, the tribal leadership had remained passive and had waited for government to approach them.⁴⁶⁷ The way forward, according to one of the headmen, lies in mutually recognising and respecting the characteristics and features of each other. While government needed to realise that traditional leaders and tribes were duty-bound to be recognised as such, traditional leaders also had to acknowledge that government is chosen by the people. In his opinion, it was necessary for the Bakgatla-ba-Kgafela to raise their voices and to make them heard by government, something which is a normal component of a democratic system. For prosperity and development and the social and economic well-being of the people, the parties needed to sit down and iron out all differences.⁴⁶⁸

⁴⁶⁵ Interview INT 18-1.

⁴⁶⁶ Interview with a male community member, Mochudi, 12/07/2013 (INT 13-1).

⁴⁶⁷ Interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

⁴⁶⁸ Interview with a headman in Mochudi, 30/07/2013 (INT 21-1).

5.2.2 South Africa

Sections 40 and 41 of the 1996 Constitution form the basis of co-operative government and intergovernmental relations in South Africa. They apply to the respective executive bodies at each level of governance. Section 40(1) stipulates that the national, provincial and local spheres are “[...] *distinctive, interdependent and interrelated*”. As agents of the state, traditional institutions are likewise affected by this provision. The subsequent Section 41(1) lists the major principles which determine the parameters of intergovernmental relations. Among rather general democratic and good governance principles, like transparency, accountability and preservation of national unity, this section also sets out the following concrete obligations of the stakeholders:

- “[...] h. *co-operate with one another in mutual trust and good faith by -*
- i. fostering friendly relations;*
 - ii. assisting and supporting one another;*
 - iii. informing one another of, and consulting one another on, matters of common interest;*
 - iv. co-ordinating their actions and legislation with one another;*
 - v. adhering to agreed procedures; and*
 - vi. avoiding legal proceedings against one another.*⁴⁶⁹”

The Intergovernmental Relations Framework Act⁴⁷⁰ regulates the cooperation of governmental institutions at national, provincial and local level and their related organs of state. The Act provides for the creation of forums at inter- and intragovernmental level, which constitute the link and general frame for horizontal and vertical coordination, cooperation and exchange among the major stakeholders. District intergovernmental forums were established for the district municipality and the respective local municipalities.⁴⁷¹

“26. (1) *The role of a district intergovernmental forum is to serve as a consultative forum for the district municipality and the local municipalities in*

⁴⁶⁹ Section 41(1) lit. h of the Constitution of South Africa.

⁴⁷⁰ Cf. Intergovernmental Relations Framework Act No. 13 of 2005.

⁴⁷¹ Cf. Section 24 of the Intergovernmental Relations Framework Act.

the district to discuss and consult each other on matters of mutual interest, including—

(a) draft national and provincial policy and legislation relating to matters affecting local government interests in the district;

(b) the implementation of national and provincial policy and legislation with respect to such matters in the district; [...]

(e) the provision of services in the district;

(f) coherent planning and development in the district;

*(g) the co-ordination and alignment of the strategic and performance plans and priorities, objectives and strategies of the municipalities in the district [...].*⁴⁷²

The actual creation and functioning of these intergovernmental forums was confirmed by representatives of the district municipality in Rustenburg and the local municipality in Mogwase. The local municipality operates autonomously and communicates directly with the departments and institutions at local and regional level. Their formal relations are laid down in the framework on corporate governance and in policy programmes. The mayors, speakers and municipal managers all hold forums in which the representatives at district and local level come together. Cooperation takes place in matters which cross municipal borders, like road construction. Moreover, the district has a coordinating role towards the local municipalities and initiates projects, provides training and skills enhancement to other institutions.⁴⁷³ In accordance with the Divisional Revenue Act, the municipalities do not receive revenues from the districts in South Africa. The only budget they receive from the districts is for certain projects that the latter want to implement within the local municipality. In those cases, the local and the district municipality interact, identify projects and then work and implement them together.⁴⁷⁴

Local government and traditional institutions cooperate in the field of development. As traditional institutions are represented in the local councils, they also participate

⁴⁷² Section 26(1) of the Intergovernmental Relations Framework Act.

⁴⁷³ Interviews conducted with a local government representative, Mogwase, 18/09/2013 (INT 43-1), and with a representative of the district municipality, Rustenburg, 03/09/2013 (INT 32-1).

⁴⁷⁴ Interview INT 43-1.

in making and defining the budgets for the rural areas.⁴⁷⁵ A representative of the district municipality has summarised that traditional leaders identify needs and potential projects in the communities. The district municipality then provides project related funding and the local municipality initiates and manages the projects. There are 2 million Rand allocated for those kinds of projects in the Bojanala Platinum District.⁴⁷⁶

During the empirical research, representatives of the tribal administration of the Bakgatla-ba-Kgafela and of local government stated that there was no competition or conflict between them. In contrast, the interviewees have pointed to their fruitful cooperation. The different stakeholders come together quarterly for joint sessions in Moses Kotane and also to check that they are working in line with local requests and programmes.⁴⁷⁷ A government representative has validated those statements. *“We don't have cases here in Moses Kotane where tribal leaders are acting against us or are blocking development. It is honestly rather us as a municipality not reaching them.”*⁴⁷⁸ Traditional leadership in Moruleng has described itself as being a division within local government that provides support but it was not necessarily mandated by government to do certain things. A member of the royal council has summarised the status as follows: *“We can say we are quasi government within the government sphere.”*⁴⁷⁹

Nyalala Pilane also confirmed that in general general inter-institutional relations are fruitful, albeit with some minor exceptions.

“Our relationship with government, in actual fact, it's supposed to be cooperative governance because the institution of traditional leadership, it's a governance on its own. And then there comes the political governance. And because we are ruling or governing over one people or we are serving one client, we need to cooperate so that there is no competition. Unfortunately, as you know, South Africa, it's still a new government so because of that some want to turn to be superior and want to crack a whip where it is not necessary.”

⁴⁷⁵ Interview INT 32-1.

⁴⁷⁶ Interview INT 32-1.

⁴⁷⁷ Interviews conducted with a local government representative, Mogwase, 18/09/2013 (INT 43-1), with a representative of the district municipality, Rustenburg, 03/09/2013 (INT 32-1), and with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

⁴⁷⁸ Interview INT 43-1.

⁴⁷⁹ Interview with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1).

*So there is still that slight friction. But I think it's because of misunderstanding.*⁴⁸⁰

According to interviews with representatives of the district and local municipality, the members of the local government institutions generally appreciate the engagement of the Bakgatla-ba-Kgafela leadership, which benefits the same target group that the municipalities serve. The boundaries of the Bakgatla communities are more or less congruent with the constituencies of the local municipality. The ward and village headmen are all leaders of villages which fall under Moses Kotane. As a respondent of the municipality has confirmed, traditional institutions remain the first point of call for the people. From there on, it is a matter between them and the municipality. As a consequence, the municipality has to engage more with traditional institutions with regard to what their communities need. Therefore the municipality takes a position as their supporters in bringing development and progress to the local level.⁴⁸¹ A key respondent of the Moses Kotane municipality admitted that it was difficult for them to reach the people in the remote areas while they are located in Mogwase. So, a kind of cooperation has been established between traditional and government institutions to reach those areas and to support each other's work.⁴⁸²

The lowest level of local government is formed by the ward councillors who usually interact with the headmen in the villages. The headmen who work in the same areas only have small revenues arising from local businesses or the mines. One of the headmen has emphasised that ward councillors are mandated to act in the field of development and that headmen are confined to act in traditional and customary affairs. Nevertheless, they also cooperate and exchange information on local needs and requests, as every local stakeholder essentially serves the same community.⁴⁸³ One of the local government councillors in the Bakgatla area confirmed the central role of the councillors in enabling community members and stakeholders to participate in decision-making. The ward councillors are mandated to assemble people, to listen to their concerns and requests and to take them to the municipality.⁴⁸⁴ So, in line with the legal framework, they are the main local

⁴⁸⁰ Interview with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

⁴⁸¹ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁴⁸² Interview INT 43-1.

⁴⁸³ Interview with a headman in Moruleng, 12/09/2013 (INT 37-1).

⁴⁸⁴ Interview with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

government actors in the villages and should receive the support of traditional institutions. As the Bakgatla leadership was increasingly engaged in community development itself and was politically connected, the focus and distribution of tasks has shifted.

A representative of local government gave a different picture of the role and interaction of the stakeholders in Moses Kotane. In his opinion, it was not a duplicated structure to have ward committees and councillors in villages where traditional leaders are present. It is all about representation at the various levels. Moses Kotane has 107 villages and it was impossible for the members of the political and administrative wing of the municipality to address the people regularly:

“There is just no way we can engage with all of them, either directly with the communities themselves or with their chiefs. And hence we need that reaction chain to say we have people on the ground that should assist, that should take communication between the municipality and the communities and even the tribal offices. Because you have representatives from the tribal offices as well. Some of them are even board committee members, I think there is one that is a ward councillor who is a representative of the tribal office.”⁴⁸⁵

Despite the generally positive assessments of the interactions between governmental and traditional institutions, contrary reactions were also expressed. At grassroots level, the relationship between some of the ward councillors, ward committees and tribal administration proved to be difficult in the Bakgatla area. While there was no direct conflict between the parties, relations were partly marked by mutual ignorance and lack of communication. Traditional institutions remained the dominant actors in the villages. Due to the good relations between traditional leaders and politicians at municipal and provincial level, the grassroots level is often left out. In certain cases, actors are not integrated in decision-making and consultation does not take place. Actually, there are now two parties with a similar mandate working independently: one based on elections and the other one on birth right or customary law.⁴⁸⁶ As several key respondents have reported, a form of competition, particularly at

⁴⁸⁵ Interview INT 43-1.

⁴⁸⁶ Interview INT 28-1.

headmen level, evolves when local councillors were not aware of the nature and limits of their competences.⁴⁸⁷

Traditional representatives and respondents from the district and local municipality have stressed that there was no competition with regard to development. Instead, the stakeholders were all active in different fields of development and complement each other. Development planning is a joint project in Moses Kotane, where all the stakeholders from the tribal offices, the mines and businesses assemble in a representative forum. The municipality indicates its planned projects and priorities and the other stakeholders state what kind of contributions they would like to make. In the case of the mines, the contribution is guided and motivated by the legal framework.⁴⁸⁸

The Bakgatla-ba-Kgafela have their own business operations and mines and had to find a way to use the revenues for the benefit of the community. After having made their own internal development plans, the tribal leadership sits down with local government to present their plans and strategies. Due to this exchange, there was regular communication and information on priorities and projects.⁴⁸⁹ A representative of the local municipality has reported that there was no real competition in Moses Kotane due to the larger funds at the tribal administration's disposal. Instead, the institutions complement each other. With regard to the problem of water provision, the Bakgatla-ba-Kgafela tribal administration funded and built a huge water reservoir. When the reservoir could not be used due to the water shortage, the municipality sent its consultant for water services to find a joint solution.⁴⁹⁰ Nyalala Pilane stated that people from the community and municipality were very sceptical when he first presented his ideas and vision. In their view, the area was too rural to implement those kinds of projects and to attract investors. Nyalala Pilane reported an incident whereby the municipality refused to increase capacities and he had to deal with the service providers on his own.⁴⁹¹

⁴⁸⁷ Interviews conducted with a local government representative, Moruleng, 12/09/2013 (INT 39-1), and with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁴⁸⁸ Interview INT 43-1.

⁴⁸⁹ Interview with a headman in Moruleng, 12/09/2013 (INT 37-1).

⁴⁹⁰ Interview INT 43-1.

⁴⁹¹ Interview with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

In day-to-day practice, the interactions at the grassroots level were sometimes not sufficient. According to the respondent, traditional leaders regularly come to the municipality to speak about projects because, in their words, they could not find the ward councillor or ward committee.⁴⁹² A local councillor has given a contrary view by stating that it was the tribal offices who were bypassing the grassroots institutions of local governance.⁴⁹³ He described the relationship with traditional institutions as problematic. There was a lack of coordination and mutual involvement in local policies. Despite this, the councillor emphasised the different spheres of action in which each party fulfils its own functions.⁴⁹⁴

Land ownership remains a major problem for Moses Kotane Municipality. The municipality owns only a minor portion of the land and in certain cases it needs to go to the traditional leaders and ask them to allocate land.

“20% of the land is owned by the municipality. 80% is that of traditional chiefs. Even this area, we are on the Bakgatla land. It would sell it to Moses Kotane back then. But we still have to consult with the chiefs on whatever developments that we have to undertake. Not that we have a problem or anything. But you know that consultation process has to be held.”⁴⁹⁵

Addressing a different topic, one of the local government representatives has criticised the reliance and dependence on government when it comes to traditional leadership. It was not the responsibility of government or the municipality to take over if traditional institutions fail. Moreover, government’s involvement in enthroning traditional leaders was seen as problematic. The royal family has to take care of installing a person who is educated and qualified enough for the position.⁴⁹⁶ This shows a contrary perspective to the one that prevails in Botswana.

To conclude this section, it can be summarised that the respondents have given an overall positive image of the state of affairs in Moses Kotane. There were certain shortcomings at the grassroots level which have affected governmental and traditional institutions alike. Despite this, traditional institutions generally enjoy good relations with the political and administrative representatives of local government.

⁴⁹² Interview INT 43-1.

⁴⁹³ Interview conducted with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

⁴⁹⁴ Interview INT 28-1.

⁴⁹⁵ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁴⁹⁶ Interview INT 43-1.

Representatives of local and district level have expressed their appreciation for the performance of traditional institutions and have emphasised the cooperative relationship.

5.3 Participation and representation of local interests

5.3.1 Botswana

A major intention of democratic local government is to empower community members to participate in local affairs. This includes an active contribution to policy formulation and implementation at local level. In pluralistic institutional set-ups, community members are supposed to have more direct and indirect forms of participation and representation by different actors and in multiple forums. Apart from selecting or electing representatives who act on behalf of community members at local and national level, the latter can actively take part in assemblies and community meetings.

In round 3 of the Afrobarometer survey, 44% of the respondents stated that they were very interested in public affairs. An additional 29% voted that they were somewhat interested. This was also reflected by another figure. When people were asked whether they had attended community meetings during the past year, 60% of the rural respondents confirmed their occasional or regular attendance.⁴⁹⁷ Results were different for bilateral interactions. The responses given during round 3 have shown that an overwhelming majority of the people did not contact local government institutions, representatives of central government or traditional institutions during the previous year (year of reference: 2004).⁴⁹⁸ In more detail, 74% of the respondents have not contacted a local government councillor, 87% have never contacted a government ministry official and 88% have not contacted their Member of Parliament. The percentage of persons who have not contacted a traditional leader during the previous year was equally high at 85%. Interestingly, as the results of the research in 2013 have confirmed, a slightly lower number of 74% have never contacted a religious leader. The number of people who have contacted traditional leaders increased in the 6th round of the Afrobarometer survey. 76% of the

⁴⁹⁷ Cf. Afrobarometer 2005: Botswana Round 3, pp. 9, 14.

⁴⁹⁸ Cf. Ibid., pp. 15-16.

respondents (and 71% of the respondents in rural areas) answered that they have not consulted a traditional leader in the past year.⁴⁹⁹

Ribot has warned against equating decentralisation and pluralism at local level with real options of representation and participation of community members. Instead, the inclusion of traditional institutions in Southern Africa has sometimes produced adverse effects.⁵⁰⁰ A critical point that is raised against a formal role of traditional institutions at local level is based on the traditionally manifested marginalisation and preferential treatment of certain community members. Critics have argued that it leads to limited participation of those marginalised individuals and also restricts their access to services, land and resources, particularly in rural areas where traditional institutions often form the prevailing systems of local government and jurisdiction.⁵⁰¹ During the research in Botswana and in South Africa, respondents from the communities, local government and traditional leadership have confirmed that the institutional pluralism generally creates opportunities for enhanced participation of the population. Despite this, the actual amount of integration and involvement depends on the interests and leadership styles of the local stakeholders and the will of the community members to become active in community affairs.

In Botswana, local government representatives were asked in 2013 about how accessible the services and contact points of the respective institutions were for community members. One interviewee of the District Commissioner's office stated that they maintain an open-door policy and that they introduced these structures to enable their clients of the public to express their status and dissatisfaction. This was also communicated in the kgotla meetings. Due to this policy, the District Commissioner's office is an institution which operates close to the people.⁵⁰² A

⁴⁹⁹ Cf. Afrobarometer 2014: Botswana Round 6, p. 14.

⁵⁰⁰ Cf. Ribot, Jesse 2007: Representation, Citizenship and the Public Domain in Democratic Decentralization, in: *Development* 50, No. 1, p. 44.

⁵⁰¹ Cf. Cailleba, Patrice/Kumar, Rekha A. 2010: When customary laws face civil society organisations: Gender issues in Botswana, in: *African Journal of Political Science and International Relations* 9, No. 4, pp. 330-339; Hendricks, Fred/Ntsebeza, Lungisile 1999: Chiefs and Rural Local Government in Post-Apartheid South Africa, in: *African Journal of Political Science* 4, No. 1, pp. 99-126; Oomen 2005: Chiefs in South Africa, pp. 200-234; Rangan, Haripriya/Gilmartin, Mary 2002: Gender, traditional authority, and the politics of rural reform in South Africa, in: *Development and Change* 33, No. 4, pp. 633-658.

⁵⁰² Interview with a male representative of the Kgatleng District Commissioner's office, Mochudi, 19/07/2013 (INT 14-1).

further communication channel was the regular newsletter that was disseminated to inform households about the work of central government.⁵⁰³

With regard to the internal structure of the Bakgatla-ba-Kgafela community, Kgatleng District is divided into five different wards to which decision-making is decentralised. In this particular set-up, the local villages report to the ward cabinet which communicates directly with the Paramount Chief or his deputy. The wards play a crucial role in making sure that information is disseminated and that democratic participation is facilitated in the villages.⁵⁰⁴ Each headman has his own village kgotla in which he convenes regular meetings. At certain intervals, major meetings take place in the main kgotla of the senior traditional leader, where all community members are assembled. Between those general assemblies, the headmen come together on a frequent basis to consult on matters of relevance at village and district level. Among the Bakgatla-ba-Kgafela, these meetings were convened weekly.⁵⁰⁵

In the context of participation and representation, the kgotla has remained a valuable institution for traditional leadership and local government in Botswana. Kgotla assemblies are not limited to the rural areas, as urban customary courts fulfil similar functions in the towns and cities. Vacancies in the urban customary courts are often filled by applicants with a professional background in law or public administration. Therefore, rural instruments like the courts and the kgotla assemblies are replicated by artificial structures with educated and experienced personnel in the urban areas and combine the benefits of traditional and modern governance.⁵⁰⁶ A member of the District Council in Kgatleng has called the kgotla assembly the place where they have participatory democracy. When members of the District Council come to the kgotla meetings to communicate government policies, they represent the government of the day but not their political parties.⁵⁰⁷ The kgotla is also an essential part of the bottom-up planning system. It is in the kgotla where the members of the council listen to community members, get their ideas and project requests and then take this list back to the council to transform its content into policies or projects. This

⁵⁰³ Interview DC office, INT 14-1.

⁵⁰⁴ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁵⁰⁵ Interview conducted with a ward headman, Mochudi, 26/07/2013 (INT 19-1).

⁵⁰⁶ Interview with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1).

⁵⁰⁷ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

procedure enables the government to develop an integrative planning system that receives contributions from the grassroots level up to the top.⁵⁰⁸ The kgotla also played an important role in the consultation process for the ‘Botswana Vision 2016’ that was established in 1996 as the national long-term development framework. The priorities and needs were explored by a Presidential Task Group which created diverse communication channels for the people throughout the country. Some of them included open hearings and kgotla meetings where people could participate and express their ideas and requests.⁵⁰⁹

In Botswana, attendance of kgotla meetings was described by different stakeholders as a valuable way to receive first-hand information about what was going on in the community⁵¹⁰, or, to cite it in the idiom one of the interviewees used: *“It’s best to get information directly from the horse’s mouth”*⁵¹¹. Due to the dual character of the kgotla as a place where traditional leaders receive feedback from the community and where its members have the right to voice their own opinion, one headman from Kgatleng District has labelled the kgotla *“[...] the most unique centre of democracy in Botswana.”*⁵¹² Moreover, councillors and Members of Parliament alike use the kgotla to engage with people, to address them and to receive their ideas which are then debated in the council.⁵¹³ Some respondents also regard their attendance at the meetings as their duty or responsibility. Not attending meetings also meant that people were leaving themselves out of village affairs.⁵¹⁴ Still, there were different participation patterns among the members of the Bakgatla in Kgatleng and other chiefdoms in Botswana. One young key interviewee reported that acquaintances of his age sometimes react negatively when he told them that he attends kgotla meetings. Many of his friends have expressed the opinion that kgotla meetings were something for the old people in the community.⁵¹⁵

⁵⁰⁸ Interview INT 17-1.

⁵⁰⁹ The booklet on the long-term vision for Botswana gives information on the procedures, main challenges and targets and the implementation plans [http://www.vision2016.co.bw/temping/media/mediac_102.pdf 15.06.2017].

⁵¹⁰ Interview with a male community member, Mochudi, 12/07/2013 (INT 13-1).

⁵¹¹ Interview with a young male community member, Mochudi, 19/07/2013 (INT 15-1).

⁵¹² Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁵¹³ Interview Kgatleng District Council, Mochudi, 22/07/2013 (INT 17-1).

⁵¹⁴ Interviews conducted with two young male community members, Mochudi, 10/07/2013 and 19/07/2013 (INT 10-1, INT 15-1).

⁵¹⁵ Interview INT 15-1.

In general, traditional institutions have proved to be easily accessible and to offer a rather high degree of participation in decision-making at grass-roots level. Decisions in the kgotla were more transparent and based on the consensus of the participants. The latter were involved directly in consultation processes without having to be represented by a nominated or elected person. Despite these theoretical benefits, kgotla meetings are marked by certain deficiencies. Lekorwe points to the different status of village members during kgotla meetings. Although meetings are supposed to include the whole community and to give a voice to every participant, a distinction has to be drawn between mere attendance and actual participation.⁵¹⁶ The kgotla does not offer equal opportunities to each participant, as certain groups and representatives like members of the royal family, people who are close to the traditional leader and males in general, prove to be dominant. Problematic gender and ethnic-based exclusions are reproduced at the expense of women, youths and residents of foreign origin.⁵¹⁷ There are further reasons why the kgotla assemblies have become less inclusive in recent years. Mokwena and Fakir refer to the declining participatory character of kgotlas in Botswana due to migration, urbanisation and perceived inefficiencies of the assemblies. As the Village Development Committees are interrelated with the kgotlas, this development also affects participation in these forums and the inclusive character of development planning.⁵¹⁸

The dispute in Kgatleng and the superiority of government in determining the actions of traditional institutions have had far-reaching consequences for the Bakgatla-ba-Kgafela with regard to participation and representation of community members. Apart from shortcomings in service-delivery and jurisdiction, further limitations arise from the lack of representation of local interests at national level as the Bakgatla-ba-Kgafela were not represented in the Ntlo ya Dikgosi. Under Kgafela's leadership, their seat in the advisory institution has remained vacant due to the disagreements between him and the government. There were two distinct but related versions of the background of this non-representation at national level: One explanation stated that

⁵¹⁶ Cf. Lekorwe 2011: *The Kgotla and Traditional Leadership*, pp. 388-389.

⁵¹⁷ Cf. Molomo 2011: *Widening the Democracy Debate*, pp. 439-440; Mompati, Tlamelo/Prinsen, Gerard 2000: *Ethnicity and participatory methods in Botswana*. Some participants are to be seen and not heard, in: *Development in Practice* 10, No. 5, November, pp. 625-630.

⁵¹⁸ Cf. Mokwena, Lebogang/Fakir, Ebrahim 2009: *Democratic decision-making and development at the local level: Lessons from rural Botswana*, Research report 111, Centre for Policy Studies, Johannesburg, pp. 11-18.

Kgafela regarded the Ntlo ya Dikgosi as a ‘toothless tiger’ without any real influence on national decision-making. A second argument referred to the obligation of the legal framework that a member of the Ntlo ya Dikgosi must be a civil servant performing his or her functions in accordance with the Bogosi Act. Due to his refusal to be subordinated to the Minister of Local Government and to be a full-time officer in the kgotla who is on government payroll, the Bakgatla could not be represented by Kgafela.⁵¹⁹

One of the headmen has criticised this situation, as it left the whole Kgatleng District lacking representation in the Ntlo ya Dikgosi and nobody was speaking on behalf of the district and the Bakgatla-ba-Kgafela. At the very least, Kgafela should have appointed someone to take the seat. In his opinion, the conflict situation with government and the state of affairs in the district could have been discussed together with other traditional leaders at national level and a common understanding might have been reached. Moreover, other traditional leaders could have exerted influence on government representatives.⁵²⁰ In addition, another respondent has pointed to the enhanced position of the Bakgatla-ba-Kgafela in the Ntlo ya Dikgosi. As one of the principal tribes with a permanent seat, their voice was more influential and could exert more pressure in the house compared to those tribes that have to appoint a joint representative. Additionally, this position could have opened the opportunity to touch upon critical issues, something which Kgafela had wasted by his refusal to take the seat or settle the underlying dispute.⁵²¹

To finalise this section, it can be concluded that the institutional pluralism opens and strengthens mechanisms for community representation and participation in Botswana. The variety of institutions increases accessibility and reduces barriers down to the grassroots level. The positive aspects of the institutional pluralism are not necessarily valid in every context, as the findings of the research in Kgatleng have demonstrated. Irrespective of these shortcomings, the possibility to receive first-hand information and to be consulted on important community matters have increased the interest and willingness to engage oneself in the political process among community members of different age groups and social backgrounds.

⁵¹⁹ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁵²⁰ Interview INT 21-1.

⁵²¹ Interview with male community member, Mochudi, 18/06/2013 (INT 02-1).

5.3.2 South Africa

The implementation of democratic and participatory local government has become one of the major objectives of democratic transformation in South Africa since 1996. Section 152 (1) lit. a of the South African Constitution provides for participation and involvement at local level. It stipulates that local government should “[...] encourage the involvement of communities and community organizations in the matters of local government”. Sections 16 and 17 of the Municipal Systems Act underline the importance of participatory governance and provide details on municipalities’ obligations, mechanisms and procedures.

Traditional institutions are represented formally at each level of government in South Africa. At municipal level, they come together in the Local Houses of Traditional Leaders to participate in decision-making. There are local houses in each district in North West. In 2013, these houses still had no defined functions. The National House of Traditional Leaders deals with political matters. At provincial level, the houses are involved in conflict resolution and monitoring rural development programmes.⁵²² Generally, traditional institutions are in a position to represent the interests of their communities at different levels. Moreover, they are able to facilitate participation and inclusion of the local population. Still, empirical results point to different rates of contact. During round 4 of the Afrobarometer Survey in 2008, respondents were asked how often they had consulted a traditional leader in the past year. In North West, 5% of the respondents stated that they had often contacted a traditional leader, 11% replied that they had contacted him a few times and 9% answered that they had consulted him only once. The number of respondents who had no contact at all was 74%. The total sum of respondents who had not contacted a traditional leader within the last 12 months throughout the country was 86%.⁵²³ These low numbers indicate that regarding traditional institutions, institutional pluralism does not necessarily increase the actual level of participation or representation.

In the same survey in 2008, people were asked about how often they think local government councillors and traditional leaders tried their best to listen to what they have to say. A comparatively high number of 36% of the respondents from North

⁵²² Interviews with a representative of the North West House of Traditional Leaders in Mmabatho, 28/08/2013 (INT 31-1) and with a district municipality representative in Rustenburg, 03/09/2013 (INT 32-1).

⁵²³ Cf. Afrobarometer 2008: Round 4 Afrobarometer Survey, p. 16.

West did not perceive traditional leaders to be responsive and to listen to them. 21% of the respondents rated their elected local government councillors negatively in this context. In general, councillors received a better assessment of their performance, as the following table shows.⁵²⁴

Table 3: Responsiveness of local actors

How much of the time did the following actors tried their best to listen to you?				
	Elected Local Government Councillor		Traditional Leaders	
	North West	Total	North West	Total
Never	21	30	36	29
Only sometimes	36	34	15	21
Often	22	18	14	15
Always	17	9	18	12
Don't know	4	9	17	24

Source: Own presentation, based on Afrobarometer 2008, p. 39.

During round 5 of the Afrobarometer survey in 2011, people were again asked about their assessment of the responsiveness of local government councillors. In North West, the percentage of people who thought that government never tried to listen to them has risen to 31%. On the other hand, only 7% of the respondents stated that their local councillors always tried to listen to them. 24% of respondents answered that their local councillors 'often' listen, while answers indicating 'only sometimes' were given by 33% of the respondents. Despite the decrease in the category 'always', North West had the highest percentage of respondents who stated that their local government councillor was often or always responsive. The total numbers were 15% for often and 6% for always. The highest number of respondents who stated 'never' was 67% in the Eastern Cape, followed by Mpumalanga with 46%.⁵²⁵

The Afrobarometer survey also asked about the inclusiveness of decision-making at local level. Respondents were asked to rate to which extent their local councils allowed citizens to participate in their decisions and how much they consulted other local stakeholders. 71% of the respondents reported that the councils were performing badly in terms of allowing them to participate. Only 23% of them gave the councils a positive rating. Their performance in consulting further local interest

⁵²⁴ Cf. Afrobarometer 2008: Round 4 Afrobarometer Survey, p. 39: questions 54B and 54C.

⁵²⁵ Cf. Ibid, p. 51.

groups, like traditional leaders and community leaders, was assessed more positively, but still needed significant improvement. Only 30% of the respondents gave a positive vote, while 53% were not satisfied with the level of consultation.

Table 4: Assessment of participation and consultation

	Allowing citizens to participate in the council's decisions		Consulting others* before making decisions	
	North West	Total	North West	Total
Very badly	37	30	29	26
Fairly badly	34	34	24	29
Fairly well	16	20	23	20
Very well	7	7	7	7
Don't know/ Haven't heard enough	5	9	18	18

* including traditional, civic and community leaders

Source: Own presentation, based on Afrobarometer 2008, p. 54.

Seeing these rather negative evaluations of the inclusiveness of decision-making, the low frequency of contact between community members and their local councillors seems to be even more serious. Nevertheless, the following numbers do not explain whether people were not able or not willing to contact their councillors. In round 5 of the survey in 2011, people were asked about how often they have contacted or consulted a local government councillor in the past year. A high number of respondents, 79%, indicated that they had no contact at all. 15% consulted a councillor once, 5% of the respondents had several contacts and only 1% of the respondents stated that they often consulted their councillor.⁵²⁶ One of the councillors in the Bakgatla area has reported that the ward committee and the community held at least monthly meetings with the ward councillor. The councillor acts as intermediary between them, the speaker's office and the party.⁵²⁷ Still, the impact remains limited, as the Afrobarometer surveys and community responses have revealed. The negative credit given to forms of participation and consultation as well as low contact levels between people and councillors indicate that decision-making in the municipalities only represents the interests of few vocal community members and stakeholders.

⁵²⁶ Cf. Afrobarometer 2011: Round 5, p. 24.

⁵²⁷ Interview with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

When it comes to the visibility and communication policy of local government, one resident complained about the situation in his ward. The ward residents had fought to have the number of councillors raised from one up to the present three. Still, people have the impression that the councillors were not doing a proper job and that nothing was happening. In the words of the key interview partner, the old councillor took his management to Mogwase and forgot about the people in his ward. The community tried to sanction this form of neglect by voting the councillor out and by electing another candidate. Slow progress has only become visible in the last few years.⁵²⁸ Criticism was also raised regarding the outline of the Integrated Development Plan (IDP). A key respondent has claimed that the final plan does not reflect the needs and requests of the community, and that the process was not inclusive enough.⁵²⁹

Based on the answers provided during the community interviews in 2013, three different positions could be identified by people who never attended the local meetings or traditional leaders. Some respondents were generally opposed to traditional institutions and/or to the present incumbents on the one side. In addition, there were people who did not think that traditional institutions had major influence or who did not feel that their participation would have an impact. Finally, there were community members among the interviewees who were simply not interested in traditional institutions and local meetings.⁵³⁰ Similar arguments were provided with regard to the non-attendance at community meetings or contact with local government representatives. Some community members have admitted that they are not keen to engage actively in local government issues and to attend meetings. Other respondents have answered that their councillor was either not interested in the development of the community or too weak to make an impact. While community members gave neutral or positive credits to the performance and responsiveness of the municipality as local government institution, none of them pro-actively praised the actions and performance of their councillor.

A key respondent from one of the Bakgatla villages has emphasised that he expects traditional institutions and the local municipality to work hand in hand. The tribal

⁵²⁸ Interview with a male community member, Moruleng, 06/09/2013 (INT 34-1).

⁵²⁹ Interview INT 28-1.

⁵³⁰ Statement made by a young male respondent from Segakwaneng during a group interview, 09/09/2013 (INT 49-1). Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1).

office should be the one to communicate with the municipality about local needs.⁵³¹ This assessment exemplifies the problematic expectations of people. Traditional institutions are supposed to support the municipalities in their development-orientated work. According to the legal framework, local councillors are the ones who have to identify local needs and report them back to the municipality. One community activist has therefore criticised the role of traditional institutions as intermediaries in local government.

“I think in the local municipality, we have elected councillors. They are supposed to represent us there. There is no way directly they can work with the chiefs. Yes, they can work with the chiefs. Because they are operating in the land of the chief. But what I know is that it is not like that they must go to the chief and do that.”⁵³²

The Bakgatla-ba-Kgafela in South Africa have retained the ward structures which also serve as chains of communication and define the hierarchy of the royal houses. Therefore, traditional institutions are represented at similar levels to local government. Village headmen, the heads of the five wards and the senior traditional leader operate from the lowest to the highest echelons of tribal administration.⁵³³ Due to this decentralised structure, the leadership is theoretically accessible to the majority of community members. It must be noted that all of the respondents from the Bakgatla villages in South Africa knew their local headman and were informed about how to approach him. The villages select individuals to represent them in the traditional council in Moruleng. Each village has its own council which is led by a headman. This form of representation was established to ensure that information was getting to the people. But still, one of the headmen admitted that there were cases where the representatives were lazy and failed to organise meetings, and the community had to bear the consequences of their inactivity.⁵³⁴ This means that village residents remain dependent on the will and ability of their representatives to act on their behalf.

Despite the framework conditions and different reporting and feedback mechanisms that were introduced locally, community members and traditional institutions alike

⁵³¹ Interview with a male community member, Moruleng, 26/08/2013 (INT 27-1).

⁵³² Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

⁵³³ Interview with a headman in Moruleng, 12/09/2013 (INT 37-1).

⁵³⁴ Interview INT 37-1.

have addressed the problem of insufficient communication channels and involvement. Several interviewees have pointed to the obvious gap between statements made by stakeholders about what they were doing for the community and the impressions and subsequent statements of community members about what was being done for them. For the transformation and professionalisation of the Bakgatla-ba-Kgafela, it has become increasingly important to involve the community and to enable exchange on the needs, requests and general problems in the area.⁵³⁵ Still, the actual inclusion and exchange with community members has remained a challenge in the Bakgatla area. According to an interview with an internal key stakeholder, the leadership in Moruleng is looking for ways to deal with concerns and complaints from the people and how to monitor their own performance and the one in the villages: *“Bakgatla are serving the community. Not the other way round. And that means translating in how we engage.”*⁵³⁶ One respondent has mentioned the different communication channels that the leadership had created to inform the villagers. Apart from local kgotla meetings, the tribal administration in Moruleng has arranged campaigns to raise awareness on certain projects and published and distributed a regular newsletter to the households.⁵³⁷

One attempt to act more responsively and to include community interests was the selection of additional representatives at grassroots level. These so-called community ambassadors were introduced to facilitate communication between the centre and the villages, and to create a channel to give answers and feedback to both sides. They also served to disseminate information on the tribal leadership’s initiatives and strategies to remote villages. In a more critical view, these offices were created to bring the youths in and to ‘silence noise’ in the local communities.⁵³⁸ Accordingly, community members have given a varied picture of the performance of these local representatives. One community activist described the situation in his village:

“Ambassadors are unreliable people. I have got an example of one in this village. We sent him to Moruleng to carry information from there to here and from here to there. Suddenly it's almost eight months that he has vanished. You

⁵³⁵ Interviews conducted with representatives of the tribal administration in Moruleng (INT 38-1, INT 40-1) and with community representatives (INT 44-1, INT 47-1).

⁵³⁶ Interview INT 38-1.

⁵³⁷ Female interviewee, group interview in Segakwaneng, 09/09/2013 (INT 49-1).

⁵³⁸ Interviews INT 38-1 and with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

will see him having money, happy. Actually when they arrived there, they made him to be against the people who sent him there. He doesn't give information. Not only ambassadors. Even councillors in the tribal council. We sent councillors there, like councillors in the political arena. We sent them there. When they get there, they never come back."⁵³⁹

This statement reveals that despite the creation of a specific position, the interests of community members were not automatically represented any better in Moruleng. Existing communication channels have actually resulted in lower levels of representation and participation and some respondents have become even more frustrated. The statement above also addresses the problem of bribery and corruption.

When it comes to development planning, the long-term vision and Master Plan of the tribal leadership defines the objectives and priorities of the Bakgatla-ba-Kgafela. They build the foundation of the initiatives that are implemented in Moruleng and the surrounding villages. Despite the tribal leadership's attempts to engage community members, several interviewees complained about the lack of consultation and participation during the drafting of development plans. The tribal leadership acted on behalf of the community and with the financial support of the tribal funds but was not responsive to local needs and did not create appropriate and transparent mechanisms for consultation. Community members were therefore excluded from agenda setting.⁵⁴⁰ Exchange at grassroots level usually takes place in the wards which are led by headmen. Community members who never attend ward meetings have no alternative channels to make proposals or to discuss priorities. Those who participate in meetings are sometimes confronted with headmen who do not have formal education and who are not capable of understanding and communicating the complex and technical leadership initiatives.⁵⁴¹

While improvements and development projects at local level were generally welcomed, three crucial points were raised with regard to the inclusion and representation of community interests. Firstly, among the Bakgatla-ba-Kgafela in South Africa, meetings of the whole chiefdom were supposed to take place

⁵³⁹ Interview INT 44-1.

⁵⁴⁰ This is also confirmed by Mswana's research in the Bafokeng and Bakgatla area: Mswana, Sonwabile 2014: Mineral wealth – 'in the name of morafe'? Community control in South Africa's 'Platinum Valley', in: *Development Southern Africa* 31, No. 6, pp. 826-842.

⁵⁴¹ Group interview with several young male respondents, Moruleng, 06/09/2013 (INT 47-1).

bi-annually and were organised in the Moruleng stadium. Despite the fact that they were not the appropriate frame for real consultation and active participation, several of those meetings have been disrupted in recent years.⁵⁴² One of the interviewees has brought forward a solution for more participation and has suggested that general meetings of the people from the 32 Bakgatla villages should take place each trimester to announce governance priorities and to provide feedback on the status of projects.⁵⁴³ The kgotla meetings used to be a forum where people would discuss current topics, receive information about developments at leadership level and about local projects and would issue their requests. The leaders of the kgotla would then take the information and requests to the municipality which would act much faster due to the dual pressure.⁵⁴⁴ One interviewee said that regular meetings of the headmen with the tribal headquarters in Moruleng were only introduced recently after an assessment of the present situation was made. This has made it clear that there was no uniformity in the villages, that communication and information levels differed and that a platform was needed where all the villagers could speak with an equal voice.⁵⁴⁵

On a second level, present communication channels have also proved to be insufficient for informing the community about the Bakgatla leadership's plans and projects. The background, technical details and impact of further mining operations, investments, business activities and use of tribal funds were often too complex to present in reports and meetings for the community. Accordingly, the less inclusive development planning of the Bakgatla-ba-Kgafela was justified based on the insufficient knowledge of community members and their ability to grasp and assess 'the whole picture' and long-term effects.⁵⁴⁶ On this basis, the tribal leadership makes major decisions on behalf of and for the benefit of the community but without including it in the decision-making process. As a consequence of this policy, most of the interviewees from the community have complained about the lack of consultation and participation in decision-making of the tribal administration. They have stated

⁵⁴² See for example Seitshiro, Kabelo 2012: Bakgatla meeting abandoned amid chaos, in: Sunday Standard Online Edition, 20 December.

⁵⁴³ Statement made by a young male respondent from Segakwaneng during a group interview, 09/09/2013 (INT 49-1).

⁵⁴⁴ Interviews with a male community member, Moruleng, 26/08/2013 (INT 27-1) and with a senior female community member, Moruleng, 27/08/2013 (INT 29-1).

⁵⁴⁵ Interview with an employee at the tribal administration, Moruleng, 12/09/2013 (INT 38-1).

⁵⁴⁶ Interview with a local government representative, Moruleng, 12/09/2013 (INT 39-1).

that Nyalala Pilane only talked to the council, government and the mines while community members were not involved in planning.⁵⁴⁷

A final issue was already raised and refers to the lack of accountability which was criticised by some community members. At present, they do not feel sufficiently informed about how much money is in the tribal funds, how the money is spent and invested. Allegations of mismanagement of funds and corruption have been voiced and culminated in the creation of a village-based organisation and criminal charges against the tribal leadership.

In line with the arguments presented above, several younger people have complained that they do not receive sufficient information on running and future projects and policy priorities, both by government and by the BBKTA. According to them, the communication channels favoured people who were able to take advantage of the present system and who were closely related to the respective institution. In their view, other people were left out.⁵⁴⁸ People have named the introduction of the new shopping mall as an example where participation and communication mechanisms have failed. Several interviewees have stated that they were not consulted about it or informed about the individual stages, although Nyalala Pilane used land which belonged to the Bakgatla community.⁵⁴⁹

With regard to the overall situation and the reasons for the negative assessments, it was stated that some of the community members were either unaware of existing communication channels or were not interested enough to attend events or campaigns organised by the tribal leadership. Regarding the latter, some of the key respondents have also criticised those people for being too passive and for refraining from active participation in their communities. Some of them seemed to be not interested at all in community affairs. By their non-attendance at village kgotla meetings or assemblies of their local councillors, they exclude themselves and do not receive the kind of information that the headmen were communicating from the headquarters or that the councillors were bringing from the municipality.⁵⁵⁰ A key respondent from local government has pointed to an additional problem at the local level. There are still lots

⁵⁴⁷ Interview with a male senior respondent, Mothlabe, 16/09/2013 (INT 41-1).

⁵⁴⁸ Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1).

⁵⁴⁹ Interview INT 41-1.

⁵⁵⁰ Interviews with a male community member, Moruleng, 06/09/2013 (INT 34-1), and with a representative of the BBK youth organisation, Moruleng, 12/09/2013 (INT 36-1).

of people who are not registered as voters. This has two effects: people waste their political voice and moreover, the municipality receives less money. For further participation and revenues, local government and traditional leadership need to work hand in hand to encourage people to register.⁵⁵¹ The question remains whether people were simply not willing to participate actively in local affairs or whether the overall framework and set-up were insufficient to include them and to empower them.

⁵⁵¹ Interview with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

6 Effects on traditional communities and the local population

6.1 Legal rights and empowerment of the rural population

6.1.1 Botswana – Questions of gender, human rights and minorities

The initial chapter introduced the major critical issues and ambiguities which have shaped the debate on the integration and resilience of traditional leadership in a democratic dispensation. One of them is the compatibility of governance by hereditary institutions and the preservation of democratic rights. A second issue refers to the limited role of women, youths and local residents from different tribes who are often said to be disadvantaged regarding access to resources and participation in decision-making. Both issues were raised in several interviews conducted with community members in Botswana and South Africa in 2013. The key respondents were asked whether they preferred to retain the current system of automatic succession or whether they would prefer to elect their leaders instead. Two sets of questions were asked to women and young people during the interviews. The first asked the respondent's opinion about the treatment and opportunities women and youths experience at local level and how they were empowered or restricted in exercising equal rights. The second touched the subject of almost exclusive male dominance in traditional leadership positions. It was related to the topic of the general mode of selecting office holders.

Generally speaking, with regard to discrimination and participation of certain societal groups, the role and empowerment of women always remains one of the problematic features of Tswana culture, customary law in general and traditional leadership in particular. For many centuries, women were excluded from actively participating in community matters, taking over traditional offices, representing themselves and their interests in public and in the courts and in gaining property and resources.⁵⁵² In the past decades, the situation has developed in favour of women and their role has been enhanced throughout the country, although Botswana has still maintained its patriarchal character. Women have taken over positions in national and local government, political parties, organisations and even in tribal leadership. In

⁵⁵² See for example Kompe, Lydia/Small, Janet 1991: Demanding a Place Under the Kgotla Tree: Women's Rural Access to Land and Power, in: *Third World Legal Studies* 10, pp. 137-156; Mafela, Lily 2007: Botswana Women and Law. Society, Education and Migration (c. 1840-c. 1980), in: *Cahiers d'Études Africaines* 47, Nos. 187/188, pp. 523-566; Schapera 1994.

Kgatleng, a woman can take any position apart from chieftainship, as the culture and custom of the Bakgatla do not provide for the installation of a female leader.⁵⁵³

An exception to the exclusion of women from being traditional leaders can be found in one of the neighbouring Tswana chiefdoms. In 2002, Mosadi Seboko of the chiefdom of the Balete not only became the first female Paramount Chief, but was also voted as chairperson of the Ntlo ya Dikgosi. She had to fight opposition within the royal family when she attempted to succeed her late brother. Despite this, she enjoyed broad support from the Balete who elected her in the kgotla.⁵⁵⁴ Prior to Mosadi Seboko, Rebecca Banika was elected as the first female traditional leader to the Ntlo ya Dikgosi, representing Chobe district and some of Botswana's minority tribes at national level.⁵⁵⁵

There was a clear division between female respondents' answers to the questions about potential discrimination and equal leadership opportunities during the empirical research. In Mochudi, several interviewees attributed the limited empowerment of women to the character of Tswana society and the general system. The fact that equal treatment was not realised at local level and that there were many cases of aggression and discrimination against women was not seen as something related to traditional leadership but as a consequence arising out of Botswana's culture and history and the weak social standing of women. Moreover, it was nothing particular to traditional communities in the south, but a reality in many African countries.⁵⁵⁶

A male respondent has summarised the essence of this issue:

“Women in traditional societies and here, I have to admit, they have no power like they are supposed to. Look at the parliament; it's only having four female members. You look at the chiefs. Only one chief is a woman. Even there were some people who were opposed to it. And also you look at the decision-making, when it comes to family issues, inheritance laws and stuff like that, you find

⁵⁵³ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

⁵⁵⁴ Cf. Lekorwe, Mogopodi H. 2011: Gender and Traditional Leadership in Botswana, in: Ray, Donald I./Quinlan, Tim/Sharma, Keshav/Clarke, Tacita A. O. (Eds.): Reinventing African Chieftaincy in the Age of AIDS, Gender, Governance, and Development, Calgary, Alberta, pp. 249-266; Ramsay, Jeff 2007: Kgosi-e-kgolo Linchwe II (1935-2007), in: Sunday Standard, 26 August.

⁵⁵⁵ Cf. Sharma 2011: The Role of the House of Chiefs, pp. 478-479.

⁵⁵⁶ Interviews with two female community members in Mochudi, 10/07/2013 and 29/08/2013 (INT 11-1, INT 23-1), and with a male community member, Mochudi, 12/07/2013 (INT 13-1).

*that truly speaking women are being misrepresented in so many institutions. Even at the kgotla meetings, it's very, very difficult to hear and to see an agenda that has strong women issues. I think it's the mentality, with the patriarchal norm of our societies. There are lobby groups for women. They are not as vocal as they should be. Emang Basadi⁵⁵⁷ is based in Gaborone and it doesn't go to the grassroots.*⁵⁵⁸

This statement summarises the answers that were provided by further respondents. The rather weak civil society in Botswana also goes hand in hand with a lack of pressure groups that support the transformation of the role and influence of women. Initiatives that were found in and around Mochudi were not designed to uplift the status of women in governance and politics.

Succession to office was rated differently. None of the male and female respondents criticised the patriarchal character of the Bakgatla-ba-Kgafela or stated that they felt discriminated against by the customary provisions. One female respondent emphasised that it was part of Bakgatla culture and tradition that succession to traditional office is based on the male lineage. Elements of patriarchy are also common in Botswana's government, which has had predominantly male leaders in the past. The fact that there have not been female incumbents among the Bakgatla does not prove that women were prohibited to act as regents or traditional leaders. So far, there have not been serious claims from the Bakgatla community to select a female leader. In the words of the interviewee, unfair treatment would entail the denial of a rightful claim of a female heir apparent. She emphasised that she respects the traditional system the way it is and that it had never crossed her mind to assess it as being discriminatory.⁵⁵⁹

Despite this, one male interviewee said that he had welcomed the news that the first female Paramount Chief, Mosadi Seboko, was enthroned by the Bamalete. To him, this is the positive proof that a woman is capable of taking over such a responsibility and leading a tribe, which had previously always been considered to be a male domain.⁵⁶⁰ The Bakgatla-ba-Kgafela were actually in a similar situation. After the

⁵⁵⁷ Emang Basadi is a non-governmental, human rights organisation in Botswana. It was established in 1986 to lobby against discriminatory laws and to empower women.

⁵⁵⁸ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

⁵⁵⁹ Interview with a female respondent, Mochudi, 29/08/2013 (INT 23-1).

⁵⁶⁰ Interview with a young male community member, Mochudi, 19/07/2013 (INT 15-1).

installation of Seboko and Linchwe's death in 2007, people started to ask whether Kgafela's elder sister, who was the first-born child, could follow the example of the Bamalete and be enthroned as female Paramount Chief. But the then regent Mothibe announced in the kgotla that Seingwaeng Kgafela was not entitled to rule over the Bakgatla.⁵⁶¹

Among the Bakgatla, several steps were taken to improve the participation of women in village affairs. After his coronation in 1963, Linchwe II was the first Paramount Chief to open up traditional meetings to women and to allow them to represent themselves in the kgotla and during court sessions.⁵⁶² Apart from the empowerment of women, the Bakgatla also tried to remain open to people from other chiefdoms. One headman stated that people who originate from outside Kgatleng District were not discriminated against and were welcome to participate in village affairs and in the kgotla.⁵⁶³

Despite the measures applied by the tribal leadership, one of the respondents confirmed that there were certain instances and contexts where women and young community members were somehow left out. This was partly attributed to their status and the common social structures which automatically made them rather powerless. Some of the elders would not take them seriously or consider their suggestions and complaints. However, the respondent also stated that everyone, irrespective of age or sex, was welcome to join meetings and was encouraged to participate in consultations and decision-making. He explained that in most cases, women and young people were responsible for their own marginalisation, as they did not make themselves available or participate fully. According to him, they were neglecting this special kind of responsibility. Still, they were eager and active in challenging certain aspects and developments.⁵⁶⁴

Another topic in the context of legal rights is the past and present situation of non-Tswana or so-called minority tribes and the advancement and preferable status of the Tswana chiefdoms in Botswana. Werbner⁵⁶⁵ examined the problem of discrimination

⁵⁶¹ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁵⁶² Interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

⁵⁶³ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁵⁶⁴ Interview with a young male community member, Mochudi, 19/07/2013 (INT 15-1).

⁵⁶⁵ Cf. Werbner, Richard 2002: Challenging Minorities, Difference and Tribal Citizenship in Botswana, in: *Journal of Southern African Studies* 28, No. 4, pp. 671-684.

against these minority tribes, which he sees as being deeply rooted in the colonial past and the independence period. On the one hand, the definition of tribal reserves in the Protectorate Bechuanaland had set fixed boundaries to the tribal territories and had assigned sovereign communities under the leadership of a Paramount Chief. Due to this, non-Tswana groups also experienced subordination. On the other hand, President Khama's approach to establish and promote national unity in the 1960s had fuelled assimilation and marginalisation, which is also one of the reasons why Botswana is still perceived as a homogenous country today. Werbner described the process in the following words: "*Building one state was building one nation – the Tswana nation.*"⁵⁶⁶ Members of non-Tswana chiefdoms have not experienced the same rights of participation and representation. They have faced discrimination regarding access to resources and land and participation in decision-making. Nevertheless, certain improvements could be realised by pursuing a strategy of official minoritisation and indigenisation of the affected groups which would also raise awareness nationally and internationally.⁵⁶⁷

Molomo discussed the fate of the Bakgalagadi and Basarwa (San-speaking people of the Kalahari) who suffered both from economic and political marginalisation. The legal framework used to exemplify the different status of Botswana's chiefdoms. The constitutional provisions on the composition of the Ntlo ya Dikgosi enumerated the major Tswana chiefdoms. As Chapter 3.3 has shown, the debate and resistance regarding discrimination and equal treatment resulted in the formation of the Balopi Commission to render Sections 77 to 79 ethnically neutral.⁵⁶⁸

Ethnicity is becoming an increasingly important issue in Botswana and the opposition of the minority tribes has only been a first indicator. During one of the interviews, a respondent said that the people in Botswana who were educated were becoming increasingly aware of the discrepancies and unequal treatment of members of the different tribes. Scholars, politicians, members of minority tribes and even some traditional leaders have advocated for years that the issue of major and smaller tribes should be dismantled and Botswana should learn lessons from South Africa, where all tribes were given due recognition, even in the House of Traditional

⁵⁶⁶ Werbner 2002, p. 676.

⁵⁶⁷ Cf. Ibid., pp. 677-680.

⁵⁶⁸ Cf. Molomo 2011: Widening the Democracy Debate, pp. 445-447.

Leaders. Despite the work of the Balopi Commission, this goal was not anchored in the constitutional amendments in 2008. According to the respondent, the affected people were benefitting from greater educational opportunities and were becoming more familiar with the question of equality: *“They will say ‘Enough is enough. We are being under dominance for too long. We are not having any resources. Our villages are lacking in development. Development is projected with those other tribes, but we are not being recognised as equal’.*”⁵⁶⁹

Within the context of legal rights, Fombad pointed out to a major problem challenging the legal and institutional pluralism in Botswana. The legal framework requires the application of customary law whenever it is applicable. Many successors to traditional leadership were brought up in a modern and sometimes urban environment and have received a professional education. Therefore, they were not familiar with customary jurisdiction. The magistrates and small claims courts also employ judges who were often not rooted in the communities and who consequently do not have the required knowledge of local customary law.⁵⁷⁰ One of the headmen in Kgatleng recalled his initiation when he took over from his father. He did not enjoy proper training, but rather had to learn by observing and by consulting the elders in the village. He has speculated that the high number of appeals against court judgements was correlated with the lack of formal training or orientation that incumbents receive.⁵⁷¹ When the fact that the majority of civil cases and a huge amount of the criminal cases in Botswana are decided upon in the customary courts is taken into account, this background information becomes critical.

One development which is attributed to the institutional pluralism is the so-called forum shopping. This implies that the plurality of institutions offers enhanced choice and access options to the local population. Depending on the respective circumstances, it is assumed that people will turn to the most convenient addressee. They can benefit from the opportunity to choose between governmental and traditional institutions in administration, jurisdiction and service delivery.⁵⁷² There are two different varieties. Depending on the context, people can either prefer one or

⁵⁶⁹ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

⁵⁷⁰ Cf. Fombad 2004, p. 82.

⁵⁷¹ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁵⁷² Cf. Sanderfur, Justin/Siddiqi, Bilal 2012: Citizen or subject? Forum shopping and legal pluralism in rural Liberia, International Growth Centre (IGC) (IGC Working Paper).

the other stakeholder or they can try them one after another to receive their envisioned goals. In contrast to the positive aspects, there are also certain problematic consequences arising in the field of jurisdiction. Theoretically, people are free to select the kind of court where they want to have their cases tried. Persons involved in civil or criminal cases might seek to evade potentially higher punishment in the Magistrate Courts by having their case heard before a customary court. As a convict can only be tried once for the same offense, proper sanctioning of criminal offences could be prevented.⁵⁷³ On the other hand, higher penalties for perpetrators might not necessarily include restitution for plaintiffs.⁵⁷⁴ So it remains difficult to provide an overall assessment on the impact of forum shopping.

Kgafela's ruling period in Mochudi has revealed a further feature of the institutional pluralism with regard to human rights in Kgatleng. When he was installed, one of his aims was the restoration of peace and order at local level. Local policing and the persecution of perpetrators for the sake of social order used to be one of the genuine responsibilities of a traditional leader. These functions were partly performed by traditional leaders at ward level and by age regiments.⁵⁷⁵ To silence upheaval in the community, members of Kgafela's age regiment had started to patrol through Mochudi and to flog community members to sanction any form of misbehaviour. It must be noted that in Botswana corporal punishment is part of customary jurisdiction and is also applied by the magistrates' courts. The members of the regiment took it too far by acting on their own and by punishing people who were not supposed to be flogged. Moreover, they did not take those people to the kgotla or the customary court. As this kind of punishment had occurred without proper trial, the persons affected approached the police and the local courts. Subsequently, Kgafela II and members of the age regiment and tribal leadership were charged in court. According to one interviewee, it was the media which blew the flogging incidents out of

⁵⁷³ Cf. Benda-Beckmann, Franz von/Benda-Beckmann, Keebet von 2006: *The Dynamics of Change and Continuity in Plural Legal Orders*, in: *Journal of Legal Pluralism* 53-54; Horn 2006; Oomen 2003.

⁵⁷⁴ Cf. Benda-Beckmann, Keebet von 1981: *Forum Shopping and Shopping Forums: Dispute Processing in Minangkabau Village*, in: *Journal of Legal Pluralism* 19, pp. 117-159; Griffiths, Anne M. O. 1984: *Support for women with dependent children in Botswana*, in: *Journal of Legal Pluralism* 22, pp. 1-15; Griffiths, Anne M. O. 1996: *Legal Pluralism in Africa: The Role of Gender and Women's Access to Law*, in: *Political and Legal Anthropology Review* 19, No. 2, pp. 93-108.

⁵⁷⁵ Cf. Bouman, Marlies 1987: *A note on chiefly and national policing in Botswana*, in: *Journal of Legal Pluralism*, Nrs. 25 & 26, pp. 275-300.

proportion.⁵⁷⁶ It remained unclear how far Kgafela was actually involved in the incidents. Irrespective of his actual involvement, he did not order his age regiment to stop their illegal activities. As Paramount Chief and leader of the people, he was held accountable and responsible for the deeds of his close supporters.⁵⁷⁷

As one of the initiates in Mochudi said, Kgafela must have been aware of the allegiance of his followers and the dangers that were related to this support and group identity. In her view, he should have called a meeting to make clear that this was not the kind of order he wanted to bring to the community.⁵⁷⁸ Regardless of his own active or passive role in the floggings, one informant revealed that Kgafela refused to talk and apologise to the victims based on the grounds that a traditional leader never apologises to his subjects. With this attitude, Kgafela missed the chance to solve the incidents outside of the courts.⁵⁷⁹ The flogging of community members has two implications within the context of the present section. On the one hand, it demonstrates the power that a traditional leader can exercise. In Kgafela's case, it was the police and the courts that held him and his age regiment members accountable. There were no instruments available for community members to intervene. On the other hand, the remark above indicates the hierarchical subordination of citizens under the rule of a traditional leader. This goes in line with the critical statements of Mamdani and Ntsebeza which were introduced in the initial chapters. The formal recognition and integration of traditional institutions limits the people in the respective areas to remain subjects of non-elected leaders. Kgafela II saw himself as someone who was above the people and above the law. This form of rule would be definitely incompatible with democratic governance. Moreover, it contradicts the concepts of empowerment and human and democratic rights.

Generally, this section has demonstrated the positive and negative effects of the legal and institutional pluralism for communities in Botswana. Some features are related to the way traditional institutions are recognised and empowered. Other parts shape the status of community members within the legal framework and customary set-up. It is actually a consideration of greater accessibility and variation on the one hand and a limitation of human rights and democratic freedom on the other hand. Finally, the

⁵⁷⁶ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

⁵⁷⁷ Interview with a senior male community member, Mochudi, 18/06/2013 (INT 02-1).

⁵⁷⁸ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁵⁷⁹ Interview INT 02-1.

research has reversed the assumption that gender issues were of major importance to the people in Kgatleng. Discrimination was mainly of relevance in the context of minority tribes.

6.1.2 South Africa – Equal treatment and democratic rights

In South Africa, the status of women in traditional communities and customary law is still criticised by researchers, community members and activists. To counter this criticism and to align traditional leadership with the Constitution, emphasis was laid on gender equality and the formal empowerment of women in traditional institutions in the post-apartheid period. In addition to the provisions in the Bill of Rights, legislation has introduced gender quotas for governmental and traditional institutions. Until then, women were not recognised in traditional leadership positions in most traditional communities.⁵⁸⁰

In 2008, the decision of the South African Constitutional Court in the Shilubana case stipulated that the Constitution remains the supreme law of the country and that customary law needs to be dynamic and adaptable to promote gender equality. The court recognised the right of a woman to be appointed as a traditional leader and therefore created a precedent for further gender-based succession disputes in traditional communities.⁵⁸¹ Justice Johann van der Westhuizen provided the reasoning of the Constitutional Court:

*“[...] Customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.”*⁵⁸²

The court’s decision emphasises that customary law needs to be developed in line with the Constitution. Despite a certain progress, the interpretation of customary law and the further legislative transformation have manifested the limited role and impact

⁵⁸⁰ Cf. Beall, Jo 2005: Decentralizing Government and Centralizing Gender in Southern Africa: Lessons from the South African Experience (OPGP8, UNRISD), Geneva, pp. 15-17.

⁵⁸¹ Cf. Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9; also see Mireku, Obeng 2010: Customary law and the promotion of gender equality: An appraisal of the Shilubana decision, in: African Human Rights Law Journal 10, No. 2, pp. 515-523.

⁵⁸² Paragraph 81, Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9.

of women with regard to land and political decision-making, as Claassens has shown.⁵⁸³

While the promotion of gender equality and the enhanced opportunities for women to participate in decision-making were initially opposed by traditional leaders, the TLGFA has set a mandatory quota. As shown in Chapter 3, 40% of the traditional council's members are to be elected and at least one third of its overall members are supposed to be women. It remains difficult to reach those quotas in certain areas, as the other 60% of the council members who are appointed are traditional leaders and elders. The North West Act of 2005 does not provide for a split between elected and selected members of the traditional council, as the TLGFA does. Moreover, it does not specify the procedures for holding elections in traditional communities.⁵⁸⁴ While the composition of traditional councils has to be published in the Gazette, the names of the council members are not announced publicly after the elections. Accordingly, there is no reliable information on the number of male and female members. During the empirical research, it was reported that there were mixed results in North West, with some councils meeting the gender quota and other councils failing to meet it.

The Bakgatla-ba-Kgafela supported gender equality by transforming their own structures and by including women in the tribal office and councils.⁵⁸⁵ A representative of the royal family has stated that the older people in the community still had to adapt to the fact that women were now empowered to be in charge, and that they would prefer to stick to the old rules. On the contrary, younger women and girls welcomed the new rules and requested further changes.⁵⁸⁶

The empirical research also addressed the hereditary character of leadership and traditional rule in rural areas. When asked about the automatic succession to office, a female respondent from Moruleng justified her preference for the traditional system with a reference to the role and merit of traditional institutions and of the respective

⁵⁸³ Cf. Claassens, Aninka 2008: Women, land and power: the impact of the Communal Land Rights Act, in: Claassens, Aninka/Cousins, Ben (Eds.): Land, Power & Custom: controversies generated by South Africa's Communal Land Rights Act, Cape Town, pp. 154-183.

⁵⁸⁴ See Section 6(1), (2) of the North West Act.

⁵⁸⁵ Group interview three female respondents, Moruleng, 11/09/2013 (INT 48-1).

⁵⁸⁶ Group interview INT 48-1.

royal families in the past: *“My point of view is that those who fought for the land [author: against the Boers] have got the right to rule and govern us.”*⁵⁸⁷

Although customary jurisdiction played a minor role among the Bakgatla-ba-Kgafela in South Africa, some of the interviewees have pointed to the critical provisions of the Traditional Courts Bill. Some of them have also filed against the Bill in the consultation process. They opposed the empowerment of uneducated traditional leaders over the level of magistrates in rural areas.⁵⁸⁸ In those areas, the mandatory subjection of the local population under traditional leadership and the lack of options to opt out remained a critical factor. As long as formal legislation did not provide for the subject status of community members with regard to customary courts and traditional councils, like the Traditional Courts Bill attempted to do, women could use the opportunities offered by the institutional pluralism and become active in forum shopping to approach an institution that is more favourable to women.

The previous sections have already indicated the powerful position that traditional leaders and traditional councils hold in South Africa. Within the context of legal rights and empowerment in rural areas, the far-reaching authority that is vested in traditional councils and their insecure or even illegitimate status were of serious concern. As has been stated in Chapter 3, the TLGFA provided for the transformation of tribal authorities into traditional councils that needed to be re-elected according to the Act and provincial legislation. The names of the council members were supposed to be published in the Gazette.⁵⁸⁹ Originally, the councils had a transitory period until September 2005 to reconstitute themselves and hold elections in line with the legal framework. The period was extended to 2011 by an amendment of the TLGFA. In the case of North West, the legal framework did not refer to a transformation, but provided for the continuing existence of the tribal authorities. They would only cease to exist after traditional councils were elected which were in line with the legal provisions in terms of their composition.⁵⁹⁰

In North West, the elections were postponed several times which endangered the legal status of the councils after the expiry of their term of office in September 2010.

⁵⁸⁷ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

⁵⁸⁸ Interview with a male senior respondent, Mothlabe, 16/09/2013 (INT 44-1).

⁵⁸⁹ For North West, provincial legislation requires the Premier to publish the composition of traditional councils. Cf. Section 6(3) of the North West Act.

⁵⁹⁰ See Section 43 of the North West Traditional Leadership and Governance Act No. 2 of 2005.

For the Bakgatla-ba-Kgafela, election dates were first set for 2011, before being postponed to July 2013 and then again to 2014. The elections in Bojanala Platinum District were finally held on 25 January 2014.⁵⁹¹ This means that the Bakgatla-ba-Kgafela Traditional Council was actually dysfunctional during the time of the empirical research and beyond. Traditional leaders and councils are the institutions that represent rural communities and are therefore entitled to manage land and to enter into mining deals. The status of the traditional councils has been debated in several High Court cases, and judges have provided different and even contradictory interpretations of the legal framework.⁵⁹² In the case of David Pheto and others against Nyalala Pilane and the traditional council, the North West High Court concluded that the traditional council continued to exist despite of the formal expiry of its term of office.

*“[21] The Second Applicant is the traditional council of the tribe which is constituted by almost 60% of its members who are nominated by the First Applicant. To reiterate what is contained in the judgment in the main application – there can never be a lacuna in that no Traditional Council exists to run the affairs of the traditional community. Although their term of office expired on 24 September 2010, the members of the Traditional Council must remain in office until the process of re-composition of Traditional Council’s is finalized. For the sake of good governance, a council whose term of office has expired should continue to be in existence until it is replaced by a newly elected council.”*⁵⁹³

Other judgements have left the question of what should happen after the expiry date open. With regard to the particular context of traditional communities in the Platinum Belt, this uncertainty meant a serious challenge to democratic rights.

Mnwana identified a related major problem that will also be dealt with in the subsequent section. It refers to the way in which South African courts have handled

⁵⁹¹ Cf. de Souza, Monica 2014: Justice and legitimacy hindered by uncertainty. The legal status of traditional councils in North West Province, in: SA Crime Quarterly 49, pp. 41-56.

⁵⁹² Cf. Pilane and Another v Pheto and Others (CA 582/11) [2012] ZANWHC 10 (19 April 2012); Traditional Authority of the Bapo Ba Mogale Community v Kenoshi and Another (31876/10) [2010] ZAGPPHC 72 (29 July 2010); Maakane and Others v Premier of the North-West Province and Others (2715/2010) [2011] ZANWHC 29 (23 June 2011); Maakane and Others v Premier of the North-West Province and Others (2715/2010) [2011] ZANWHC 29 (23 June 2011).

⁵⁹³ Pilane and Another v Pheto and Others (CA 582/11), (19 April 2012).

applicants' claims to hold leaders accountable and their attempts to express opposition.⁵⁹⁴ Mounting resistance against the Bakgatla-ba-Kgafela leaders was silenced through court decisions and financial sanctions. Opposition was directed against Tidimane Pilane and against Nyalala Pilane. In 1956 the Transvaal Supreme Court ruled that a leader does not have to account to individuals, and that traditional leaders are only accountable to the tribe. In the present cases, Nyalala Pilane filed court interdicts against community members who tried to challenge him. The claimants not only lost their case but even suffered punitive costs. As an interview with a COBACO⁵⁹⁵ activist has revealed, people were getting increasingly frustrated with the limited authority they could exercise.⁵⁹⁶ Interdicts were inter alia issued against David Pheto and Mmuthi Pilane. The latter went up to the Constitutional Court which cast out three interdicts which had been upheld by the High Court and the Supreme Court.⁵⁹⁷

One related aspect which was brought up in the previous sections gains even more relevance in the context of granting equal democratic rights to community members in areas under traditional leadership. Sections 16 and 17 of the Constitution of 1996 provide everyone with the freedom of expression and the right to assemble, demonstrate and petition. The village of Mothlabe sought the right to self-determination from the Bakgatla-ba-Kgafela in Moruleng, which meant secession in terms of territory and leadership. Other community activists had tried to convene meetings to hold Nyalala Pilane accountable or to remove him from office. Moreover, further opponents protested against the illegitimate traditional council of the Bakgatla-ba-Kgafela that was not elected in line with the provisions of the TLGFA.⁵⁹⁸ The interdicts to hold meetings which Nyalala Pilane had filed with the support of the courts against community members therefore violated guarantees of the Bill of Rights. It was brought forward by the courts that the people who tried to convene assemblies to discuss community and leadership matters had no 'locus

⁵⁹⁴ Cf. Mswana, Sonwabile 2014: Chief's justice? Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area, in: SA Crime Quarterly 49, pp. 21-29.

⁵⁹⁵ Concerned Bakgatla Anti-Corruption Organisation.

⁵⁹⁶ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

⁵⁹⁷ Interview conducted in Mothlabe, 16/09/2013 (INT 41-1) and talks with representatives of the Legal Resources Centre in Cape Town who were supporting the court cases (held in September 2013 in Mogwase and in December 2013 in Cape Town).

⁵⁹⁸ Cf. Matlala, Boitumelo 2014: 'We want the bread, not the crumbs'. Challenging traditional authority in the platinum belt, in: SA Crime Quarterly 49, pp. 31-40.

standi'. The traditional leader remains the only legitimate person who is entitled to act as representative and to convene meetings on behalf of the traditional community. This means that a person who claims a traditional leadership position and whose claim is not formally recognised, is prohibited to convene meetings as community leader. This right was reserved for the officially recognised traditional leader. The respective community members opposed the High Court's interdict to hold assemblies on the grounds that it violated their freedom of expression, freedom of assembly and freedom of association. These interdicts were issued against opposition factions of the royal family, against secessionist communities and further critical community members.⁵⁹⁹ In addition, the courts have affirmed that it was only the Bakgatla community as a whole that could hold their traditional leader accountable in a kgotla meeting. As a consequence, Bakgatla-ba-Kgafela community members were effectively stripped of any right to voice opposition or to fight unfair treatment. There are actually two different aspects that the court decisions reveal with regard to the legal rights of rural citizens. On the one hand, it clearly demonstrates that legislation and the interpretation of customary law and customs undermine democratic rights like the freedom of assembly and association. On the other hand, people were actually treated as subjects of traditional leaders, stripped of any viable option to voice opposition or to demand accountable governance.

A similar dominance of traditional leadership was displayed in the court cases over the question of which institution was entitled to administrate land that was successfully claimed by a community. Although community members had expressed their wish that a Communal Property Association should be in charge, the traditional council questioned the legitimate constitution of the association.⁶⁰⁰ So it was actually another struggle for community members to get direct control over the administration and allocation of land and resources. The further context of the CPA claim and court case will be discussed in 6.2.2.

It can be concluded that the present legal framework and jurisdiction of the courts support the influential position of traditional institution at the expense of genuine

⁵⁹⁹ Interviews conducted with a male Moruleng resident, 26/08/2013, with a member of the royal family outside Moruleng, 16/09/2013 and a male community member, 18/09/2013 (INT 27-1, INT 41-1, INT 44-1).

⁶⁰⁰ See *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25.

democratisation at local level. Community members still only enjoy limited democratic rights. An important signal was set in the context of gender equality by introducing a quota system. Despite this, a lack of control of the implementation and delayed council elections have weakened the effects.

6.1.3 Democratisation and empowerment – Accountable and responsive governance

Drawing on the principal-agent theory, government and political actors act on behalf of and by the will of the principal or the public and are accountable to the latter. Certain political actors within the system might pursue their own interests without taking care of the principal or the electorate. Additionally, without proper modes of communication, the assessments and assumed needs and priorities of the principal and the agent may differ. Schedler provided the following short definition of accountability: “*A is accountable to B when A is obliged to inform B about A’s (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct.*”⁶⁰¹ This definition will provide the starting point of the analysis of the accountability of governmental and traditional institutions.

Generally, there is a broad range of concepts on accountability in democratic governance. For the purpose of the present analysis, a narrower focus on selected forms and mechanisms of accountability is appropriate. This includes vertical accountability in contrast to horizontal accountability on the one hand and the differentiation between political and social accountability on the other hand. While vertical/horizontal accountability and political/social accountability are sometimes treated as distinct types, they are also regarded as sub-forms or mechanisms of each other.⁶⁰²

In representative democracies, vertical accountability is exercised from below by citizens and society. Citizens can seek to hold government accountable through voting behaviour in elections and through public claims via political parties, mass

⁶⁰¹ Schedler, Andreas 1999: Conceptualizing Accountability, in: Schedler, Andreas, Diamond, Larry/Plattner, Marc F. (Eds.): *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder/London, p. 17.

⁶⁰² Cf. Bratton, Michael/Logan, Carolyn 2014: From Elections to Accountability in Africa? In: *Governance in Africa* 1, No. 1:3, pp. 1-2.

media and civic organisations. The latter are either seen as a form of vertical accountability mechanism or are attributed to the distinct category of social accountability. Claims to social accountability can be made formally or informally, with limited means to sanction non-conformance. Horizontal accountability relates to constitutional checks and balances and mechanisms between government institutions to hold each other accountable. Political accountability refers to formal channels, like elections or instruments to monitor the actions of the executive. Political accountability can be enforced by horizontal and vertical mechanisms, such as elections and institutional checks and balances.⁶⁰³

Goetz and Jenkins refer to another dimension of accountability systems, namely the retrospective ex post and the forward looking ex ante accountability. While ex post accountability is seen as the purest form of accountability, the latter is applied during processes and has the potential to increase responsiveness.⁶⁰⁴ This categorisation will be used to pay closer attention to the inclusiveness and responsiveness of decision-making in Botswana and South Africa. Based on this introduction, it will be examined how and to which extent the local populace can hold its political and traditional leaders accountable and how these mechanisms work out in day-to-day governance.

In their analysis on the discretion and accountability of local government, Yilmaz, Beris and Serrano-Berthet provided a statement on the role of local councils in making local politics downwardly accountable. It is used as a frame and point of reference here to approach the topic of accountability at the local level.

“Local councils are the core units of representative governments. Functioning local council oversight relies on the assumption that local elected representatives have more incentive to respond to the needs and preferences of local populations and that they are more downwardly accountable than local bureaucrats. [...] They are assumed to be representing citizens—by giving

⁶⁰³ Cf. Meija Acosta, Andrés/Anuradha, Joshi/Graeme, Ramshaw 2013: Democratic Accountability and Service Delivery: A Desk Review, International Institute for Democracy and Electoral Assistance IDEA, Stockholm, pp. 6-10; O'Donnell, Guillermo 1999: Horizontal Accountability in New Democracies, in Schedler, Andreas, Diamond, Larry/Plattner, Marc F. (Eds.): The Self-Restraining State: Power and Accountability in New Democracies. Boulder/London, pp. 29-51; Schedler 1999.

⁶⁰⁴ Cf. Goetz, Anne-Marie/Jenkins, Rob 2005: Reinventing Accountability: Making Democracy Work for Human Development, Basingstoke/New York, p. 12.

*voice to individual citizens, civil society organizations, and business groups— and by representing the needs of local constituents in policy-making.*⁶⁰⁵

With regard to the countries of the case study, councils are found at local and district level and in traditional communities. It needs to be investigated whether the quotation above can be confirmed for the Bakgatla-ba-Kgafela areas. Based on the empirical data, the analysis will examine what kind of instruments community members and voters have to request and enforce accountability, how they rate the actual strength of these instruments and how they perceive the accountability and responsiveness of their leaders.

Mawere and Myakiso have pointed to the potential of traditional institutions to hold the political leadership accountable and to redirect resources to the communities in need. In their view, the majority of traditional leaders live in the same areas as the local populace and are affected by the same shortcomings in governance and service delivery. Accordingly, it is in their own interest that government is responsive to the communities and provides services and development initiatives.⁶⁰⁶

This contrasts with critical statements provided by various researchers. Due to colonial distortions of traditional leadership and customary law and the interdependence with governmental structures, scholars have argued that traditional institutions have lost their accountability towards the populace. Moreover, customary systems of checks and balances and mechanisms to enforce accountability and responsiveness of traditional institutions were set aside. In the case of South Africa and other countries, versions of codified customary law have even extended their powers. Central criticism was therefore raised about the accountability of leaders in post-colonial democratic settings in Africa.⁶⁰⁷

Before the focus is shifted to the empirical results, it is helpful to have a look at the survey results which Bratton and Logan evaluated for different African countries for the years 2011-2013. People were asked whether they either prefer government to be more efficient with potentially less political accountability or whether they favour

⁶⁰⁵ Yilmaz, Serdar/Beris, Yakup/Serrano-Berthet, Rodrigo 2008: Local Government Discretion and Accountability: A Diagnostic Framework for Local Governance (Local Governance & Accountability Series, Social Development Papers, Paper No. 113), p. 13.

⁶⁰⁶ Cf. Mawere, Munyaradzi/Mayekiso, Andile 2014: Traditional leadership, democracy and social equality in Africa: The Role of Traditional Leadership in Emboldening Social Equality in South Africa, in: International Journal of Politics and Good Governance 5, No. 5.3, p. 3.

⁶⁰⁷ See for example Ntsebeza 2005 or Mnwana 2014: Chief's justice?

government to be more accountable and potentially slower in decision-making. According to the results presented by Bratton and Logan, 51% of the respondents in South Africa supported the first statement, while 44% saw responsible government as more important. Contrarily, responses from people in Botswana showed a strong preference of 74% for political accountability and only 24% for potentially higher levels of efficiency at the expense of accountability.⁶⁰⁸

These findings were similar to the ones of the Bakgatla area. A certain lack of accountability seemed to be somewhat accepted in South Africa in exchange for progress. During the empirical research in Botswana in 2013, none of the respondents of government, traditional leadership or the community saw a general problem with the accountability and responsiveness of their local and national representatives. This was a direct contrast to the research findings made in South Africa. Negative assessments in Botswana were only provided about the overall set-up and formal inter-institutional relations.

In line with further research, one of the key respondents from Mochudi criticised the centralised and hierarchical structure of the state and the way in which the stakeholders relate to each other. It was not only traditional institutions that were dependent on government and accountable to the Ministry instead of being accountable to their communities in the first instance. Ministers and government employees also had to follow the directives of the President and were accountable and responsible towards him. On the contrary, traditional institutions were seen as neutral actors who were not campaigning for votes and who were supposed to act in the interest of the community.⁶⁰⁹

At grassroots level, a transformation of the VDCs has also affected chains of accountability and responsiveness. The VDCs are a part of local government and were formed to bring government further down to the sub-district level to create a kind of village parliament in Botswana. As one traditional leader said, some of the committees were politically elected and this kind of politicising of the VDCs resulted in them no longer working as they were intended to do. They now owe their

⁶⁰⁸ Cf. Bratton/Logan 2014, pp. 4-5.

⁶⁰⁹ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

allegiance to their voters - but no longer to the whole community they were actually supposed to be serving.⁶¹⁰

With regard to the legal framework and the role of the Ministry of Local Government in tribal administration, a community informant emphasised that Kgafela was strictly against the enhanced role of government. According to him, Kgafela has stated: *"I want to be responsible to my tribe, not responsible to some other authorities that do not have the interest of the tribe at heart."*⁶¹¹ This statement addresses the transformed lines of accountability when it comes to answerability and enforceability of traditional leaders in Botswana. Kgafela II tried to overcome the superior position of the Ministry of Local Government in assessing the performance and actions of traditional institutions in traditional communities by restoring pre-independence lines of accountability and strengthening the role of community members in this regard.

A particularly critical detail was Kgafela's move to South Africa and the way he interacted with members of his traditional community in Mochudi. Kgatleng residents with an educated background were aware of his permanent relocation as they read the newspapers and actively sought information about Kgafela which was not provided in the kgotla. Some of them confirmed that the majority of the residents had no knowledge about where Kgafela was or what he was doing. The respondents admitted that no one from the royal family or the tribal administration had told the truth about the relocation and the current state of affairs. One respondent assumed that the royal family knew that Kgafela was not in control in Moruleng and was still in denial.⁶¹² Moreover, some of the respondents clearly stated that ordinary community members were told lies by the tribal leadership.⁶¹³ With regard to information about future plans and actions taken, the tribal leadership has failed to integrate the community.

In South Africa, governance by political and traditional institutions has remained critical with regard to accountability. This particularly relates to the way in which funds and resources were used and how stakeholders have acted on behalf of the

⁶¹⁰ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁶¹¹ Interview INT 06-1.

⁶¹² Interviews with a male community member, Mochudi, 18/06/2013 (INT 02-1), with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1), and with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁶¹³ Interview INT 24-1.

communities and have fulfilled electoral promises. A representative of Moses Kotane municipality gave a vivid illustration of what is happening after elections and how the accountability chain is being distorted. *“Now, our politics say, just before elections you go out and tell the people all these things, well vote for me or whatever. After being elected, you know, as a municipality, instead of seeing the councillor more, you see more of the community in to your offices.”*⁶¹⁴ In day-to-day life this means that community members vote for their political representatives who then do not feel accountable to them. To receive services and advice, many community members turn to the local municipality in Mogwase to compensate for the shortcomings of the local councillors.

A member of the tribal leadership confirmed the assessment of several community members that some of the local councillors, like some of the headmen, are ignoring the needs of their constituencies:

*“It's the same with government. There are some people in government and this is now their area that they represent. They normally should [...] they don't even bring any information from the government here. This is their constituency. He just sits there with his information. But he depends on the people. Not everybody is dedicated to his duties. They just want to get their salary for free. We then suffer as the community.”*⁶¹⁵

Local stakeholders like community activists, traditional leaders or residents have only limited means available to enforce accountability and some of them have become more and more frustrated. During several interviews, respondents confirmed that the primary instrument for vertical accountability was no longer used by a growing number of community members. As people were growing increasingly dissatisfied with the performance of their local councillors, they have not shifted their allegiance to another party to sanction shortcomings in the next elections. The people rather tend to stay away from the polling stations. Some interviewees have expressed their frustration that new candidates were adopting similar patterns during their terms of office. According to some of the respondents, the people in the rural areas were not experienced in electing their representatives and holding them accountable in the forthcoming elections. Moreover, many of the local politicians

⁶¹⁴ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁶¹⁵ Interview with a headman in Moruleng, 12/09/2013 (INT 37-1).

were more interested in immediate personal gain than in getting re-elected. Consequently, community members were getting tired of voting when seeing the lack of change and positive results in their area.⁶¹⁶

In addition, some councillors were not even expecting to be re-elected. This also depended on the support of the ANC for its party members. The political orientation and self-enrichment attitude of local councillors was mentioned as a serious problem rural communities were facing in the Bakgatla area. The interviews gave the overall impression that politicians were more interested in short-term benefits than in accountability and re-election.⁶¹⁷

*“People of South Africa, they don't understand politics. They voted for Mandela ‘cause they sympathised with him for being in prison, but without knowing the background. People also criticise the ANC. Before, when Mandela was leading the ANC, everybody was happy. But now, the ANC has to change its policies. We can change presidents every five years, but it's more important to change the lines and the principles to combat corruption.”*⁶¹⁸

Corruption and mismanagement of funds remain major problems among both traditional leadership and local governance. Based on data generated during the 5th round of the Afrobarometer in 2011, South African people were asked about their perception of the level of corruption amongst representatives of different categories. Half of the respondents stated that they think most or all government officials and local government councillors were involved in corruption. The results show a constant increase in the number people who perceive their representatives to be corrupt. On the contrary, a much lower number of about 10% of the respondents who had accessed certain services from government officials could confirm concrete incidents where they had experienced bribery.⁶¹⁹

In the case of this particular case-study, alleged misuse of funds and lack of accountability of traditional leaders and local councillors were named as critical hindrances to inclusive and democratic local governance. Several key respondents voiced their frustrations over their limited influence on responsive decision-making

⁶¹⁶ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

⁶¹⁷ Interview with a male senior respondent, Mothlabe, 16/09/2013 (INT 41-1).

⁶¹⁸ Interview INT 44-1.

⁶¹⁹ Cf. Wielders, Iris 2013: Perceptions and Realities of Corruption in South Africa (Afrobarometer Briefing Paper No. 110), pp. 3-5.

and the poor mechanisms to hold officeholders accountable. While some local councillors seemed to be overburdened and not qualified enough to deal with local requirements, others have complained about the missing support of the ANC and the lack of cooperation and dominance of certain actors. In addition, community members have accused local politicians of being merely interested in personal enrichment.

During the empirical research, several community members reported incidents and situations where they struggled to hold their leaders accountable or to be integrated in decision-making. The so-called community ambassadors were originally introduced to create a more responsive environment and to facilitate inclusion and communication with the different villages. One respondent has complained about the lack of commitment and the poor performance of the ambassadors. Instead of feeling responsible for the community this particular ambassador was representing, he had shifted his allegiance to other stakeholders who were more beneficial to him.

“The survival of the fittest, that is what is happening here. Those people who call the ambassadors, who nominate them there, we don't know. We sent one boy to Moruleng. When he got there, he was supposed to represent the community here. Once he gets there, they pay him, you don't know for what good reason, what contract have he signed, what functions are they performing, you don't know the duties, the functions, the job description, etc. for those people. And suddenly, they don't even report to us. It's finished. It's like if you favour me, I do you favours. More especially when I realise that you are the most hungry person. Then I will give you so that when other people ask me questions, you must cool them down and tell them things are going right. There is no downward communication and upward communication, no structures. There is nothing.”⁶²⁰

Apart from the community ambassadors, another institution was created to enhance communication and control, namely the royal council, a genuine Bakgatla institution. The council was formed in March 2012 as a new institution to advise and support Nyalala Pilane and the facilitate institutions to perform their functions. The five

⁶²⁰ Interview INT 44-1.

houses of the Bakgatla royal family are represented in the council.⁶²¹ An addition to its advisory functions, it also works as a controlling and supervisory authority to detect failures of the leadership and the traditional council. To a certain extent, the Bakgatla royal family has created an institution which aims to hold the leadership accountable. On the other hand, this supervision was not necessarily installed for the benefit of the community.

Irrespective of the motives that were related to individual steps, the Bakgatla leadership has remained active in transforming and improving interactions and procedures. To enhance transparency and to inform the communities, different means of communication were set up by the tribal administration in Moruleng. Apart from the kgotla meetings in the villages and the annual AGMs, the leadership has established further instruments to communicate with the people. They include newsletters which are distributed to households, posters, awareness raising campaigns, social media, the creation of youth structures in the villages and the inclusion of representatives of stakeholder organisations.⁶²² Additionally, there is a youth desk in the tribal office so that young people have a contact point of their own.⁶²³

The control of finances was also a problematic aspect of traditional leadership in North West. According to the first section, intra-governmental control takes place horizontally. In the case of traditional institutions and their tribal funds, the provincial government is legally in charge of controlling the assets annually. This is even more critical in the mining areas where traditional leadership acts on behalf of the communities.

“In North West, we have got 80 tribal offices. But ever since the government was introduced in 1994, books were never audited. But there is somewhere where the auditor-general gave an instruction that all the tribal offices must be

⁶²¹ Interview with a representative of the tribal administration, Moruleng, 12/09/2013 (INT 38-1).

⁶²² Female interviewee, group interview in Segakwaneng, 09/09/2013 (INT 49-1); group interview three female respondents, Moruleng, 11/09/2013 (INT 48-1). Interviews conducted with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1), and with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

⁶²³ Group interview INT 49-1.

audited. It never happened. We don't get any financial report. That's why we are fighting for it."⁶²⁴

The privatisation of community resources by traditional institutions against their statutory mandate was therefore becoming a serious obstacle to development in the rural areas. People were complaining that their land and funds were controlled by the office in Moruleng without bringing benefit like infrastructure, employment opportunities, and recreational facilities to the local communities.⁶²⁵ Community members had no idea about how much money was in the tribal funds and how it was being invested. They complained about the gap between the funds which would be available and the actual outcomes. Therefore, the respondents favoured more communal control over the money, which belongs to the Bakgatla as a whole.⁶²⁶

During the research, several respondents pointed to the example of the Royal Bafokeng Nation with regard to impact and positive outcomes, as compared to the situation of the Bakgatla communities. In their view, their tribal administration was performing much better and more responsively, although they also had to admit serious shortcomings. One interviewee has summarised the differences:

*"In the Bafokeng area, you see more development in the villages. Streets are being paved, running water, storm water, everything is up to date. It's a very peaceful community. They are more responsive to the community. Kgotla meetings still take place. That man there is also abusing the money, but he is doing more for the community. So this man here first puts in his pocket and the community comes after."*⁶²⁷

This statement indicates that a certain amount of corruption and mismanagement of funds seems to be accepted the norm in the mining areas. People seem to be satisfied as long as they experience some form of transformation and development in their villages.

While the misuse and re-direction of funds is one aspect, another source of discontent was the way in which offences were dealt with. People criticised the slow

⁶²⁴ Interview INT 44-1.

⁶²⁵ Interviews with different male community members from Moruleng, Kraalhoek and Mothlabe in August and September 2013 (INT 27-1, INT 41-1, INT 44-1).

⁶²⁶ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

⁶²⁷ Interview with a male community member, Moruleng, 26/08/2013 (INT 27-1).

or lack of commitment to sanction traditional leaders and government officials.

*“Every leader should be guided by the Constitution. I think it is corruption which is silencing people not to rule lawfully. You can't let people do something wrong. Even government is not reacting. There were people who were crying out here, also to the province, also to Botswana. Botswana tried it, yes, but South Africa they are so in complaint with the rules and laws.”*⁶²⁸

The present legal framework severely limits the options for community members to hold their leadership accountable for business transactions on behalf of the community. As a response to the lack of transparency and the alleged misuse of tribal funds among the Bakgatla-ba-Kgafela, COBACO was formed in 1997 to address financial imbalances in the administration and to prosecute the Bakgatla leadership.⁶²⁹ This organisation was established by community activists who were seeking ways to detect and sanction wrongdoings of the council and its chairman and to initiate legal prosecution. From 1997 onwards, members of COBACO attempted to bring Nyalala Pilane and one of his tribal councillors to court. In September 2010, the North West High Court turned down a conviction for fraud and theft that was handed down in 2006 by the regional court in Mogwase.⁶³⁰ This long history demonstrates that applicants were caught in expensive and long-lasting judicial disputes and some of them were sanctioned to bear the punitive costs. As a consequence, opposition from community members and ways to organise and enforce accountability were effectively silenced, as Claassens and Mnwana have shown in their articles.⁶³¹ Mnwana has analysed how this was confirmed and enforced by recent court decisions on the Bakgatla. Citing the case of David Pheto, Mnwana revealed how both the current legal framework and the North West High Court have nullified attempts by community members to hold traditional leaders accountable or to oppose them.⁶³² This case, as well as further cases and appeals, was decided in favour of Nyalala Pilane and the traditional council and the premier and

⁶²⁸ Interview with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

⁶²⁹ Interview conducted with a founding member of COBACO, 18/09/2013 (INT 44-1).

⁶³⁰ Cf. Mnwana 2014: Chief's justice?

⁶³¹ Cf. Claassens 2014, pp. 774-776; Mnwana 2014: Chief's justice? pp. 21-29.

⁶³² See Mnwana 2014: Chief's justice?

the auditor-general have backed them up. Accordingly, community members were looking for further options to express their opposition, like disrupting formal meetings.⁶³³

Consequently, community protests have tackled the lack of accountability of the leadership in Moruleng and the lack of transparency over the amount and use of tribal funds from mining and further business activities. People demanded to be informed about the tribal funds, the money which was invested into certain projects and the kind of contracts the administration held with investors and partners.⁶³⁴ Although protests were revived at the end of November 2015, community activists and members of the royal family were not successful in forcing the tribal leadership to have the books audited so far.

Interviewees also addressed further issues apart from the misuse of funds. One respondent spoke about the problem that the tribal administration was not fulfilling its promises with regard to local development and the creation of employment opportunities. The projects which were part of the Master Plan and the social and labour plans of the mining operators were supposed to benefit the local communities. Respondents from different age groups have expressed their frustration that they were still not getting jobs. Moreover, they had no means available to enforce some form of responsiveness of the tribal leadership, as the following example demonstrates:

“The biggest problems are maladministration and unemployment. As soon as you can provide a proof of residence, no one will question it. We cannot make the chief accountable because he is running away. He doesn't answer our questions. People are looking for employment in the mines but there are foreigners who are getting the jobs. So we decided to make committees. Each and every village has got its committee. If the mine is corresponding well with us, if they want people, they contact those centres. Now he [author's remark: Nyalala Pilane] is telling us not to go to the mines but wait. On the other hand, he is putting people in the mines. So it's a double deal. But after several

⁶³³ Cf. Claassens, Aninka 2015: Traditional leaders lack accountability, in: Sowetan Live, 3 December.

⁶³⁴ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

months, the mine is not calling, it's quiet. There is no meeting. The number of unemployment here, it's not decreasing. It's going up."⁶³⁵

Nevertheless, a certain change was initiated as the first phase of the Bakgatla Master Plan was launched with the new road, the stadium, the water reservoir and the shopping mall in Moruleng to demonstrate that the tribal funds were used for the community.

Concluding this section, it can be summarised that the institutional pluralism and the legal framework have created a challenging environment for communities to benefit from democratic governance and development in South Africa. The way complaints are handled and the limited democratic and judicial instruments that are available have led to a certain apathy among stakeholders. In Botswana, on the other hand, people are content with the current state of accountable and responsive governance and the performance of their representatives. Coming back to the results of the Afrobarometer survey that was presented above, the findings in the Bakgatla communities have somewhat confirmed a form of adaptation and compromise, as people in Botswana and South Africa have put different weight on the importance of accountability.

6.2 Dynamic community structures and relevance of traditional institutions

6.2.1 Botswana

Chapters 5 and 6.1 have given a clear impression of the transformation that has taken place in traditional communities in Southern Africa over the past few decades. The legislative framework and internal and external factors have reshaped community structures and have redefined the role of traditional institutions. People in Botswana and South Africa have adopted formal pluralistic structures of governance and jurisdiction, as the empirical research in both countries has shown. There were no indications that people exclusively used either governmental or traditional institutions or completely rejected one of them. Despite of that, there were variations between the general assessment of the institutions and present incumbents. Still,

⁶³⁵ Interview with a male community member, Moruleng, 26/08/2013 (INT 27-1).

further examination was needed to determine in which circumstances people use which kind of institution, and what implications this had for community structures. Within the context of the case study of this thesis, the following paragraphs will take a closer look at the local situation in both Bakgatla communities and the actual impact of transformed community structures on the relevance of traditional institutions. It will illustrate whether community members favour a limited or an enhanced role of traditional leadership and how they are positively and negatively affected by the institutional pluralism.

The formal integration of traditional institutions in the colonial and post-colonial settings not only introduced new rules and procedures to the communities and their leadership structures, but also initiated processes in which traditional leaders and community members willingly adopted or adapted to the changing framework. Schapera reported far-reaching changes within the chiefdoms since the establishment of the Protectorate Bechuanaland. One difference related to the resolution of disputes. According to Schapera, it had become common for many local stakeholders – traditional leaders, royal family members and community members – to involve the Protectorate administration in the process of addressing claims and solving disputes.⁶³⁶

Throughout the past centuries, traditional leaders have demonstrated their ability to adapt to internal and external changes in different contexts, as Schapera and others have concluded.⁶³⁷ Individual leaders have adopted diverse ambitions and strategies throughout Botswana. There were three different categories: traditional leaders who accepted the role ascribed to them or who were afraid to voice opposition, others who were progressive and sometimes even radical and finally leaders who quit their traditional office because they objected to the limitations placed upon their power and influence.⁶³⁸

The overall transformation of Botswana's governance and jurisdiction after 1966 and the recognition and incorporation of traditional leadership and customary law have altered the assessment of traditional institutions by the public. Analysing the results

⁶³⁶ Cf. Schapera 1963: Kinship and Politics, p. 163.

⁶³⁷ Cf. Nyamjoh, Francis B. 2015: Modernising Traditions and Traditionalising Modernity in Africa. Chieftaincy and Democracy in Cameroon and Botswana, Bamenda; Schapera, Isaac 1970: Tribal Innovators. Tswana Chiefs and Social Change 1795 - 1940, London.

⁶³⁸ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

of the 2008 Afrobarometer survey, Logan concluded that the majority of countries have given greater influence to traditional leadership than Botswana and that an overall integration of the institution seems to have an ambivalent long-term impact:

*“All of the countries except South Africa (and Lesotho, where the effects are not significant) tend to be more positive about traditional leaders than Botswana. This is somewhat surprising given Botswana’s reputation for providing the paradigm of well-integrated traditional and modern political systems. It is consistent, however, with findings reported elsewhere that integration of traditional leaders into a political system may enhance the legitimacy of the system as a whole, while undermining the standing of the traditional leaders themselves.”*⁶³⁹

Logan thereby also touches the issue of the legitimising functions of the institutional pluralism for the overall governance system. Molomo, on the other hand, has shown that preference and support for democratic and traditional governance were not mutually exclusive in Botswana. According to the survey results, the latter seems to reinforce the first.

*“Conventional wisdom suggests that as more people live in an urban setting and obtain education, they will transcend traditional loyalties and be less supportive of traditional institutions. However, recent survey results from Botswana do not support this thesis. Paradoxically, overwhelming majorities support both democracy and chieftainship. Perhaps the evidence in this analysis illustrates how traditionalism and modernity are not necessarily mutually exclusive. Contrary to views that traditional institutions would pass away, Botswana perceive traditional institutions as parallel and even supportive of democratic institutions. Moreover, the survey evidence suggests that bogosi has been able to re-invent itself to be responsive to contemporary challenges and justify its authority alongside democratic institutions.”*⁶⁴⁰

While the interviews from 2013 validated Molomo’s arguments, they did not support Logan’s findings of the negative consequences of integrating traditional institutions. One of the respondents from the Bakgatla community in Kgatleng District

⁶³⁹ Logan 2008, p. 18-19.

⁶⁴⁰ Molomo, Mpho G. 2014: Chieftainship (Bogosi) Endures Despite Democratic Consolidation in Botswana (Afrobarometer Briefing Paper No. 130), p. 7.

summarised the benefits that the institution of traditional leadership still offers to the local communities as follows: Within an ideal scenario, traditional institutions form the connecting link between the people and government at local and national level. They are not on the side of a particular party⁶⁴¹ and do not campaign for themselves. They are supposed to be neutral and constant stakeholders who act on behalf of the community and facilitate development.⁶⁴² Several key respondents praised the greater flexibility of traditional institutions to interact independently with the community. They can call assemblies or arrange meetings with the headmen without relying on other village institutions and are involved in all major community activities.⁶⁴³

The majority of the respondents confirmed the central formal and informal role of traditional institutions in the communities. Even though several governmental and non-governmental stakeholders work in Kgatleng District, traditional leaders remained the first to be informed about problems or matters of concern. According to one respondent, the representatives of the other district institutions or of the local police always asked if the leader already knew about the matter.⁶⁴⁴ In Botswana, the majority of the community members continue to consult traditional institutions about their needs and problems. Due to this, they were informed about matters of relevance at local level and could speak on behalf of the community during meetings. This has made them valuable actors at local government level.⁶⁴⁵ On the other hand, the consultation with traditional leaders was sometimes not exclusively voluntary as community members needed to adhere to the protocol by involving the headmen and the Paramount Chief in any initiative or project which was to be realised in the villages.⁶⁴⁶ Although certain respondents claimed loyalty to the traditional leadership of the Bakgatla, they voted for the freedom of the individual to either follow or to ignore this form of local rule. Traditional leadership should rather be treated as an option and not as an obligation to follow, as one respondent has claimed: “*I don't*

⁶⁴¹ Exceptions from this ideal picture were provided by traditional leaders who realigned themselves with political parties. Linchwe II of the Bakgatla was a supporter of the Botswana People's Party in Kgatleng and therefore not unbiased.

⁶⁴² Interview conducted with a male young resident of Mochudi, 04/07/2013 (INT 07-1).

⁶⁴³ Interview with a male community member, Mochudi, 08/07/2013 (INT 09-1).

⁶⁴⁴ Interview with a senior female community member, Mochudi, 05/07/2013 (INT 08-1).

⁶⁴⁵ Interviews conducted with a female respondent, Mochudi, 29/08/2013 (INT 23-1), and with a young male community member, Mochudi, 10/07/2013 (INT 10-1).

⁶⁴⁶ Interview INT 23-1.

*think god created us to put other laws that make us not be free.*⁶⁴⁷ Traditional institutions were described as powerful agents of the community in several interviews. They had the potential to advise or criticise the people more openly than any politician and could therefore contribute to order and safety in the community.⁶⁴⁸

Community structures are further shaped by the immediate effects of the institutional pluralism. As the previous sections have revealed, participation in local decision-making and beneficitation from resources and institutional plurality can be denied to people who are already being discriminated against in remote rural areas where traditional institutions often form the only accessible representatives. Moreover, other institutions like the VDCs in Botswana are interlinked with the kgotla where meetings take place and members are elected. They can therefore also mirror and reinforce the dominance of certain stakeholders and the discriminatory character of traditional leadership.

To stay relevant and to serve community needs, traditional institutions were bound to adapt to the requirements of a modern and democratic governance system. According to one of the traditional leaders in Kgatleng, the institutions had to take into consideration new innovations, prosperity and technology instead of continuously sticking to the old ways of doing things. In his opinion, democracy needs to be observed and is a valuable opportunity for the people to participate actively in what is going on in their environment. To him, a vigilant traditional leader is one who adopts modern technologies and still promotes the traditional ways.⁶⁴⁹ This delicate balance between tradition and adaptation to democracy and development has become central both for traditional institutions and for communities.

Apart from the political and judicial arena, major transformations have taken place in the socio-economic environment of Botswana that have also affected communities and their leadership structures. The historical overview has already shown that farming and cattle holding used to be essential domains of community welfare and control among the Tswana. Moreover, traditional institutions used to play a leading role throughout the harvest season. They were not only responsible for rain-making, but also for announcing the beginning of ploughing and harvesting. The senior

⁶⁴⁷ Interview held with a male community member in Mochudi, 12/07/2013 (INT 13-1).

⁶⁴⁸ Interview with male community member, Mochudi, 18/06/2013 (INT 02-1).

⁶⁴⁹ Interview with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

traditional leader was the one who redistributed crop yields to cater for the poorer members of the community. Among the Bakgatla-ba-Kgafela, the Paramount Chief or his deputy still tells the headmen when to announce the start of the season in their villages. However, many residents no longer pay attention to these calls and simply act on their own.⁶⁵⁰ Although agriculture and livestock have remained dominant throughout Botswana, subsistence farming has been partly replaced by employment in the private and public sectors. Moreover, certain Kgatleng residents have moved to urban areas or commute between the district and Gaborone.⁶⁵¹

In the olden days, members of the traditional community, often organised in the age regiments, provided volunteer work, like building roads and schools, ploughing fields or looking after the cattle of their leader. This kind of community work has declined during the last decades, as the majority of respondents confirmed during the interviews. There were four major reasons for this development: Firstly, the long years without initiations schools and age regiments have loosened community ties. Secondly, there were many people in the community who did not feel sufficiently affiliated to the tribal leadership to provide free labour. In addition, traditional institutions lost the power to force people to work for them as their former subjects do not longer rely on them. Finally, many members of the traditional community were employed elsewhere and stated that they do not have spare time for community work.⁶⁵² As mentioned above, the Paramount Chief used to be able to enforce his claims in the pre-colonial and colonial periods. A mutual relationship existed between him and his subjects: they would pay tribute to him or work on the fields of the royal family and he would redistribute goods and resources for the economic beneficitation of community members.⁶⁵³ This form of influence has vanished as community members are no longer exclusively dependent on the traditional leadership and can benefit from social grants provided by government.

According to a representative of the Department of Tribal Administration, a former traditional leader himself, progress was achieved regarding the level of education and qualification of traditional office-holders in Botswana. While in the past some of

⁶⁵⁰ Interview with a young male community member, Mochudi, 10/07/2013 (INT 10-1).

⁶⁵¹ Interview INT 10-1.

⁶⁵² Interviews with male community member, Mochudi, 18/06/2013 (INT 02-1), and with a female respondent, Mochudi, 14/06/2013 (INT 01-1).

⁶⁵³ Interview INT 01-1.

them had not even attended primary school, nowadays they have university degrees and professional working experience before taking over their traditional office. This kind of education and professionalisation has brought a new challenge to the succession to local leadership: Depending on the hierarchical level of the position, some of the eldest sons of royal families preferred to retain their jobs instead of working in the kgotla with a low government salary and benefits.⁶⁵⁴

Despite modernisation and dynamic adaptation of the leadership, Linchwe II and Kgafela II both operated with elements of re-traditionalisation, alignment and progress orientation. Following his enthronement as Paramount Chief in 2008, Kgafela II started to apply a tripartite strategy within and beyond the limits of the existing legal framework which also involved the Bakgatla-ba-Kgafela in South Africa. Firstly, Kgafela II, like his father Linchwe II in the 1970s, aimed to extend the role of culture and tradition within the Bakgatla community, both in Botswana and in South Africa. His inclusive revival of abandoned traditions and his focus on heritage and culture were also an attempt to gain greater influence in Moruleng. The second pillar of his strategy was built on progressively promoting development through local initiatives and economic projects, following the example of the professional development orientation in Moruleng. Since Linchwe's appointment as President of the Customary Court of Appeal in Gaborone in 1991, only minor projects were implemented under his acting regent. After his enthronement, Kgafela therefore announced his ambitious plans and vision to contribute to the beneficitation of Kgatleng District.⁶⁵⁵ An assessment of these project plans cannot be made, as the dispute with local government prevented their final implementation. The third part of Kgafela's strategic orientation encompassed the extension of traditional leaders' powers in Botswana. Kgafela II opposed the administrative and financial dependence of traditional leaders on central government within the existing regulatory framework and opted for their emancipation and financial autonomy. Nevertheless, he was unsuccessful with this strategy, as the Ministry of Local Government finally exercised its dominance by derecognising Kgafela. Additionally, it was the South African legal framework and the wealth of the Bakgatla in Moruleng which enabled him to finance his court procedures and dispute at all.

⁶⁵⁴ Interview with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1).

⁶⁵⁵ Interview conducted with a member of the tribal leadership in Mochudi, 24/07/2013 (INT 18-1).

The actual impact of Kgafela's rule in Kgatleng District cannot be assessed properly due to its short duration. Nonetheless, his enthronement triggered hopes among the younger community members that he would bring progress and development to the communities. Kgafela was seen as a contrast to the rather passive regency up to his father's death in 2007. Respondents emphasised their expectations in 2008 when he was installed and presented himself as a young, ambitious, educated and progressive leader. Most of the younger respondents who were interviewed in 2013 expressed their former hopes that he would initiate projects which would benefit them, that he would exert political influence to improve infrastructure and service delivery in Kgatleng and that he would act as an intermediate between the community and governmental actors. Although these respondents attributed equal or greater impact to local government, they nevertheless emphasised the relevance of traditional institutions, *inter alia* as unbiased actors without party affiliations.⁶⁵⁶

Traditional institutions were assessed in a positive way and have remained dynamic enough to adapt to changing developments. Yet, certain major political and socio-economic transformations have proved to be serious obstacles with regard to their ongoing relevance. One set of factors concerns democratisation and the institutional pluralism, like the limited powers of traditional institutions in the present set-up, less interest and engagement in village affairs, competition among the local stakeholders, and stronger identification with democratic governance. Moreover, community structures were altered by modernisation and development. This has caused increasing urbanisation and labour migration, which leads to the depopulation of villages and changes to the composition of communities.⁶⁵⁷ While on the one hand, vital parts of the community are temporarily or permanently absent, there are also people coming from other communities or even foreign countries to live in the area of a traditional leader to whom they do not feel attached to.

In Botswana, some of the respondents reported the shifting attitudes of people towards traditional institutions. In recent years, they have observed a tendency for people to long for a more influential position of traditional leaders. Due to electoral terms, politicians were always in transition and stopped being responsive and

⁶⁵⁶ Cf. Interviews conducted with male respondents in Mochudi on 4 July, 19 July and with a female respondent on 20 September 2013 (INT 01-1, INT 07-1, INT 24-1).

⁶⁵⁷ See Holm/Botlhale 2008, pp. 74-87.

accountable after the elections. Traditional leaders, on the other hand, were reduced to a limited role which is defined in few provisions of the Bogosi Act.⁶⁵⁸ When community members were asked about the prospective future role of traditional institutions and about their own preferences, they confirmed that traditional institutions were going to remain important local actors. Moreover, many of them have expressed the wish to increase their responsibilities to become more influential in local government and development. For Kgatleng, several members of the community preferred a progressive leader who confronts in a professional and principled manner and who interrogates issues.⁶⁵⁹

Despite this general support for the institution of traditional leadership in Kgatleng District, a restriction has to be made on the appropriate role it should fulfil. In line with the opinions expressed by the community respondents, actual governance at local level should remain in the hands of elected government institutions, like the councils. Traditional institutions, on the contrary, should engage in matters of culture, tradition, development promotion and dispute settlement. There is a clear preference for modern and democratic governance among the younger respondents. Events like the reintroduction of the initiation schools by Kgafela II were welcomed. They help to unite the Bakgatla-ba-Kgafela and to preserve their culture and customs.⁶⁶⁰ As one respondent claimed, community members were longing for a cultural identity revival and not for a person who would use traditional restoration to increase his power base.⁶⁶¹ But even with regard to culture, the assessments were not unanimous. The Bakgatla community in Botswana was divided between those members that attend meetings and ceremonies and those who thought that the latter were a waste of time. Some emphasised the role of culture and tradition as important factors contributing to the collective identity as Bakgatla-ba-Kgafela. This included, amongst others, the traditional choirs and initiation ceremonies.⁶⁶²

With ongoing socio-economic change and modernisation in Botswana, the younger generations have become vital in determining the future relevance of traditional

⁶⁵⁸ Interview with a male community member, Mochudi, 08/07/2013 (INT 09-1).

⁶⁵⁹ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

⁶⁶⁰ The interviewees included male and female respondents interviewed in Mochudi on 14 June and 4 July and in Gaborone on 20 September 2013 (INT 01-1, INT 07-1, INT 24-1).

⁶⁶¹ Interviews conducted with a male respondent in Mochudi, 26/06/2013 and 26/07/2013 (INT 04-1, INT 04-2).

⁶⁶² Interview with a female respondent, Mochudi, 29/08/2013 (INT 23-1).

institutions. Some of the leaders have introduced special programmes and communication channels for the youth and interact regularly with them, while other traditional leaders have remained rather passive. The latter have nurtured feelings among the community members that their leaders were not helping them much. This stands in contrast to other traditional leaders who also invited non-governmental organisations into their areas to talk to the youths and to introduce programmes which can uplift their lives. If a leader fails to interact with his community members, the community tends to rate the whole institution as something which is not important to them.⁶⁶³

In sum, currently in Botswana traditional institutions have to delicately balance their engagement and target group orientation to handle the dynamic community structures and to be an equal and independent partner within the institutional pluralism. The following statement by Nyamjoh addresses the multiple roles that they have to play in their communities and the hybrid forms of leadership. Nyamjoh emphasises the adaptability of traditional institutions in Botswana and points to the fact that they cannot be simply categorised in terms of tradition or modernity.

*“Invented, distorted, appropriated or not, chieftaincy remains part of the cultural and political landscapes, and is constantly negotiating and renegotiating with new encounters and changing material realities. The results are chiefs and chiefdoms that are neither completely traditional nor completely modern.”*⁶⁶⁴

The legal and institutional framework and expectations and demands from community members and other stakeholders have reinforced the ability of traditional institutions to adapt to dynamic transformations. Moreover, traditional institutions are exposed to the constant need to offer added value for communities and for government to defend their position at local level. Nyamjoh’s statement has therefore neatly expressed the correlation between change, dynamics and adaptation. In the case of the Bakgatla-ba-Kgafela, key respondents have voted for an extended role of traditional institutions, but within the legal framework and to support local government.

⁶⁶³ Interviews conducted with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1), and with a headman conducted in Mochudi, 30/07/2013 (INT 21-1).

⁶⁶⁴ Nyamjoh 2015, p. 14.

6.2.2 South Africa

The introduction of a democratic local government system has transformed local power balances and community structures in rural areas since 1994. Similar to Botswana, traditional institutions were forced to adapt to the restructured system and local requirements. The transformation process throughout the 1990s produced certain challenging and undesired outcomes at community level. Nxumalo and Whittal illustrated some of the consequences of municipal demarcation for traditional institutions and communities in post-apartheid South Africa. The impact of shifting boundaries becomes visible when one takes the example of the Nhlanguwini community in KwaZulu Natal. Following its demarcation, the community was suddenly split across two different district municipalities and two distinct local municipalities. The grievances lodged at the Municipal Demarcation Board by the community pointed to the inconsistent development opportunities and legal frameworks they would experience in two separate districts. Additionally, the separation would require the traditional leadership to take a dual approach towards two different municipalities to deal with community affairs.⁶⁶⁵ This is a comparatively severe example of how communities were affected by transformations of the governance system and by boundaries that were not congruent with their own territorial scope.

Findings from the Afrobarometer surveys in South Africa give a better impression of the overall assessment of traditional institutions at communal level in North West. In round 4 in 2008, people were asked about the role of traditional institutions in their communities. In particular, the questions aimed to determine how the respondents rated the influence of traditional leaders in local governance and whether this influence should increase or decrease. In North West, the following answers were given on the present grade of influence:

- a great deal: 10%,
- some: 26%,
- a small amount: 27%,
- none: 26%,
- don't know: 1%.

⁶⁶⁵ Cf. Nxumalo, Cleotilde/Whittal, Jennifer 2013: Municipal Boundary Demarcation in South Africa: Processes and Effects on Governance in Traditional Rural Areas, in: South African Journal of Geomatics 2, No. 4, pp. 329-331.

With regard to the preferable development of the grade of influence, 10% of the respondents in North West favoured a decrease, 28% stated it should remain the same and 39% of the respondents wanted the influence of traditional leaders on local governance to increase somewhat or a lot. 23% of the respondents could not answer the questions.⁶⁶⁶ A member of the royal family has given her own assessment by stating that the quota of people supporting or opposing traditional leadership in the Bakgatla area was about 70:30.⁶⁶⁷ Generally, more participation and a greater traditional and cultural orientation of the youths were to be found in the smaller villages.⁶⁶⁸

Several of the younger community members have expressed that they felt closer to the municipality and that they had the impression that their complaints were heard over there.⁶⁶⁹ The previous chapter has already shown the low rates of people who were content with the level of responsiveness of traditional leaders and local councillors. The preferences presented here refer to the municipality in Mogwase and not to the individual ward councillors. Assessments varied according to the way in which local government representatives and traditional leaders were able to cater for the needs of individuals. Interviewees emphasised the need for traditional institutions to be active and engaged in their areas and to become aware of the roles they are supposed to play compared to the municipalities. If traditional institutions are not successful in distinctly benefitting the communities and bringing up development plans, their influence and importance are bound to diminish.⁶⁷⁰

Similar to the research findings in Botswana, several key respondents have pointed to the important role that culture plays for the future development and sustainability of traditional institutions. The Bakgatla-ba-Kgafela in South Africa were seen as a successful example in sustaining and improving on their culture. In addition to their developmental approach, they also focus on their heritage.⁶⁷¹ Culture was thereby valued as an essential instrument to unite people within a tribe or community. In general, representatives of the tribal administration in Moruleng reported that the

⁶⁶⁶ Cf. Afrobarometer 2008: Round 4 Afrobarometer Survey in South Africa. Summary of results (compiled by Citizen Surveys), p. 60.

⁶⁶⁷ Female interviewee, group interview in Segakwaneng, 09/09/2013 (INT 49-1).

⁶⁶⁸ Statement made by a senior male respondent from Segakwaneng during a group interview, 09/09/2013 (INT 49-1).

⁶⁶⁹ Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1).

⁶⁷⁰ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁶⁷¹ Interview INT 43-1.

community gives them support and that the promotion of Bakgatla culture has gained importance in recent years. Moruleng residents have recounted that there were now several women who wear traditional clothes and who practice and perform traditional dances around the tribal offices. Moreover, some of them also cross the border to celebrate cultural events in Mochudi.⁶⁷² Moreover, the Bakgatla have started to cherish their culture on Heritage Day in September, a public holiday, where they are also joined by people from Mochudi.⁶⁷³ A respondent from the traditional council gave a short explanation as to why the tribal leadership has started to embrace cultural revivals: *“The fact that we appreciate is that culture tends to unite people more than being modernised.”*⁶⁷⁴

Contrarily, several respondents stated that culture was of minor relevance to them. There were two sets of people who rejected the cultural revival of the Bakgatla leadership – younger people who have not experienced the cultural or ethnical features of traditional leadership and those who were dissatisfied with traditional leadership. Culture and tradition have become secondary to young people who grew up in a more modern and westernised environment, in particular during the years of non-existent cross-border relations of the Bakgatla and in the post-apartheid transformation.⁶⁷⁵ The other group included people who stated that culture and traditions were of minor importance to them as long as communities were still suffering from underdevelopment. Moreover, one respondent emphasised that an exclusive focus on culture and the conservation of certain traditions were not suitable to address present needs. Additionally, he pointed to another transformation which has taken place. People have started to see themselves no longer exclusively as members of a single community or tribe, but in non-cultural or non-tribal terms.

“The tribal values, they help us with nothing. They have never helped us with nothing. Because whether you keep the culture, the norms of your tribe, we still suffer the same. What is important is we must move with times. We must move with eras and changes. Certain norms yes we can keep. But others they have

⁶⁷² Interview with a senior female community member, Moruleng, 27/08/2013 (INT 29-1).

⁶⁷³ Interview with a senior male community member, Moruleng, 27/08/2013 (INT 30-1).

⁶⁷⁴ Interview with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1).

⁶⁷⁵ Interview INT 26-1. Group interview with three female respondents, Moruleng, 11/09/2013 (INT 48-1).

*never worked for us. We have now a global village. We are one now, on one boat.*⁶⁷⁶

In contrast to the situation in Botswana, the majority of the community members in South Africa stated that belonging to the Bakgatla-ba-Kgafela does not give them a significant sense of identity. Exceptions were to be found among those people who were close to the royal family or even a part of it. In terms of custom and culture and tribal cohesion, people drifted apart during the homeland period. In South Africa, national identity has become much more important.⁶⁷⁷ This is in line with developments in Botswana under Seretse Khama's presidency. Nevertheless, people in Botswana associate themselves with both their Bakgatla and their national identity and cherish the relevance of culture in their communities.

A factor that has strongly influenced traditional leadership and community structures in the Platinum Belt is the mining operations and the adaptation of leaders and communities. A council representative has explained in more detail how this development in the economic sector has altered local priorities and characteristics in South Africa compared to the Bakgatla in Botswana.

*"It's different that our economy was mine-based and the influence of the labour migration from different points had some effect on our way of lives. So we had to accommodate different ways of life. And mainly the mining environment, if you think about it, then began to alter the way that we lived and that modernised our way of life. Your income is from modern sources, you tend to be modern. In Mochudi, they do a lot of subsistence farming; even to an extent of they have now grown to have it as a commercial activity. But they are more entrenched customarily than we are this side."*⁶⁷⁸

The majority of stakeholders interviewed in 2013 emphasised the importance of traditional institutions engaging in business. They stressed that there must be economic activity in rural areas as this creates employment opportunities which limits the flow of people moving from villages to urban areas. People have more options to get a piece of land and to provide for their own subsistence in rural

⁶⁷⁶ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

⁶⁷⁷ Interview with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1). Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1).

⁶⁷⁸ Interview INT 26-1.

areas.⁶⁷⁹ Different stakeholders and representatives of traditional institutions have pointed to the need for traditional leaders to become more focussed on development and the empowerment of community members and to pay attention to topics which may be outside of their immediate jurisdiction but which impact highly on community life.

“We should encourage traditional leaders to think globally. They should be aware of what is taking place, but act locally. Take for instance environmental management. This thing of global warming... People always thought that it's mostly academics that deal with it. But the effects of it are the ones that are going to impact on our lives. I mean if there's draught, who suffers? It means that we need to plan. One other thing that we need to do is embark on an outreach programme for young people. Because the youths are not interested in traditional leadership. We need to go out and address the young people so that they begin to understand that we are there and we are there for their own benefit, so there must be youth participation in rural areas. So traditional leaders are called upon to start with programmes to empower youths in their villages. But because we don't have money, that's our biggest problem.”⁶⁸⁰

During the time of the empirical research, the Bakgatla-ba-Kgafela were already in a position where they have implemented most of the requirements that are indicated in the statement above, like their global vision, the development focus and the inclusion of younger community members. In this regard, they have therefore adapted to socio-economic and political dynamics.

This need to adapt goes in line with the requirement to have traditional leaders who are capable of meeting the criteria listed above. In Moruleng, the lack of formal education of some of the headmen was recognised as a problem. As a solution, it was decided to empower the children of headmen with education and skills development so that they are well equipped to meet community needs as leaders or ambassadors.⁶⁸¹ The educational and professional requirements of traditional leaders

⁶⁷⁹ Interviews with a representative of the House of Traditional Leaders, Mmabatho, 28/08/2013 (INT 31-1), and with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

⁶⁸⁰ Interview with a representative of the House of Traditional Leaders, Mmabatho, 28/08/2013 (INT 31-1).

⁶⁸¹ Interview with a headman in Moruleng, 12/09/2013 (INT 37-1). By the time of the interview, those were still plans but not implemented yet.

have grown in the last decade. It has become increasingly important for them to have an academic background and/or business experience to handle complex matters for the community and to effectively represent the interests of the tribe.⁶⁸² In South Africa, headmen are free to decide if they want to take over leadership or if they want to retain their jobs. They can appoint an uncle who either takes over completely or who is assigned to perform certain duties at the council.⁶⁸³ Among the Bakgatla-ba-Kgafela in South Africa, there were several heirs who did not want to succeed their fathers as traditional leaders because they had better opportunities in a non-traditional office. In that case, a regent or representative needs to be appointed.⁶⁸⁴

During the research stay, community members were asked whether they had the impression that the business orientation and development focus of the Bakgatla has divided the community from traditional leadership. In general, the respondents did not feel that the professionalization of leadership has created a kind of barrier. People who benefitted from the initiatives of the tribal leadership or whose families were closely attached to traditional leadership remained in regular contact. According to the statements of Nyalala Pilane, the development orientation has rather brought the traditional leadership closer to the people, as the communities were now benefitting from employment opportunities, infrastructure and facilities. In Nyalala Pilane's view, those people who complained did not understand the process and the long-term character of their leader's vision.⁶⁸⁵ Pilane has pointed to another transformation of traditional leadership in the Bakgatla villages. According to him, the tribal administration in Moruleng was perceived to be an institution which was distant from the people when he came to his office under Linchwe II. While the headmen in the villages were viewed as accessible contact persons, only few people tended to see the senior traditional leader in Moruleng as someone who could be approached with requests and problems, and who could give something back to the people. Moreover, it was regarded as an institution where elderly people retired to. Under Nyalala Pilane, the image of the tribal administration has changed in a positive way and it

⁶⁸² Interview INT 31-1.

⁶⁸³ Interview INT 37-1.

⁶⁸⁴ Interview INT 37-1.

⁶⁸⁵ Interview with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

was brought closer to the people. Additionally, the tribal administration and the adjunct business wing have become major employers in the Bakgatla area.⁶⁸⁶

Apart from the positive features of the legal framework and institutional pluralism and the effects at communal level, there were certain potentially negative aspects of the role of traditional institutions in rural communities. This correlates with Chapter 4 and the way in which legislation and jurisdiction sometimes support leadership positions against the preference and benefit of community members. Claassens summarised the problem of institutional claims raised within the process of land restitution. Based on the Land Restitution Act of 1994 and the Communal Property Associations Act of 1996, communities were enabled to form juristic persons which are called Community Property Associations (CPA) to acquire, hold and manage communal property, like claims of land restoration. This means that communities were free to decide who should be in charge of representing their interests. Accordingly, traditional institutions have opposed the establishment of these CPAs which would limit their influence in rural communities.⁶⁸⁷ This form of opposition was also exercised by the Bakgatla leadership as the following example reveals.

The Bakgatla-ba-Kgafela community had lodged a successful claim and the respective land was restored to them in 2006. The land was transferred and registered in the name of a provisional CPA. While the residents preferred for the communal property association to act on their behalf, the tribal leadership wanted to hold it in trust for the community and doubted the legality of the CPA as it lacked formal registration. In the subsequent years, the tribal leadership and community residents were caught in a legal dispute over communal tenure of this land. It was debated whether the CPA had ceased to exist, as its provisional registration in 2008 was not confirmed and transformed into a permanent status. The dispute was first decided in favour of the CPA in the Land Claims Court. The Supreme Court of Appeal overturned this ruling in 2014. In August 2015, the case was brought before the Constitutional Court which finally confirmed the legality of the CPA and its permanent registration.⁶⁸⁸ Thereby, the court has supported a transformation of

⁶⁸⁶ Interview INT 40-1.

⁶⁸⁷ Cf. Claassens 2014, pp. 765-766.

⁶⁸⁸ See the judgement of the Constitutional Court of 20 August 2015: *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* (CCT231/14) [2015] ZACC 25.

customary land management in traditional communities in favour of an inclusive and self-determined approach. Chris Jafta, the judge of the Constitutional Court, gave the following reasons in his judgement:

“[50] [...] It is clear from the scheme of the Act [author’s remark: Communal Property Association Act of 1996] that once a traditional community expresses a desire to form an association, the Director-General must do everything permissible to assist the community to accomplish its goal. [...]”

[54] [...] Once an association qualifies to be registered, the Director-General or her delegate has no discretion but to register the association. The fact that a traditional leader or some members of the traditional community prefer a different entity to the association is not a justification for withholding registration and imposing mediation on the parties.

[55] Where a traditional community or the majority of its members as was the position in this case, have chosen the democratic route contemplated in the Act, effect must be given to the wishes of the majority. In his report in terms of section 7(2) of the Act, the Department’s representative recorded that there were no interests negatively affected by the adoption of the Association’s constitution. Accordingly, there is no impediment to the registration of the Association. Instead, by effecting registration, the Department would be creating a platform for democracy to flourish among the Bakgatla-Ba-Kgafela Traditional Community.”⁶⁸⁹

On the one hand, the example of the Bakgatla-ba-Kgafela CPA demonstrates the difficulties the rural population face in areas under traditional leadership within the present legal framework. On the other hand, it reveals a successful case of community opposition against traditional leadership claims in favour of alternative and elected institutions and community control. This is also in accordance with the overall conclusion on the role of traditional institutions at communal level as many people strove for a limitation of their competencies. This section has revealed the capacity of the Bakgatla to adapt to evolving community structures. It also shows that local interests were too varied to speak of unequivocal positive or negative

⁶⁸⁹ Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others [2015] ZACC 25.

effects of the institutional pluralism. Considering the objectives of the introduction of democratic local government, it should at least rest within the authority of community members to decide over the kind of role that they would like to see traditional institutions play.

6.3 Power base and legitimacy of the formal stakeholders at local level

6.3.1 Background and context

In the Weberian sense, power is the “[...] probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests.” According to Weber, authority⁶⁹⁰, on the other hand, is the “[...] probability that a command with a given content will be obeyed by a given group of persons.”⁶⁹¹ Weber distinguishes two forms: power as authority and power as coercion. Whilst the former refers to a legitimate form of power with subordinate groups consenting to the influence of superior groups, the latter is an illegitimate enforcement of one’s will. Among the legitimate forms of rule, Weber identified three ideal types that claim their legitimacy on different grounds, namely traditional authority, charismatic authority and rational-legal authority.⁶⁹²

Traditional authority is based on references to variants of tradition and long-established customs and structures. This form of authority is derived from traditional norms which define leadership positions. The ability and right to rule are often passed down hereditarily. This type of authority is inherent to the institution of traditional leadership. Charismatic authority is derived from the personal qualities and extraordinary characteristics of a leader. Rational-legal authority is based on norms and formal rules or on natural law. Weber gave the example of a bureaucracy for this form of authority. In their empirical form, none of these types of authority always remains pure and static.⁶⁹³

⁶⁹⁰ The original translation of Weber’s term *Herrschaft* would be *domination*. As discussions of Weber’s concept of power mostly translate *Herrschaft* into *authority*, this is followed here as well.

⁶⁹¹ Weber, Max 1968: *Economy and society. An outline of interpretive sociology*, Berkeley, p. 53.

⁶⁹² Cf. Weber, Max 1958: The three types of legitimate rule, in: *Berkeley Publications in Society and Institutions* 4, No. 1 (transl. by Hans Gerth), pp. 1-11.

⁶⁹³ Cf. *Ibid.*

Coming to traditional institutions, it is helpful to cite Oomen and Van Kessel. They pointed to the essential and still debated origin of the legitimacy of traditional institutions in South Africa after 1994 and the role of their formal recognition.

“Chiefs have proven that the institution is adaptable to changing times. If traditional leaders are perceived as non-partisan, they can play a valuable role in local communities, e.g., in the sphere of conflict resolution and justice. But if chiefs remain dependent on government patronage, they can easily be manipulated by the government of the day. The central issue remains unresolved: do chiefs derive their legitimacy from state recognition or from popular support?”⁶⁹⁴

This is a question that produces contrasting answers, both from a more theoretical and from a practical perspective. While some authors identify independent factors, based for example on genealogy or the performance of traditional institutions,⁶⁹⁵ others, like Mamdani, attribute their legitimacy exclusively to the formal recognition and support by government.⁶⁹⁶ In most cases, the recognition of traditional institutions is joined by symbolic recognition, access to resources and formal representation within the local government structures, as the previous sections have shown and as the following ones will confirm.

Donald Ray summarised that traditional institutions still rely on a different legitimacy basis rooted in the history, organisation and culture of traditional communities. In his words, they “[...] embody their people’s history, culture, laws and values, religion, and even remnants of pre-colonial sovereignty.”⁶⁹⁷ The post-colonial state, on the other hand, lays its legitimacy claims on the national struggle and transition to democratic rule based on the will of the people which finds expression in elections and a legal-constitutional system.⁶⁹⁸

⁶⁹⁴ Van Kessel/Oomen 1997, p. 585.

⁶⁹⁵ Cf. Comaroff 1974, pp. 41-42; Logan, Carolyn 2011: *The Roots of Resilience: Exploring Popular Support for African Traditional Authorities*, Afrobarometer Working Paper No. 128; Sharma 2003, pp. 249-262.

⁶⁹⁶ See for example Mamdani 1996; Ntsebeza, Lungisile 2003.

⁶⁹⁷ Ray, Donald I. 2003: *Rural Local Governance and Traditional Leadership in Africa and the Afro-Caribbean: Policy and Research Implications from Africa to the Americas and Australasia*, in: Ray, Donald I./Reddy, P. S. (Eds.), *Grassroots Governance? Chiefs in Africa and the Afro-Caribbean*, Calgary, p. 5.

⁶⁹⁸ *Ibid.*, p. 5.

Similar to Ray, Thornton states that traditional institutions and the state appeal to different sources of legitimacy. He emphasises that traditional institutions, within the local context, are the representatives of the land and the people and build a counterweight to the power of the post-colonial state.⁶⁹⁹ Their legitimacy and power rest on the particular features of chieftainship itself and its interdependence with the community: “[...] a chief may exist even when no one follows his commands, but he may not exist without a tribe that acknowledges his existence as chief. It is their recognition of the chief as chief, rather than their obeisance to his command, that makes him chief, and that makes him powerful.”⁷⁰⁰

According to Schapera, chieftainship is not static among the Tswana and leadership positions remain contested. This fact is often not reflected in the legal frameworks that were set up. A distinction has to be drawn between the office itself and its current incumbent. Chieftainship is marked by succession disputes, constant performance assessments and variations of the legitimacy and actual authority of a leader. Schapera also cited examples of ‘dynastic’ disputes over succession and leadership within royal families which occurred in the 1930s and 1940s among the principal Tswana chiefdoms.⁷⁰¹

John Comaroff points to a major feature of Tswana traditional leadership which illustrates the impact and discrepancy between the indigenous and post-colonial role of traditional institutions. Among the Tswana, a person is born as a traditional leader. After his formal installation, he remains a leader until he dies. This tradition clearly excludes elections of traditional leaders. Despite this ideal-typical description, historical examples provide numerous exceptions to automatic succession. Comaroff confirmed Schapera’s conclusions about the office of a traditional leader and the position of the actual incumbent and the varying levels of support and legitimacy. Their performance is constantly assessed and reflected.⁷⁰²

The first and second round of the Afrobarometer surveys have produced results which contrast statements which see the legitimacy and influence of traditional institutions correlated to formal recognition and government protection. With slight

⁶⁹⁹ Cf. Thornton, Robert 2003: Chiefs: Power in a Political Wilderness, in: Ray, Donald I./Reddy, P. S. (Eds.), Grassroots Governance? Chiefs in Africa and the Afro-Caribbean, Calgary, p. 127.

⁷⁰⁰ Ibid, p. 140.

⁷⁰¹ Cf. Schapera 1963: Kinship and Politics, pp. 161-162.

⁷⁰² Cf. Comaroff 1974, pp. 37-38.

deviations in South Africa, the majority of respondents show strong support for traditional institutions.

“Those who insist that traditional leaders do not enjoy popular support appear to be missing the core reality on the ground: in almost all of the countries studied, solid and at times overwhelming majorities of Africans affirm that traditional leaders continue to play an important role in their societies, and that this is desirable.”⁷⁰³

The results of the research in 2013 confirm the independent support basis of traditional institutions, as will be shown in the subsequent sections. Despite this, certain features that were granted to traditional institutions by the legal framework and government enable them to exercise a form of power that is independent of community support and even legitimate rule. In addition, the research findings show that government pursues different strategies in Botswana and South Africa and has diverse motives for co-opting traditional institutions.

There are earlier studies which have pointed to the link between government performance and the relevance of traditional institutions. The findings in Botswana and South Africa have shown that the assessment of government had no significant impact on the attitudes towards the status or legitimacy of traditional institutions. It was actually not a zero sum game where an increase of support for one actor would decrease the support for the other one. In Kgatleng, local government performance was principally assessed in a positive way. Still, respondents expressed that they value traditional institutions. In South Africa, local councillors received negative assessments for their performance, while the local municipality received balanced ratings. Comparing the answers provided during the interviews, there was a rather negative assessment of traditional leadership. According to Logan, the results of the Afrobarometer surveys of 1999 to 2003 also could not show this kind of dependence.

“Our findings [...] sharply challenge the increasingly common assumption that allegiance to traditional rulers is based in significant part on the perceived performance failures of central and especially local governments. In fact, we find no significant association between support for expanding the influence of traditional leaders and the substantive performance of either local or central

⁷⁰³ Logan 2009, p. 20.

*governments. This presents a direct challenge to an increasingly prevalent assumption that it is state weakness and ineffectiveness in delivering public goods and services that drives people to align with or hang onto traditional leaders.*⁷⁰⁴

So there are actually two distinct but partly interrelated issues that the subsequent sections will look at: the legitimacy of the local institutions and the kind of power they can and do exercise. The analysis will consider factors that are claimed to be decisive for the legitimacy of the stakeholders and how they affect the power basis of the local actors. It includes the form of support that institutions receive within the present system. This also means taking a closer look at the impact of formal recognition and integration. The second part will therefore examine the authority and the power local actors can exercise, either based on the legal framework, other influencing factors or based on the legitimacy and support they receive. The previous sections have already indicated important differences between Botswana and South Africa with regard to the legitimacy and support of leaders and their scope of action that will be explored in more detail.

6.3.2 Legitimacy and support in the context of the institutional pluralism

There are different ways to approach the question of how legitimate traditional institutions and local government are perceived to be in Botswana and South Africa. The section will first highlight the general situation in both countries and will give an initial statement on the status of traditional and governmental institutions. It will continue by discussing how legitimacy finds expression, before focusing on essential factors that increase or decrease legitimacy and support and their implications.

Generally, traditional institutions have continued to enjoy a stable standing in Botswana. The results of the Afrobarometer survey in 2014 indicate an overwhelming support for traditional institutions. This occurs across all levels of education and in rural and urban settings alike. Moreover, the results reveal that people who support democracy also give equal support to the institution of traditional leadership and that preferences were not mutually exclusive. Accordingly, people who prefer a democratic system do not automatically reject traditional forms

⁷⁰⁴ Logan 2009, p. 17.

of governance or vice versa.⁷⁰⁵ Findings from an earlier Afrobarometer survey in 2008-2009 have underlined these findings. Back then, 78% of the people interviewed in Botswana supported the statement that traditional institutions should have increased powers. These results mirror the answers provided during the research in Kgatleng in 2013 that have also confirmed another finding of the Afrobarometer survey: support for traditional institutions and preference for their greater involvement were not related to age or gender, and in some cases not even to the origin, of the respondents.⁷⁰⁶

These answers are in line with further findings on the local support for traditional leadership. In the 2014 survey, people were also asked about their preference for the role of traditional institutions in Botswana. In rural areas, 94% of the respondents (strongly) agreed with the statement that traditional leadership is a part of the value system and culture, helps to strengthen democracy and should therefore be retained. This statement already indicates some factors that may define the legitimacy of local stakeholders and that are dealt with in the subsequent paragraphs. Only 5% of the respondents stressed that they support the statement that the institution of traditional leadership is outdated and no longer useful in a democratic setting and should therefore be abolished. The numbers were slightly different in urban areas, but the average level of support for traditional institutions remained high with 88%.⁷⁰⁷

A first indication of the more complex situation in South Africa is provided by survey results from 2008. During this Afrobarometer round, respondents were asked about their level of trust with regard to traditional leaders. In North West, about one quarter (23%) of the respondents stated that they do not trust traditional leaders at all. An equal number of 21% stated that they trust them somewhat or a lot.⁷⁰⁸ The numbers for local councils were different. In the 2001 survey, 13% of the respondents indicated that they trust their local government council a lot (33% answered 'somewhat' and 34% answered 'just a little'). 20% of the people in North West confirmed the statement that they do not trust their council at all.⁷⁰⁹

⁷⁰⁵ Cf. Molomo 2014, pp. 5-7.

⁷⁰⁶ Cf. Logan 2009, pp. 11-12.

⁷⁰⁷ Cf. Afrobarometer 2014: Botswana Round 6, 2014, p. 54.

⁷⁰⁸ Cf. Afrobarometer 2008: Round 4 Afrobarometer Survey, p. 34.

⁷⁰⁹ Cf. Afrobarometer 2011: Round 5, p. 45.

With regard to the assessment of trust levels, the findings were contrary in Botswana. Despite this general support, the survey results of round 6 of the Afrobarometer point to the different standing that traditional and governmental institutions have locally. Respondents were asked about how much they trust their local government council and their traditional leaders. The answers show a significant difference in the trust levels between the two categories.⁷¹⁰

Table 5: Levels of trust

	Local Government Council	Traditional Leaders
Not at all	19	10
Just a little	27	17
Somewhat	27	26
A lot	26	45
Don't know/Haven't heard enough	2	1

Source: Own presentation, based on Afrobarometer 2014, pp. 28-29.

In a direct comparison, the results show the overwhelming support and high level of trust that traditional institutions enjoy. Contrasting this form of support, close to one fifth of the respondents stated that they do not trust their council at all. The positive assessment and general importance of traditional institutions was also valid for the case study and was emphasised in several interviews.⁷¹¹ Even some of the people who were not really close to traditional leadership have stressed their special role and have stated that people in Botswana want to retain traditional institutions as leaders of the people.⁷¹² This approval can be regarded as one indicator with which to evaluate the legitimacy of traditional institutions.

Assertions made by Comaroff on the Tshidi and by Schapera, who differentiates between the office and the incumbent leader, were also true for the case study. Traditional leadership was generally valued, but with certain differentiations with regard to the present leaders Kgafela II and Nyalala Pilane. The reception of Kgafela in South Africa was more critical due to the cross-border context, the lack of local relations and absence and the fact that he has benefitted from the Bakgatla wealth without offering added value. This will be addressed further in Chapter 8.

⁷¹⁰ Cf. Afrobarometer 2014: Botswana Round 6, 2014, pp. 28-29.

⁷¹¹ While one of the respondents in Mochudi stated that he never attends any kgotla meetings and was not interested in traditional leadership as he does not see its impact at local level, he was in favour of retaining, reorganising and finally strengthening traditional institutions when he was asked about future prospects in Botswana (see INT 07-1).

⁷¹² Interview with a senior male respondent in Mochudi, 19/07/2013 (INT 16-1).

The impact of history continues to shape the picture of the institutional pluralism in South Africa. The recognition and legitimacy of traditional institutions is still associated with the apartheid years, both with regard to popular support and to origin. Although this was of minor relevance for the Bakgatla-ba-Kgafela, there were traditional leaders around South Africa who were wrongfully appointed or even imposed prior to 1994. Even though the selection of a traditional leader was made by the royal family, government has occasionally supported or recognised a candidate who was not the immediate heir to the traditional office. A member of the Bakgatla royal family has indicated how this has also affected support for the institution itself.

*“Young people are reluctant toward tribal leadership because government has imposed illegitimate chiefs in most areas. People from other areas are imposed who don't even stay in the communities.”*⁷¹³

Further authors have confirmed those incidents in other parts of South Africa. There are several cases of disputed leadership in which government has supported a more convenient candidate who was not even familiar with the geographical area.⁷¹⁴ This is even more critical in areas where traditional leaders control land or mineral resources. Solving the resulting disputes and replacing office incumbents has become a major task in the post-apartheid years that still continues.

Apart from these manipulations, the general reputation of traditional institutions has suffered from their role in homeland governance and administration. This is one of the reasons why the institutional pluralism and integration of non-democratic governance and jurisdiction were severely debated after 1994. Generally, the Bakgatla-ba-Kgafela territory in North West seemed to be less affected by apartheid manipulations compared to other parts of South Africa. Quite the contrary to benefitting of the overall empowerment of traditional institutions, Bakgatla leaders were rather in a subordinated position during the apartheid years. A senior traditional leader has reported during the empirical research that traditional leaders were more oppressed and controlled in Bophuthatswana than they are today. Since 1994, bodies like the Houses of Traditional Leaders provide places for traditional leaders to express their needs and requests. Before, the president used to be the central figure

⁷¹³ Interview with a male senior respondent, Mothlabe, 16/09/2013 (INT 44-1).

⁷¹⁴ See for example Skosana, Dineo 2013: The Interface between Tradition and Modern in Postapartheid South Africa: An Outline of the Kekana Family Succession Dispute and Their Encounter with the Platinum Reef Resource Mine, in: New Contree, No. 67 (Special Edition).

who gave instructions to traditional institutions and controlled them. On the one hand, they benefitted from development initiatives in their areas. On the other hand, government decided over the fate of supportive or opposing leaders in Bophuthatswana and clearly manipulated them.

*“There was a lot of development that was taking place in rural areas. We had for instance schools, clinics were built. But one would have thought that traditional leaders were going to be more supported. If you did not agree with the president, he would depose you. A lot of leaders were deposed because they differed with the president. That's why we have many problems with succession, because some were installed by Bophuthatswana.”*⁷¹⁵

In addition to history, certain factors influence the perceived and actual legitimacy to varying degrees. The quote by Thornton in the previous section has raised an important element of legitimacy, namely the recognition as a leader. This does not necessarily address government, but also traditional communities and further stakeholders. In this regard, Kgafela's case has illustrated the subordinated role of governmental recognition for the legitimacy and support of a traditional leader. The Bakgatla community has actually ignored the derecognition and has continued to regard Kgafela as rightful leader. This was in line with how local stakeholders have treated him. Due to genealogy and his birthright, he has remained the only acceptable heir to the throne for the community. Moreover, only he could have appointed a regent. Finally, Kgafela's eldest son Matshego Kgafela who is supposed to succeed him one day was still a minor. A similar form of support and legitimacy was given to Kgafela's deputy against government interdicts. Based on section 26(1) of the Bogosi Act, the Minister of Local Government issued an order in 2014 stating that Bana Sekai was prohibited from purporting to act as the leader of the Bakgatla-ba-Kgafela in Kgatleng and that no person was supposed to treat him as a traditional leader.⁷¹⁶

The situation was quite contrary in South Africa. Only few people among those who were interviewed in 2013 recognised actual cross-border governance and Kgafela's claim to rule in Moruleng. There were different factors that have prevented his

⁷¹⁵ Interview with a member of the North West House of Traditional Leaders, Mmabatho, 28/08/2013 (INT 31-1).

⁷¹⁶ Cf. Statutory Instrument No. 36 of 2014, published on 11 April 2014.

support, among them his foreign citizenship and unlawful actions. As a consequence of the dispute between Kgafela and the royal family in Moruleng, support from within the Bakgatla royal houses had come to an end and the conflict was transferred to the provincial Commission on Traditional Leadership Disputes and Claims (see subsequent chapters).

Depending on the context and interviewee, Nyalala Pilane has also faced a lack of recognition and allegiance. This was partly based on the fact that he was appointed by the Paramount Chief in Botswana and that he was not the rightful descendant in the lineage of the royal family. In addition, the way in which Pilane has dealt with local resistance has affected how the community assessed him. With the Botswana Bakgatla losing more and more influence in South Africa and the dispute around his office becoming more formal through the installation of the Commission, Nyalala Pilane's position was further weakened. Beside his supporters, there were several voices from the community and the royal family who have confirmed that he was not recognised as Bakgatla leader. Chapter 9 will give a brief outlook on this issue with regard to the findings of the North West Commission. The installation of the royal council as an institution that provides checks and balances and tight control was an expression of the ambiguous legitimacy basis of Pilane.

Several interviewees confirmed that Kgafela II and Nyalala Pilane were unpopular among many community members in Moruleng. Kgafela, like his father Linchwe II, had initially supported Nyalala Pilane against the opposition of the royal family and the community and had turned a blind eye to local resistance. This meant that the majority of community members in Moruleng were not interested in the outcome of Kgafela's struggle for leadership.⁷¹⁷ Moreover, he was involved in willingly covering up the waste of tribal funds as long as he used to benefit from the South African payments. Although many of them would have liked to remove Nyalala Pilane from his position, they had no means available to achieve this. Even Kgafela II, who formally had the authority to replace the regent who was appointed by his father, failed to remove him.⁷¹⁸

Opposition against the tribal leadership also gained a physical dimension. In 2012, Moruleng faced violent strikes, road blockages and acts of vandalism. A key

⁷¹⁷ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁷¹⁸ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

respondent discussed further incidents in 2012 when people moved into the office buildings and tried to remove members of the traditional council and Kgafela II from their offices. The people in Moruleng were protesting against Kgafela II and against the present leadership. Several interviewees have said that some of the young people who participated in the protests and attacks were instrumentalised by senior community and royal family members.⁷¹⁹ After people tried to enter the offices under false pretences, security measures were tightened. Security guards, fences and metal detectors were erected and visitors could only enter the buildings after undergoing some form of control.⁷²⁰ While the majority of respondents expressed that they do not feel estranged by the security provisions, other respondents see the limited access options more critically, as the following exemplary statement reveals.

“Where have you ever seen a security guard at a tribal office? At a traditional place? Why? It must be an open place for the public. These buildings create a distance from the people.”⁷²¹

In Botswana, traditional leadership still draws part of its legitimacy from its pre-colonial origins. A unique aspect of the structures of traditional leadership remains its relational character, which also increases the influence of traditional institutions. Local residents were culturally, historically and personally related to their headmen and traditional leaders. Due to this, it was not a legal or political form of hierarchy and people were willing to comply with the leader’s wishes.⁷²² In addition, people remain culturally affiliated with their communities and their leaders. Moreover, the country as a whole promotes and publicly celebrates culture and traditions. They have become supporting factors in legitimising positions and actions. Nonetheless, respondents have emphasised that the institution of traditional leadership has to adapt and move with modern times to remain competitive in the democratic set-up and to develop its potential. It was stated that traditional leaders cannot exclusively refer back to old ideas and procedures.⁷²³ Moreover, interviews with different community members have revealed that the performance of traditional institutions is increasingly

⁷¹⁹ Female interviewee, group interview in Segakwaneng, 09/09/2013 (INT 49-1).

⁷²⁰ Female interviewee INT 49-1.

⁷²¹ Interview with a male community member, Moruleng, 26/08/2013 (INT 27-1).

⁷²² Interview with a male community member, Mochudi, 26/07/2013 (INT 04-2).

⁷²³ Interview INT 03-1.

evaluated and measured by the developments and innovations they bring to their communities.

One example where culture has displayed its importance was the rites of passage, the initiation schools that used to bring people closer to the leadership and to each other. They were also seen negatively as something that promotes identification with tribes and that undermines national unity. Many Tswana chiefdoms abandoned initiation schools at the beginning of the 20th century. In the pre-colonial context, the initiates used to form the army of the traditional leader.⁷²⁴ Among the Bakgatla-ba-Kgafela, the rites of passage were revived twice under Linchwe II and Kgafela II. Linchwe II was criticised by Seretse Khama for reintroducing a feature of ‘tribalism’ in the 1970s. Nevertheless, initiation schools were described by participants as an important experience that strengthens community cohesion and loyalty to the traditional leadership.⁷²⁵ Initiation ceremonies among the Bakgatla were often held in the context of the required initiation of a prominent member of the royal family, like the traditional heir, his brothers or his wife. The age regiments that support the leader and his wife were formed during the ceremonies.⁷²⁶

In Mochudi and in Moruleng, the tribal leadership, community activists and local people have acknowledged culture as a valuable element to bring people together, to promote a common identity and to unite them in a local and even in a cross-border setting.⁷²⁷ The reported effects of cultural activities were twofold: the Bakgatla leader gains continuous support and increases acceptance for his rule and his actions. Retraditionalisation and culture are instruments that could strengthen the legitimacy basis of traditional institutions. This was confirmed by the tribal leadership on both sides of the border and was also emphasised by people who have undergone initiation ceremonies. Public events and the commercialisation of culture have become important to legitimise leaders like Kgafela II and his father Linchwe II and to generate support for them in South Africa. However, Kgafela’s ambiguous status in South Africa and the general context of cross-border leadership have prevented a

⁷²⁴ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁷²⁵ Interview with a male key informant in Mochudi on 4 July 2013 who was initiated in 1993 (INT 07-1).

⁷²⁶ Interview INT 24-1.

⁷²⁷ Interviews conducted with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1), with Nyalala, Moruleng, 12/09/2013 (INT 40-1), and with a male community member, Mochudi, 08/07/2013 (INT 09-1).

strong legitimacy basis for leaders from Botswana in Moruleng. Balancing traditional and modern elements proved to be vital for being simultaneously powerful and legitimate. One senior respondent from the royal family has pointed to two important aspects which determine the influence and potential of traditional leaders. She emphasised the efficiency of the present leadership style in Moruleng. *“I think it gives you more power when you are still traditional and professional at the same time.”*⁷²⁸

However, the element of culture and identity has lost part of its meaning in the last decades and the institution of traditional leadership has faced challenging developments. The historical overview of democratisation in Botswana has stated that independence in the 1960s went hand-in-hand with growing nationalism and strategies to promote national unity and eradicate tribalism. Furthermore, modernisation, increasing urbanisation and resettlement have created a new environment which has facilitated the emergence of a national identity that supersedes former ethnic or tribal affiliations. Several of the younger key respondents have confirmed this transformation and have expressed the greater relevance of being ‘Motswana’ than of being ‘Mokgatla’.⁷²⁹ A similar development was observed in South Africa. In general, belonging to the same community or the Bakgatla-ba-Kgafela was rated as an instrument that could unite people. But compared to other factors like the performance of leaders, this form of identification was of minor importance. Younger community members in particular put less weight on the role of identity or community cohesion. Yet, performance was rated differently by community members and local stakeholders. In Kgatleng, performance was actually of minor importance for the assessment of traditional institutions, albeit it was not completely overlooked. Due to the legal framework and institutional set-up, the lack of control over land management or the absence of communally owned resources did not affect the support for traditional institutions or even the assessment of government.

⁷²⁸ Interview with a senior female member of the royal family, Moruleng, 09/09/2013 (INT 35-1).

⁷²⁹ This statement was derived from interviews conducted in July 2013 with diverse community members from different social and educational backgrounds. An interview conducted on 22 July 2013 with a representative of local government in Kgatleng District confirmed this attitude (INT 17-1). The respondent revealed that in his present position he acts in the first place as a loyal citizen of Botswana and not as a Mokgatla.

Individual preferences and the respective performance of the actors affect the level of support residents provide to the local institutions. A key interview partner has also expressed that it is difficult to favour government or tribal administration, as, depending on the context, both can bring benefits to the people. Finally, each person has to decide for him- or herself. Yet, Mochudi residents favour a cooperation and mutual tolerance of traditional and governmental institutions. On this basis, government could attain its objectives and communities could achieve what they aim for.⁷³⁰ In the case of Kgafela II, the Bakgatla community no longer received support by its Paramount Chief. Aside from his lack of recognition and his relocation, he only had restricted options to influence processes in favour of his community members.

Coming to North West, a representative of the Provincial House of Traditional Leaders has stated his opinion on how the stakeholders at local level were perceived. Reduced to its essence, people focus on the institutions that improve living conditions, while they still respect the moral meaning of traditional leadership. This must be understood as a general assessment, which is not necessarily valid for tribes like the Bakgatla-ba-Kgafela or the Bafokeng.

“People are aware that municipalities are the ones that have more responsibility. They are aware that we have shortcomings and I always put it in this way: sentimentally, people remember, it is out of remembrance that they respect us. But when it comes to utility, people will prefer the municipality because it is the one that brings water, electricity, it's the one that creates jobs. If there is a project that is supposed to be done, it comes via the municipality. Let's say repair of roads in the village. People see it that it is the municipality, it is not the chief. So it's unfair when it comes to that because people will have more respect for the municipality than the traditional leader.”⁷³¹

The leadership in Moruleng has invested a lot of effort to change this balance and to be proactive in generating development. As was stated in the previous chapter, the local municipality in Mogwase had to rely on the Bakgatla in certain cases and felt it had limited options compared to the leadership in Moruleng. In Mochudi, the local government did not receive negative assessments on its performance. The only

⁷³⁰ Interview with a young male community member, Mochudi, 19/07/2013 (INT 15-1).

⁷³¹ Interview House of Traditional Leaders, Mmabatho, 28/08/2013 (INT 31-1).

aspect that was seen critically was the extent of centralisation. With regard to performance, Nyalala Pilane also had many supporters who welcomed his efforts in Moruleng and surroundings. He had close followers in government, the House of Traditional Leaders and in the royal family as well as among community members.

The case of Kgafela II has demonstrated that formal recognition has little or no impact on the perceived legitimacy of a leader. His birth right was far more important, yet it went together with certain benefits, like resources and representation. In South Africa, Nyalala Pilane received protection from the courts, even though community and royal family members were in open opposition. The subsequent section will address the consequences of this form of support that was not based on an overall legitimate standing at local level. Similar to Oomen's findings in her research area in Sekhukhune⁷³², the legitimacy of traditional institutions did not necessarily translate into any form of material support or action in the case study. Community members in Kgatleng and Moses Kotane did not offer tribute payments or volunteer work and leaders had no means available to request it.

Support for a traditional leader and some sort of group identity had certain critical consequences in Kgatleng. Identification went along with a kind of stigmatism. Some community members raised concerns that Kgafela's behaviour would have negative effects on Mochudi and the Bakgatla if they were perceived as being government opponents. Moreover, certain opportunities to participate in decision-making, like sitting in the Ntlo ya Dikgosi, were wasted due to Kgafela's absence. One interviewee also spoke of megalomania and stubbornness. Others have criticised the standstill at local level, particularly in 2013 when several members of the tribal leadership were on suspension and local service delivery and jurisdiction were limited.⁷³³ Still, one key respondent from the community has admitted that Kgafela II has enjoyed broad support among the people in Kgatleng, even though he has done things wrong. He has stated that there were some elders who were not bold enough to advise Kgafela properly and to criticise his behaviour and policies. Before the dispute with government had escalated, many community members followed Kgafela

⁷³² See Oomen 2003.

⁷³³ Interviews conducted with two male respondents in Mochudi, 18/06/2013 and 04/07/2013 (INT 02-1, INT 07-1).

out of blind loyalty and accepted his activities. Moreover, those who were not in favour of him did not express their discontent publicly.

“Some of them you find are even used by underground government agencies to sow the seeds of discourse among the tribe. They go behind the elders' back to go and ask forgiveness from the government authorities without the consent of the tribe. And then you find that the tribe is always against such kind of things. Those guys follow their own agenda.”⁷³⁴

It is also interesting to have a look at how legitimate local government is perceived to be in Botswana and South Africa and how this translates into support. This was partly addressed in the initial paragraphs of the current section. In Botswana and in South Africa, the ruling party is able to generate and secure votes by strategically appealing to the rural and disadvantaged populations. In Botswana, the BDP used to distribute hand-outs during the election campaigns. Due to its history as a liberation party and its performance in the post-apartheid years, the ANC has retained a strong voter basis in South Africa. Against this background, many rural people were ignorant and tolerant towards the present shortcomings of the party and the limited performance of the local ANC councillors, as a community activist summarised.

“I will tell you why people are still voting for ANC. ANC introduced electricity. We never had electricity, even the rural people. ANC introduced the RDP houses in South Africa. It catered for the poor of the poorest to a larger extent. ANC created an atmosphere of influx control where people can move from rural to urban areas. And they are being catered for. Everybody is freely moving around in South Africa. ANC has also provided the grants to the women who have got children, fatherless children. And then increased the grants for the elderly people. So many things happened. Now under that cover it is very difficult for ordinary elderly people and women to neglect it because where on universe, in South Africa, have you found a woman having three children being given a grant for the three children to sustain their lives? That only is keeping people in touch with ANC. Despite the fact of its weaknesses, ANC is unable to address the issue of the land in South Africa. It's a problem to ANC. ANC is unable to address the issue of corruption, corruption in the

⁷³⁴ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

police, corruption in all departments. So very few people know and understand it. That is why it will keep on moving."⁷³⁵

Similar to the situation in Botswana, the ANC enjoys broad support in the rural areas despite people's dissatisfaction with local government representatives and politicians. The non-political part of the local municipality as service provider and point of contact was rated in a positive way. This was in contrast to the low support for local councillors. The majority of community members that were interviewed in 2013 assessed the work of their local councillors rather negatively. This also affects how legitimate they are rated to be. The performance of ward councillors was criticised by several local stakeholders as they are not present enough and do not give sufficient support to the communities they are accountable to. People complained about the lack of proper communication and the limited influence of councillors. In a more serious stance, several interviewees have pointed to the problem of corruption, self-interest and self-enrichment of local politicians at the expense of the communities.⁷³⁶ Due to the poor assessment of their performance and accountability, they lack grassroots legitimacy. Reasons that were named for the low performance and visibility of councillors included the relationship with traditional institutions and the lack of party support for individual candidates and office holders. The ruling ANC is facing several internal divisions which also harm the work of councillors and the local municipality. It is not so much a fight over policies but rather over positions at the local level.⁷³⁷

6.3.3 Power and authority in Botswana and South Africa

The introductory chapter has pointed to the historical and ongoing debate surrounding traditional leadership and democratic governance. Considering their apartheid heritage in South Africa, the future integration of traditional institutions seemed to be more than questionable. The research in Moruleng has revealed the differing views of followers and opponents. When asked about potential reasons why traditional institutions were still present in South Africa, one respondent stated that

⁷³⁵ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

⁷³⁶ Interview with a local government representative, Mogwase, 18/09/2013 (INT 43-1). Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1).

⁷³⁷ Interview with a ward councillor, Moruleng, 27/08/2013 (INT 28-1).

he was generally content with having the institution of traditional leadership at local level, as is the majority of the community. Moreover, it was also a government policy to approve these traditional structures. Still, he stated that many people from the community were dissatisfied with the present incumbent in Moruleng.⁷³⁸ This statement supports the research findings that were made in Botswana about traditional leadership per se and incumbent leaders like Kgafela II.

During the empirical research, the author asked a senior member of the royal family about the transformation period in the 1990s and the prospective role of traditional institutions. The respondent strongly emphasised that a marginalisation similar to Botswana would not have been possible in South Africa. Asked about the probability that traditional institutions would have been reduced to a merely ceremonial role, she stated:

“In whose land? Where? No, because South Africa was just South Africa. But who really possesses it? The tribes. And if a group of white people just comes and because they form a government and because they have got canons and guns, they could not kill us all and take our land. It could not have happened.”⁷³⁹

This statement mirrors the views expressed by Ntsebeza, who emphasises the decisive role of land in determining the position and influence of traditional institutions and in limiting the prospects of local government.⁷⁴⁰ Respondents from the local municipality have confirmed the dominant role of traditional institutions at local level because they still administer and control most of the land in the area. If the municipality plans to initiate projects or to construct something, the land has to be bought or leased from them.⁷⁴¹ On the contrary, the municipality has no similar mechanisms to exercise a certain form of control over traditional leadership.

The power base of traditional institutions is further supported by post-1994 legislation. Claassens strongly criticises the government’s policy of establishing a regulatory framework which outsources power and legal authority to traditional

⁷³⁸ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

⁷³⁹ Interview with a senior female member of the royal family, Moruleng, 09/09/2013 (INT 35-1).

⁷⁴⁰ Cf. Ntsebeza, Lungisile 2004: Democratic Decentralization and Traditional Authority: Dilemmas of Land Administration in Rural South Africa, in: European Journal of Development Research 16, No. 1, pp. 71-89.

⁷⁴¹ Interviews with a local government representative, Moruleng, 12/09/2013 (INT 39-1), and with a local government representative, Mogwase, 18/09/2013 (INT 43-1).

structures and reinforces the disempowerment of the rural population as tribal subjects within the former apartheid boundaries.⁷⁴² The power base of traditional institutions therefore rests significantly on favourable legislation and the exclusion of alternative institutions within their territory.

The rather powerful standing of traditional institutions and attempts to extend this even further were criticised in diverse contexts. Still, certain aspects that are discussed within the context of power of traditional institutions proved to be less important for the case of the Bakgatla-ba-Kgafela. In South Africa, traditional jurisdiction was supposed to be extended by the Traditional Courts Bill which was first presented in 2008 and then re-proposed in 2011. Interviews in the tribal headquarters of the Bakgatla-ba-Kgafela in Moruleng have revealed that the tribal leadership was not supportive of the further judicial empowerment of traditional institutions. In general, customary cases were mainly tried at village level. Nyalala Pilane was among the opponents of a further strengthening of traditional leaders in the traditional courts. During an interview on 12 September 2013, Pilane pointed to the insufficient qualifications of leaders to gain such far-reaching competences.⁷⁴³ Consequently, he would support the partial limitation of powers that were to be granted to traditional institutions.

Authors like Ntsebeza and Oomen have already pointed to the impact of history and resources in South Africa. Based on their local power basis, traditional institutions have become important local allies for government and politicians. Research findings from both study countries have confirmed their assessments. As a contrast to the situation in Botswana, where traditional institutions are rather dependent on government support, in South Africa they enjoy a much more favourable status with increased negotiating power compared to local government representatives at grassroots level. While the following statement describes the relations and performance of the local stakeholders, it also demonstrates the limited power base of some of the local government actors. Apart from control over land, access to communities was also dependent on the will of traditional institutions and the new

⁷⁴² Cf. Claassens 2014, pp. 766-769.

⁷⁴³ Interview with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

government had to compete with them over local influence. This has created particular forms of cooperation.

“Why is local government not working? It's because of the chiefs. Even if you are a municipality, whenever you enter into a village, you must first consult with the chief. Even if you are in the ruling party, you must consult with the chief. And if the chief is not in favour of you, I mean the chiefs they do have the powers, and the ANC they support the chiefs, 'cause the ANC is what it is because of the chiefs. So that is the problem.”⁷⁴⁴

This is a form of influence that used to prevail in Botswana as well. Traditional institutions are still involved in major projects and decisions but have no potential to seriously oppose them.

Apart from external factors and stakeholders, the authority and power of traditional institutions is also shaped by internal factors. The legitimacy and thus support from community members can overlap these additional aspects. When comparing the research results from Botswana and South Africa and analyses of other researchers, differences become obvious with regard to the study area. The strong support and overall legitimacy that Kgafela enjoys in Kgatleng stood in sharp contrast to the more controversial standing of Nyalala Pilane. Despite his formal derecognition, Kgafela was still viewed as legitimate leader of the Bakgatla-ba-Kgafela in Botswana. This was also reflected by the way in which other local government stakeholders have continued to treat him. Still, while his legitimate status underlined his authority it did not provide him with additional power.

The situation in South Africa was a different one. Nyalala Pilane is an influential leader who could exert authority and power with the help of the legal framework, resources and his personal network. Land rights and the related dependency have also strengthened his influence within the municipality. As an appointed regent, his rule was not based on birthright or some form of election and he could not benefit from legitimacy through genealogy. Due to this, his claim to leadership was questioned by many community members and activists and by Kgafela himself. This also meant that those people did not regard him as legitimate. Still, this did not limit

⁷⁴⁴ Interview with a male senior respondent, Mothlabe, 16/09/2013 (INT 44-1).

his authority or power. In addition, positive outcomes of his rule, like economic development, have increased his legitimacy and authority among his followers.

The previous chapters have already dealt with the different legal frameworks in Botswana and South Africa. That of Botswana proved to be less favourable for traditional institutions. With regard to the conflicting relations and Kgafela's ambitions to increase his influence, common law and the formal institutional set-up have proved to be dominant over customary law and birth right. Although he tried to increase his authority by challenging the Constitution and the superior position of central government, Kgafela finally had to give in. He had no means available to exert power against the will of anyone as his pre-independence resources and influence were curtailed by the legislative framework. Additionally, community members in Mochudi stressed that the conflict between Kgafela, other members of the tribal leadership and government needed to be resolved within the current legislative framework. The laws of Botswana form the guidelines and limits of dispute resolution and the actions of the stakeholders.⁷⁴⁵ In Mochudi, Kgafela's conflict with government and his refusal to subordinate himself to governmental control have created two different factions of supporters and opponents within the community, the royal family and the public in general. While some people have not issued any criticism and have remained loyal supporters due to his birthright and performance, others have requested that he abdicates chieftainship.⁷⁴⁶

Since 2013, divisions have evolved among members of the Bakgatla-ba-Kgafela in Kgatleng District between those who support Kgafela II and those who strive for a resolution of the leadership vacuum. During the interviews, community members raised their concerns about the division of supporters and critics that was becoming apparent in Mochudi. One of them reported on a kgotla meeting in August 2013 where members of the royal family publicly debated the fate of Kgafela and the Bakgatla. The dispute in Kgatleng even gained a political dimension in the meantime as some members of the royal family were politicians and took the government's side.⁷⁴⁷ Despite that, most people did not see a general issue with Kgafela's

⁷⁴⁵ Interview with a young male community member, Mochudi, 10/07/2013 (INT 10-1).

⁷⁴⁶ Two young female key respondents expressed their loyalty and ongoing support for Kgafela II as their Paramount Chief during an interview on 30 August 2013 (INT 45-1).

⁷⁴⁷ Interviews with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1), and with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

self-imposed exile and continued to support him in public. According to them, he could still rule them from South Africa, as this was just a reversal of the previous cross-border leadership.⁷⁴⁸ One of the respondents has expressed the belief that government has played an active role in trying to divide the members of the Bakgatla chiefdom. In his words, the government was using some people to create local opposition.

*“Some of the people who are against Kgafela want to benefit from government. There are so many ex-politicians from the ruling party who are tribal elders also, so they are the ones who are trying to do things in a way that is not good. And a lot of people are not happy with that.”*⁷⁴⁹

It is interesting to note that none of the respondents has voiced direct criticism of the government’s decision to withdraw official recognition from Kgafela II. Although people have confirmed their ongoing support for their leader, the government’s authority remained unquestioned. Kgafela’s continuous claim to paramountcy was actually an illegitimate form of rule in the eyes of government, but still tolerated by local government actors.⁷⁵⁰ The perceived neglect due to the conflict has surely limited Kgafela’s influence and has also endangered his loyalty and support among community members. In South Africa, Pilane displayed his power with the help of the courts and interdicts against opponents. Resistance was therefore expressed differently, e.g. by violent public protests and court cases.

In Kgatleng District, a male interviewee emphasised the limits of traditional leadership in comparison to government. While he sympathised with Kgafela II’s cause and regards him as an important leader of the Bakgatla, he also stated that in the end it was only government which can bring infrastructure and development to the community, something which sustainably changes peoples’ lives.⁷⁵¹ Thus, residents acknowledge the power of government at the local level. Another male resident has summarised government’s role and strength in the community: “[T]he

⁷⁴⁸ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

⁷⁴⁹ Interview INT 06-1.

⁷⁵⁰ Respondents from the District Commissioner’s office, the council, the land board and the VDC have confirmed this (INT 14-1, INT 17-1, INT 20-1, informal talks).

⁷⁵¹ Interview with a young male community member, Mochudi, 10/07/2013 (INT 10-1).

fact is the government owns everything. Or somehow the government is in control. There is no way you are under that government and do not want to hear to it."⁷⁵²

Although Kgafela and the tribal administration in Mochudi received far-reaching support from within the community, this did not alter their local standing. Generally, the rule of the leadership was viewed as legitimate form of authority. An extension of the authority at the expense of government was not supported. The legal framework was seen as the overall frame of traditional leadership. It remains doubtful whether community members would have seriously backed Kgafela's attempt to strengthen his position as many of them longed for traditional institutions to play an important role, but not necessarily in local governance.

A temporary display of traditional power that was exercised against the will of community members in Mochudi occurred after the revival of the initiation schools. This was the illegal and public flogging of ordinary people. Members of Kgafela's age regiment had started to move around Mochudi and sanction any misbehaviour, ostensibly to restore peace and order in certain areas. Kgafela's own role in these floggings involved him in a court case but was not clarified. At the very least, he had remained passive and ignorant about the incidents around his age regiment. Nevertheless, the public floggings had brought an element of fear to Mochudi. Additionally, even those people who normally had no interest in traditional leadership were suddenly affected and concerned.⁷⁵³

The case study of the Bakgatla-ba-Kgafela involves the very special cross-border component of the context that opens up new questions of legitimacy and power. In South Africa, the interviews have brought up diverse opinions about cross-border leadership and Kgafela's claim to rule. There were both supporters and opponents who either affirmed or denied his legitimacy and authority beyond Mochudi. The mutual dependency was already addressed. Without the assistance of the tribal administration in Moruleng, Kgafela was in a position to exert neither authority nor power. Moreover, the office of a Paramount Chief was not recognised in South Africa. Therefore, he had to rely on the recognition of Bakgatla history and traditions by the royal family and community members. The cross-border context and

⁷⁵² Interview with a male community member, Mochudi, 19/07/2013 (INT 15-1).

⁷⁵³ According to an interviewee, people in Mochudi were afraid to issue criticism or to talk about the flogging incidents because "[...] you [didn't] know who was listening to you at that time." The interview took place in Mochudi on 4 July 2013 (INT 07-1).

installation of a regency have also affected South Africa. Looking at the history of the Bakgatla-ba-Kgafela as one single tribe in the Transvaal and the translocation of its leadership to Mochudi, the legitimacy of Nyalala Pilane's rule in Moruleng cannot be claimed on the grounds of traditional authority or birthright. As long as Mochudi remains the senior royal house and thus exerts its respective influence, the leader in Moruleng remains dependent. Currently, Kgafela is fighting against Pilane in court and is trying to revoke his appointment. Therefore, Pilane's position is even more questionable.

It may be concluded that legitimacy and actual support of traditional had different effects in both Bakgatla communities. It temporarily outweighed the impact of Kgafela's derecognition but has not altered his overall status in Botswana. Pilane's case, on the other hand, has emphasised that additional factors could partly overshadow local support and could even empower a leader who was perceived as illegitimate by certain community members.

PART IV: THE ESSENCE AND MAJOR LESSONS OF THE INSTITUTIONAL PLURALISM

7 The implications of pluralistic structures in Southern Africa

7.1 Theoretical assumptions and local realities in Botswana and South Africa

Chapters 4, 5 and 6 have dealt with land and resource management, local governance and community dynamics in the context of the legal and institutional pluralism. They have addressed the far-reaching transformation that has taken place in both countries and have analysed the positive and negative consequences in selected fields. The present chapter will pay closer attention to the correlation between the theoretical frame and local findings of the case study and to the implications for governance and development in Southern Africa. This section will refer back to the guiding hypotheses presented in the initial chapter. The case study of the Bakgatla-ba-Kgafela in Botswana and in South Africa and its findings need to be treated with certain caution, as it does not necessarily reflect the situation in other traditional communities in both countries, particularly due to the cross-border context and mineral wealth of the chiefdom.

The first hypothesis looks at the impact of the legal framework and the formal set-up.

The formal institutional pluralism determines and limits the actual role and influence traditional institutions exert at the local level.

The research findings on the Bakgatla have confirmed the general validity of this hypothesis. It has been shown that the legal framework and the formal set-up provide the overall frame for the relevance and role of traditional institutions. Moreover, individual leadership personalities and qualities further shape the power balance at local level. In Botswana, community support and support from the royal family could not prevent Kgafela's degradation by the Ministry of Local Government. On the contrary, Nyalala Pilane and his traditional council were protected by the legal framework and by political allies. A strong support basis in the community was not necessarily directly related to the level of local influence. It has become clear that legislation on traditional leadership and institutional pluralism in South Africa has provided a beneficial environment for traditional institutions to maintain and increase their influence and local relevance – unlike in Botswana where the legal framework

has set clear limitations on the role traditional institutions can play locally. There are actually three aspects which need to be considered to examine the assumption given above. One point is the question of how much influence and power the framework offers to traditional institutions. The second aspect is the control government can and does exert. The third aspect refers to the distinction between formal and informal settings.

Chapter 3 introduced the different preconditions of the institutional pluralism and the integration of traditional institutions. Botswana offers them a limited field of action at local level. They are confined to a ceremonial, cultural, consultative and judicial role by the Bogosi Act. The clear provisions on local governance and on land administration further restrict their options to extend their functions. Moreover, the present legislation subjects them to central government control. Kgafela's case has exemplified the limits and potentials of the framework in Botswana. Although he had tried to increase his influence and oppose government and legislation with the support of his followers, his efforts were sanctioned by the line ministry. Finally, he could not increase his powers, he could not retain his job, the Bakgatla seat in the Ntlo ya Diskgosi remained vacant and he was derecognised. Moreover, Kgafela's deputy and other members of the tribal administration were suspended. He could only pursue his fight against the ministry due to the financial compensation provided by the Bakgatla in South Africa.

Irrespective of Kgafela's approach and his personality, the incidents have shown that traditional institutions are integrated into a neat framework which leaves them with limited options to play a major role in local governance. Central government has remained dominant throughout the confrontation in Kgatleng. It was demonstrated that certain day-to-day operations were still performed and that some of the tribal leaders even continued to work during their suspensions. This occurred without payment and in limited scope. In the case of Kgafela's deputy Bana Sekai, in the end the government not only refused to renew his contract, but also issued a formal interdiction to act as deputy. Based on the research results and reports, one has to conclude that in the case of the Bakgatla-ba-Kgafela the legal framework and institutional set-up determine the formal and actual role of traditional institutions, without leaving any significant scope for change.

The research findings from South Africa paint a different picture. The legal framework offers them a broad range of competencies at local level, with a tendency of further empowerment that is also backed by government policies. Additionally, central and local government exercise less control over traditional institutions. Due to the conducive framework and the enhanced preconditions in the Platinum Belt, the leadership of the Bakgatla has managed to expand its formal and actual position. In this case, it has happened at the expense of community support. In Moruleng, the Bakgatla have become active in service delivery and in promoting development, which actually lies within the scope of municipal responsibilities. Moreover, the traditional leadership not only plays a supportive role at local level, but also interacts directly with politicians and provincial government representatives. It needs to be added in this context that the traditional council had continued its work as a traditional authority without being elected, as the TLGFA requires. Finally, the royal family remains the sole authority to enforce accountability and to balance the powers of the leader.

While the preconditions and frameworks are different in Botswana and in South Africa, it has to be noted that the actual will of the community did not impact on the influence and role of traditional leadership. Support or lack of support did not increase or decrease the scope of action. In the case of the Bakgatla in Botswana, loyal community members could not prevent Kgafela's derecognition by government. In Moruleng, community opposition failed to hold traditional leaders to account, as government and jurisdiction have supported the traditional leadership. This also exemplifies that legitimacy was not a decisive criteria for the power base of traditional institutions.

The second hypothesis focuses on the community level.

The institutional pluralism and formal integration produce altered forms of traditional leadership which eradicate essential features of chieftdoms and endanger the cohesion of traditional communities.

The idea behind this hypothesis was to point to the significant transformation that is caused by the formal integration of traditional institutions. Other authors have shown how institutional pluralism tends to revoke traditional systems of checks and balances. Additionally, it alters the role that traditional institutions fulfil within traditional communities. This raises two important questions: How 'traditional' are

contemporary traditional institutions? And which role does the institutional pluralism play in this context? It is difficult to give a final response to these questions. Three different processes have affected the contemporary setting – internal dynamics and adaptations of traditional institutions which also include a voluntary form of Westernisation, historical influences and manipulations during colonialism and apartheid, and the impact of the present legal framework.

A comparison of anthropological reports on the Bakgatla-ba-Kgafela and the present dispensation in Botswana and South Africa produce the first discrepancies which were confirmed by the analysis in the previous chapters. Certain ‘traditional’ competences, structures and procedures were set aside. Moreover, the integration of traditional institutions in Botswana and South Africa constitute two opposite sides of a continuum. Marginalisation contrasts with empowerment and yet both forms appear to be a distorted version of traditional leadership. One essential form of transformation occurred in the relationship between traditional institutions and community members. Within the democratic setting, it is formally no longer a relationship between leaders and subjects.

In Botswana, traditional institutions have lost their legislative and executive powers. Instead, their cultural, ceremonial and judicial role was emphasised. Despite a limitation of their criminal jurisdiction, the majority of competences in those fields have remained. On the other hand, they have become civil servants who are constantly subjected to the control of central government, executed by the Ministry of Local Government, instead of independent leaders. Kgafela’s derecognition by the minister occurred without the involvement of the tribal leadership or the community. The whole case shows a problematic conflict between customary and common law. According to the customs and traditions of the Tswana, there cannot be two Paramount Chiefs at one time.⁷⁵⁴ To install a new Paramount Chief, Kgafela II first has to abdicate, which is unlikely to happen as he is a chief by birth. Instead, he continues to fight for his position. In the meantime, there can only be a regent acting on his behalf.

Due to their formal integration, traditional institutions are no longer solely accountable to the traditional community. On the contrary, the analysis of the

⁷⁵⁴ A Setswana proverb states that you cannot have two bulls in the same kraal.

previous hypothesis has shown that accountability towards central government outweighs accountability towards traditional communities. Government has gained influence to interfere into internal matters of traditional leadership by recognising, paying and supervising traditional institutions. In South Africa, this kind of control remains within the remit of the royal family.

The research findings have shown that traditional institutions in Botswana have lost essential instruments to cater for the well-being of the community, among them the administration and control over tribal land. Traditional leaders are paid by government and work as civil servants. Though successors are determined by customary law, new leaders need the formal recognition of the Minister of Local Government - who also has the power to suspend or derecognise them.

In South Africa, recent attempts by the line ministries aim to further empower traditional institutions in the field of land management and jurisdiction. This form of increased power extends their customary scope of action. Land that is bought by individuals or a group of buyers is registered in the name of the traditional leader. The cases of some of the Bakgatla villages have shown that the original buyers were stripped of their land rights and their land is now controlled by traditional leaders. The legal battle over the recognition of the Bakgatla CPA has demonstrated the formal approach to consider traditional leaders as representatives of communities, even against the will of community members.

Continuous external intervention which changes traditional structures and procedures, as well as the eradication of internal checks and balances, has affected traditional communities in Botswana and South Africa alike. The Bakgatla-ba-Kgafela communities have experienced fragmentation in both countries and within the cross-border context. In Kgatleng, Kgafela's conflict with government and his resettlement have created factions of supporters and opponents within the royal family and the community. In addition, his derecognition was not based on community requests but on the assessment of government. Further suspensions of members of the tribal leadership and the refusal to recognise Bana Sekai as Kgafela's deputy after the suspensions have created a leadership vacuum and standstill in Mochudi. In this case, both the legislative framework and the Minister's policies have contributed to dissent in the community.

Another area of strong interference is the civil servant status of traditional leaders. In Botswana, headmen who reach a certain age are employed on a contract which has to be renewed by government. In South Africa, the eldest son takes over after the death of his father. If the incumbent leader wants to retire, his son does not take over customarily. In the interim period, the brothers or uncles of the headman who wants to retire will act as regents. In the tradition of the Bakgatla, a son cannot lead whilst his father is still alive because there would be two chiefs otherwise.⁷⁵⁵

In South Africa, the ANC government intends to further empower traditional institutions in customary jurisdiction and allocation of communal land. Although legislation in both fields has been dismissed, a clear tendency is visible. Local citizens are increasingly confined to the role of subjects of traditional leaders in the rural areas. The consultative and consensual element of traditional leadership is vanishing as the present legal framework puts less weight on the accountability of traditional institutions. Backed by several Acts of Parliament, the tribal leadership acts on behalf of the community without consulting its members about major decisions on projects or the appropriation of tribal funds. Disputes and open resistance in Moruleng have shown the limited options the opposition has available to sanction the tribal leadership or to hold it accountable. Both in Botswana and in South Africa, the legal framework and the resulting local realities have threatened community cohesion among the Bakgatla-ba-Kgafela. In Mochudi, community members became increasingly impatient and sceptical about the long-term effects of the dispute between Kgafela II and the Ministry. This has divided the community into loyal followers of Kgafela and those who called for a regent or successor to replace him.

The third hypothesis addresses the limited inclusion of community members.

The institutional pluralism under the present legal frameworks increases the number of formal actors at local level without enhancing efficiency, consultation and participation of the community.

Theoretically, the institutional pluralism in Southern Africa increases the amount of institutions that serve communities and that bring governance, jurisdiction and service delivery down to the grassroots level. The effects of forum shopping were

⁷⁵⁵ Interview with a headman in Moruleng, 12/09/2013 (INT 37-1).

also mentioned. Taking the general assumption that people are getting more and better services and can enjoy a greater accessibility of contact points, the research findings have displayed mixed results. Moreover, looking at the way in which community members are encouraged and empowered to contribute to community affairs and to participate in decision-making, the results are less favourable than the multitude of actors might suggest. Certain research findings from South Africa have clearly refuted the general assumptions on the positive effects of multiple local governance actors.

The interviews that were conducted in Botswana have confirmed that the multiplicity of actors at local and grassroots level offers better access to decision-making and information. The previous chapters have shown at several stages that the kgotla remains a decisive forum in local governance that is frequented by different stakeholders and that attracts community members of all age groups and social backgrounds. It was discussed how the Bakgatla-ba-Kgafela leadership has integrated people, irrespective of gender, age or origin. In this regard, they have adopted a very inclusive approach. Government officials and other local government actors also use the kgotla assembly for announcements and discussions. Due to this, community members have a forum where they can express their needs and where they can get first-hand information. Additionally, the development committees have become important grassroots institutions where community members can engage and participate.

Coming to the more practical implications of the institutional pluralism for the Bakgatla, different shortcomings were introduced in the previous chapters. The limited powers of traditional institutions also limit the influence they can exert on government on behalf of community members. Moreover, several members of the leadership were derecognised or suspended during the time of the research. As a consequence of the conflicting situation in Kgatleng, people had got the impression that they were sanctioned rather than empowered. Considering a more national perspective, the Bakgatla-ba-Kgafela have excluded themselves from participating in national politics by declining to take the seat in the Ntlo ya Dikgosi. The limited capacity of traditional leaders with regard to governance has displayed an additional feature of the institutional pluralism. There are actually only few fields where community members have a real choice of the most favourable actor or institution.

The legal framework and the institutional set-up give a clear picture of who is responsible for administration, governance and jurisdiction.

The reasons for shortcomings in consultation and participation were different in South Africa. The arguments provided on the previous hypothesis also address the lower levels of consultation and participation in Moruleng due to the enhanced status of traditional leadership. Traditional institutions were not necessarily acting as intermediates and facilitators of local government, but have become autonomous actors with their own agenda. It was shown that a division has emerged between community members who benefit and those who were excluded from the strategies of the present tribal leadership. While some respondents have welcomed the projects implemented in and around Moruleng, others have criticised inequalities, the lack of consultation and participation and the autocratic suppression of local opposition. Among the Bakgatla-ba-Kgafela in South Africa, the consensual and consultative character of traditional leadership was set aside. Meetings, public debates and ways of informing community members were reduced. Critics felt marginalised, as any kind of public opposition was silenced by interdicts to hold meetings, by decisions of different courts and by the failure of traditional mechanisms of control. Furthermore, the royal family has split up into several factions of members supporting Nyalala Pilane, members wanting to replace him and secessionists.

Accordingly, the majority of respondents have expressed their frustration over the present state of affairs. They felt left out of decision-making, both by traditional leadership and by government. One additional problem in this context was the level of trust that community members had towards traditional institutions and towards local government representatives. Several interviewees complained that the formal actors were acting for their own benefit without caring about the needs of the local communities.

Concluding this discussion about the positive and negative aspects of the institutional pluralism in Botswana and South Africa, different pictures emerge for both countries. While traditional leadership was rather inclusive and consultative in Kgatleng, the district suffered from the low influence of traditional institutions and the dominant role of government. In South Africa, on the contrary, people complained about being marginalised by powerful traditional institutions and by weak councillors at grassroots level. Due to this, the research findings have clearly confirmed that the

increased number of actors and contact points has not necessarily led to greater efficiency of processes and services delivery or consultation and participation of community members.

The final hypothesis relates to practices and strategies that traditional institutions need to employ to complement the support they receive based on their formal recognition.

Traditional institutions strategically balance elements of modernisation and retraditionalisation to increase and maintain their legitimacy basis and authority at local level.

The previous chapters have demonstrated the challenges relating to democratisation and the transformation of local governance and jurisdiction in Botswana and South Africa. The Bakgatla leadership was set into a position where it was forced to find ways how to stay relevant in the communities. Although the intensity of certain measures and programmes has varied, the research has produced commonalities in the strategic approaches that were pursued in Botswana and South Africa. Interviews with stakeholders from Mochudi and Moruleng have revealed that the Bakgatla leadership in both localities actively promoted cultural and customary procedures. In Botswana, the re-introduction of the initiation schools and the adjoining media coverage were one of several examples where the leadership has used cultural activities as an instrument to secure community cohesion and support. Other events, like the coronation of Kgafela II, were celebrated with high-ranking guests and international media reports. Moreover, the cherished traditional choirs, dances and dresses were used to enforce identification with the chieftdom and its leadership.

Although to different degrees of success, both the leadership in Botswana and in South Africa have followed a strategic and partially joint approach that focussed on history and custom as central aspects. Similar to the role model of the Royal Bafokeng Nation, they have started to commercialise their culture and heritage. The examples presented in the chapters above included the modernisation of the Bakgatla museums, the restoration of historical buildings and sites, the branding of Bakgatla and the re-introduction of ceremonies and events. Nyalala Pilane has reported that they were even eager to rebuild a kgotla in Moruleng. Events and campaigns initiated by the leadership were usually accompanied by traditional choirs and dances. In addition, Pilane and Kgafela II both frequently wore traditional dress in public.

The traditional focus was received differently by different community members, as the research findings confirmed. Representatives of both traditional communities have pointed to the need to embrace all the relevant needs and age groups within the community. Younger community members rather emphasised development orientated expectations and functions of traditional institutions. Moral support based on culture and traditions would not transform into actual support or enhancement of leadership positions. The use of social media and online communication were examples of how the Bakgatla leadership has tried to appeal to younger people.

The Bakgatla in Moruleng have established the tribal administration as a major local employer and have created further employment opportunities in companies, mining operations and tourism. In the process of transforming the leadership and internal structures, retraditionalisation and revival of customary ceremonies and culture were only a second step after modernisation. Democratisation after 1994 has given new impetus to rethink future strategies and priorities. Similar to the situation in Mochudi, there were major differences between the traditional leadership in the centre and headmen in the villages. The strategic balancing of modern and traditional elements mainly occurred in Mochudi and in Moruleng, but not necessarily beyond.

Chapter 6.3 has shown that the leadership strategies of the Bakgatla in Botswana and South Africa have led to mixed results with regard to legitimacy and power. Leaders on both sides of the border have struggled to find the right balance. Nyalala Pilane was more successful in increasing his powers, while Kgafela II enjoyed a broad support basis that even endured government pressure. The former had a greater orientation towards politics and economy, while the latter was more community orientated.

7.2 The legal framework, the set-up and the research findings – A question of agency or structure?

The previous chapters have addressed the local and national impact of the legal framework and institutional set-up on the role of traditional institutions in Botswana and in South Africa. They have indicated how the frameworks have shaped community structures and local governance. With regard to traditional institutions, the analysis has primarily concentrated on the case study and its present leaders without paying a closer look at how their personal leadership qualities and

characteristics may have altered the particular role and influence of traditional institutions. A final assessment and evaluation of the differences between the legal and institutional framework and the local realities reveal arguments for both sides – the impact of certain forms of agency and of structure. In the case of the Bakgatla-ba-Kgafela, the leadership on both sides of the border illustrate the influence of strong leader figures with a clear long-term vision and willingness to defend their positions against opposition. In Botswana, this vision included strengthening the formal role and empowerment of traditional institutions as well as promoting culture and tradition. In South Africa, leadership visions promoted modernisation and a business-oriented focus that aimed at growth, economic diversification and development.

In general, the leadership qualities and strong personalities of Kgafela II and of Nyalala Pilane seem to have played a significant role in shaping their position and powers in Botswana and South Africa. The previous chapters have shown that pluralistic structures can theoretically offer different access points for communities and can enhance the opportunities for each local stakeholder. The actual scope of action of traditional institutions was thereby clearly determined by the legal framework. Nyalala Pilane was able to compensate a lack of popular support by being protected by legislation, jurisdiction and his broad political network. Kgafela II, on the other hand, has experienced the dominance of central government in sanctioning his form of opposition and criminal acts of further members of the tribal leadership. The derecognition and suspension of leaders in Kgatleng did not prevent them from dealing with basic day-to-day matters. Nevertheless, the empirical research in Mochudi has shown that the formal institutional pluralism has also limited the scope of the informal pluralism. Kgafela was not successful in challenging the legal framework and in extending the powers of traditional institutions. Additionally, the influence of national government has remained high through the District Commissioner and the Minister, although the District Council is still the central institution in the district. Moreover, it also became obvious that the majority of community members accepted the authority of government to derecognise Kgafela and to suspend tribal leaders.

Despite customary procedures, respondents have emphasised the dominance of the Constitution and legal framework in deciding matters of traditional leadership in Botswana. One female interviewee has shown that being a close follower of the

Paramount Chief did not prevent her from giving a neutral assessment on Kgafela's relocation instead of bearing the consequences of his court cases: *"My loyalty does not keep me from saying that I am disappointed that as a ruler and as a lawyer, Kgafela could not appear for court mentioned. That is very clear to me. There is no other way I can take it. He is wrong not to appear to his court dates."*⁷⁵⁶

In Botswana, legislation has established diverse instruments for government to control traditional institutions. One interviewee has pointed to the option of government to sanction misbehaviour or opposition in a discrete way. He referred to past incidents where Paramount Chiefs were sent abroad to do diplomatic work, like in the case of Linchwe II of the Bakgatla and of Seepapitso of the Bangwaketse. The interviewee sees the work as an ambassador as sort of exile whereby local upheaval and power struggles could be silenced in a diplomatic way.⁷⁵⁷ Moreover, Linchwe's work as President of the Customary Court of Appeal in Gaborone has increased his national reputation but has left the Bakgatla in Kgatleng under the leadership of a deputy.

Many politicians and local government representatives in Botswana are members of traditional communities and live under the leadership of traditional institutions. In case of local conflicts, the impact of the formal institutional pluralism can be observed. The legal framework and institutional set-up remain decisive elements in shaping local support and affiliations. Some members of government institutions in Kgatleng who also belong to the Bakgatla-ba-Kgafela have confirmed their support for the nation as a whole. One of them has stated that this double role of being a member of a chieftom and of government does not cause loyalty conflicts to him.

*"There is no conflict about me being a member of the Bakgatla and work. Because to be a Mokgatla, at the same time I'm a Motswana. I am patriotic to this country. I am patriotic to my clan also. That's my loyalty. My nationality as a Motswana comes before my tribe or my clan. I take my nationality forward. We are the nation, we are the Batswana. So I have to be loyal to the country, not to a certain clan. Because if I can do that, we can divide the country. This could end up in conflict and civil war."*⁷⁵⁸

⁷⁵⁶ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁷⁵⁷ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

⁷⁵⁸ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

In discussions about the role of the Ntlo ya Dikgosi, the majority of respondents has pointed to the lack of influence and decision-making power of the merely ceremonial and advisory institution. One of them has stated that even the district councils were better off because they could make their own bye-laws and policies. In the view of the respondent, the Ntlo ya Dikgosi was reduced to listen to what was said in parliament and the councils rather than put forward its own ideas, or make decisions. In practice, the institution did not even play an important advisory role as the stakeholders were not bound to follow any of its advices.⁷⁵⁹ In this case, the legal framework has introduced a body at national level that was supposed to represent traditional interests but that has remained a powerless institution that could not be influenced by strong leadership personalities.

The analysis has demonstrated that the amount of external control over traditional leadership in Botswana and South Africa differs. In Botswana, a clear subordination of traditional institutions under central government has surfaced after independence. The combination of limited competences, increased governmental control and resource dependency has required some kind of compensation at non-governmental level to secure the relevance of traditional institutions. In the case study in Kgatleng District, the majority of respondents have continuously supported Kgafela II against government resistance which has strengthened his local power basis. The legitimacy Kgafela II has enjoyed has outweighed his formal derecognition by the ministry. It becomes clear that an independent power basis can contribute to counterbalancing subordination and control.

In South Africa, on the contrary, a different image has evolved within the present dispensation. The legal framework has set aside most of the external and internal control mechanisms of traditional leadership. The recognition and empowerment by the ANC government has rendered traditional institutions partly independent of local support. In the case of the Bakgatla, revenues generated from mineral deposits have created a new dimension of unaccountability and domination and detachment from communities. The lack of legitimacy at community level was compensated by legislative and financial enhancement.

⁷⁵⁹ Interview INT 17-1.

During the research in Botswana, several people have pointed to the correlation of influence, power and politics with regard to Kgafela's and other leaders' endeavours to extend the role of traditional leadership. They have concluded that the only way to realise certain ambitions was to become active in politics. There are cases in Botswana's history where traditional leaders have relinquished their traditional offices to join politics.⁷⁶⁰ This was also suggested to Kgafela II. Several interviewees have said that he could be a successful candidate in Kgatleng district. As a politician, his arguments with government and the limited competences as a traditional leader would be resolved and he would gain much more influence on his behalf and for the benefit of his people.⁷⁶¹ The fact that the exercise of real power was linked to a non-traditional office indicates a greater role of structure in Botswana.

It is more difficult to differentiate between agency and structure in the context of the case study in South Africa. The previous chapters have confirmed the beneficial legal framework and set-up. It empowers and protects traditional institutions. The case study has also emphasised how Nyalala Pilane has established his form of rule, even against the opposition of other traditional leaders or community members. His statements on the reluctance to follow his long-term vision in the initial years indicate that agency played a decisive role in this case. In addition, Pilane has built up business operations that have extended the frame of traditional duties both within the context of tradition and the legal framework. The case study has shown that the tribal administration in Moruleng has become an active agent in development planning and implementation that receives support from the municipality, and not vice versa. This was also demonstrated by the different performance and influence of traditional institutions in North West. This was partly related to land ownership and mineral resources. On the contrary, one representative of the Regional House of Traditional Leaders has confirmed the extraordinary role and performance of leaders like Nyalala Pilane in successfully developing their communities. There were numerous examples of traditional leaders that had no influence or capacities, even with the favourable legislation.

⁷⁶⁰ Interviews with two male community members, Mochudi, 18/06/2013 and 26/06/2013 (INT 02-1, INT 04-1).

⁷⁶¹ Interviews conducted with a male community member, Mochudi, 04/07/2013 (INT 07-1), and with a Magistrate of the court in Mochudi, 11/07/2013 (INT 12-1).

Comparing the empirical results from Botswana and South Africa and weighing up the different perspectives, one has to conclude that structure has played a much greater role in Mochudi and agency was more decisive in Moruleng. Still, there are arguments for both sides. Nevertheless, Kgafela's poor performance and his derecognition and movement to South Africa have shown the limited role of agency in his case. On the other hand, Pilane has continued to defend his position against opposition from within the traditional community and the royal family in Mochudi and Moruleng. The field in which he and the traditional council have gained most influence was not in the field of traditional governance and jurisdiction but in land administration and business operations. This is also in line with the findings of Chapter 6.3 concerning the correlation between legitimacy and power.

7.3 Potential long-term impact on local development and rural transformation

Depending on the interview partner and the perspective of the respondent, the research findings and assessments were not unanimous about the potentials and outcomes of the institutional pluralism for rural transformation in Botswana. Key respondents from the communities and local government institutions have provided diverse statements on the status of development in Kgatleng district. While some of them have given a positive picture, others have pointed to an ongoing and long-term process and some have also spoken of a clear lack of development. Generally, two major explanations were given by the respondents: One side expressed the concern that the government sanctioned Kgafela's opposition by a withdrawal of development initiatives or simply neglect. Others have stated that the root cause of the lack of proper development in Mochudi and the district was duly political, as the President's party never had a stronghold in the district. Apart from that, the close proximity between Kgatleng and Gaborone was regarded as being both positive and negative for the district.

Coming to the first of the two arguments, people have pointed to Kgafela's role and to the government's responsibility for the present situation and the slow progress in local development. The previous chapters have demonstrated that the dispute between Kgafela II and the Ministry of Local Government has caused a form of stagnation in Mochudi that was kept alive by the way in which the leadership has

formally handled the dispute. Kgafela II was not looking for a deputy or representative in Mochudi, as this would have been seen as bowing to the pressure government was trying to exert on him. Government was also not giving in, and the dispute had become a matter of pride at the expense of the community.⁷⁶² Within this context, a potentially negative impact of the institutional pluralism on local development has become visible.

With regard to the public image and reputation of the Bakgatla, several respondents have expressed their fear about the long-term consequences for the district. Moreover, people have become increasingly worried that their support for Kgafela II would lead to a situation in which all of the Bakgatla community members would be perceived as being anti-government. The respondents were afraid that this would have negative consequences for the district and the willingness of government to engage and invest in the Bakgatla area. According to them, the district was already experiencing delays in the promotion of infrastructure, limited funding and reluctance from external actors to invest their money locally.⁷⁶³ The negative impact of Kgafela's relocation, the suspension of further traditional leaders and the absence of an acting Paramount Chief were also confirmed by a government representative. He has stated that this was a clear disadvantage for the community as people missed out on certain initiatives and government programmes.⁷⁶⁴

With regard to the second argument, people have stated that with BDP Members of Parliament in Kgatleng East and West, the development focus might have been shifted.⁷⁶⁵ One of the respondents has reported that the two constituencies in Kgatleng were lagging behind in progress and were not influential in the present context. According to him, the background of this assessment was the general tendency of the Bakgatla-ba-Kgafela to vote for members of opposition parties. The Members of Parliament from Kgatleng were therefore often overwhelmed by the majority of BDP politicians in Gaborone. The respondent has assumed that government was sanctioning this kind of opposition by withholding development

⁷⁶² Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁷⁶³ Interviews with a young male community member, Mochudi, 10/07/2013 (INT 10-1), and with a senior male community member, Mochudi, 18/06/2013 (INT 02-1).

⁷⁶⁴ Interview with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1). Also see Maleke on the impact of the tensions in Mochudi: Maleke, Lerato 2013: The arrested development of Mochudi, in: *The Monitor*, 4 February.

⁷⁶⁵ Interview with a male community member, Mochudi, 08/07/2013 (INT 09-1).

projects so that local people would eventually turn against their Members of Parliament.⁷⁶⁶ As long as the Bakgatla leadership in Moruleng was still taking care of them in financial terms, there were only minor difficulties in Mochudi to compensate this kind of neglect.⁷⁶⁷

One of the respondents of the District Council has brought in a different perception of the public image of Kgatleng. To him the pattern of always voting for opposition parties was a positive feature of democracy to him, and no sign of being anti-government.

“You see Botswana is a multiparty state. We are a democratic country. It's not healthy for democracy to have only one party in government. We need change. Me myself, I'm an advocate of change. We need to change government because one single party has ruled for a very long time. You see, when somebody ruled for a long time, power corrupts. From way back, Bakgatla have been progressive. They have been looking for someone who was advocating for their needs. They need a genuine independence. That's why they vote the opposition. But of course, they are not voting opposition alone. They have been voting for the ruling party. So this area, this district is unpredictable. You never know who is going to rule, who is going to win the elections. If you are on opposition, then you are not doing enough. They vote you out.”⁷⁶⁸

Taking this interpretation, the government was not initiating sufficient measures to uplift the district and the people were voicing their opposition at the ballot boxes. Apart from this reasoning, one respondent has stated that he could not understand why the local politicians were not successful in realising development in the area. There were national and district development plans and the district councillors were mandated to bring development initiatives to the local level.⁷⁶⁹

A representative of the district council has opined that local governance and decentralisation needed to be further promoted in Botswana. This required, inter alia, direct elections of the council chairpersons and mayors. Moreover, they needed to be given executive powers, the power to make their own budgets and collect or generate

⁷⁶⁶ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

⁷⁶⁷ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

⁷⁶⁸ Interview with a Kgatleng District Council representative, Mochudi, 22/07/2013 (INT 17-1).

⁷⁶⁹ Interview INT 09-1.

revenues for their districts. *“The problem here is that the powers are still centred at the ministry, which is not good for democracy. We need to enhance local governance, democracy.”*⁷⁷⁰ The combination of further decentralisation of powers and the existence of plural institutions was seen as something positive for the overall development of local government.

One element where the role of traditional institutions at local level seemed to be promising for increasing development potentials was the field of culture. Many respondents have pointed to the cultural opportunities in Botswana which need to be developed as an important source of local income. So far, the focus of tourism activities has mainly concentrated on nature and game. In the case of the Bakgatla, a form of cultural tourism would open new perspectives for Kgatleng and might attract well-educated people to stay or to return to Mochudi. Moreover, culturally centred activities could also enhance the role and contribution of traditional institutions.⁷⁷¹ With a long-term view, the involvement of traditional institutions in cultural tourism could promote economic development and employment opportunities in rural areas. Due to their legal position, traditional institutions would be interlinked with all the relevant stakeholders in the area. First attempts to explore this strategy were made with the local museum, cultural festivities and strategic media coverage of traditional ceremonies.

With regard to the case study in Botswana, it can be concluded that the performance of traditional institutions in rural transformation and development was mixed and rather limited. They have lost their previous administrative and executive capacities to initiate and implement projects. Moreover, the Bakgatla-ba-Kgafela in Mochudi have remained financially dependent on the Bakgatla in South Africa and on Botswana’s government. Kgafela II tried to use the existing potential of the institutional pluralism by extending the functions and competences of traditional institutions. He was looking for an active role for traditional institutions in governance and development planning. Due to the legal framework, the opposition by the government and his own approaches, he failed. Despite that, traditional institutions were enabled to take over important functions in the field of development planning and communication of local needs by participating in meetings and

⁷⁷⁰ Interview INT 17-1.

⁷⁷¹ Interview INT 09-1.

committees and by offering the public forum of the kgotla. Still, it needs to be emphasised that they were working as intermediaries that were supporting the work of government and non-governmental institutions in bringing infrastructure and development initiatives to the area. With regard to the government's perspective, pluralistic structures promote the dissemination of information and the inclusiveness of decision-making and development planning. Representatives could use the kgotla assemblies to discuss needs and requests and could rely on the consultative functions of traditional institutions. The case of the Bakgatla has shown the continuing cooperation and frequent exchange between the local government actors despite the conflicting relations between the leadership and central government.

Interviewees from the tribal administration, government and the community have expressed the wish to alter the role of traditional institutions and to use their potential in the villages and towns. Their prospective position remains closely linked to the benefits that they can offer to government and communities and the way they can address local development needs. One of the respondents has seen the future perspective of traditional institutions as challenging but still with good chances if they manage to become more active, engaged and self-reliant. Ideally, traditional institutions would need to get community based resource management and build or initiate their own facilities, like libraries and community halls. To depend less on government, traditional leaders ought to search for funding, raise money, network with other tribes from abroad and benchmark from others how they help themselves. Moreover, they would need to focus on community empowerment, job-creation and self-employment of the youths. Finally, traditional institutions would have to promote an environment in which they work hand in hand with government, so that government can complement their activities while also being relieved of certain tasks.⁷⁷² These suggestion and approaches are actually very similar to the actions that were taken by the Bakgatla-ba-Kgafela in Moruleng.

The chapters above have pointed to the huge backlog that existed in South Africa's rural areas with regard to democratisation, local government and development. Additionally, traditional institutions needed to be re-integrated into the newly developed local government system. While some, like the leaders of the Bafokeng and the Bakgatla communities, were able to benefit from the opportunities offered by

⁷⁷² Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

their land ownership and the legal framework, others have suffered from marginalisation and the disadvantaged status of their villages. A key respondent from the Provincial House of Traditional Leaders has therefore criticised that the present focus of government still tended to neglect the rural areas. In his view, the work of traditional institutions has remained important to cover villages and remote areas.

“Currently local government concentrates on municipalities. And I think what local government needs to do is to concentrate on rural areas where traditional leaders are. And the department, take for instance North West. North West is 64% rural and 36% urban. But how do you say it's local government, department of local government? It should be department of rural development or department of traditional affairs. That's the focus. And then a small amount of time you concentrate on municipalities. So there is a bias in terms of government emphasis. Government is emphasising the development of municipalities, compared to traditional leaders. So the Paramount Chief needs to be there where more effort is made by government that traditional areas will receive more attention.”⁷⁷³

While the respondent requests an approach that is orientated on local realities, his statement reveals a second and more problematic feature. An implementation of his suggestions would reaffirm the central role that traditional institutions used to play in the administration and governance of the homelands. Moreover, it would thwart the objectives to create a local government system that straddles across local boundaries.

In a similar vein, Mawere and Mayekiso have reasoned in favour of an enhanced role for traditional leadership in the communities. They have pointed to the checks and balances that a pluralistic system offers locally.

“We [...] argue that in South Africa today corruption is at its highest, negatively affecting development and economic growth both at community and national level due to the peripheral roles that traditional leadership has been granted to ensure equity and community development. [...] Chiefs are better placed to monitor government expenditure at local level and see to it that development happens to the benefit of the community as a whole.”⁷⁷⁴

⁷⁷³ Interview House of Traditional Leaders, Mmabatho, 28/08/2013 (INT 31-1).

⁷⁷⁴ Mawere/Mayekiso 2014, p. 7.

In the case of the Bakgatla-ba-Kgafela and other traditional communities in the mining areas of the Platinum Belt, this statement needs to be qualified. Traditional leaders have also become allies of politicians and were not necessarily focussed on the benefit of the whole community. Moreover, charges and convictions of corruption among the leadership have shown that they were actually part of the very same mechanisms they were supposed to oppose and prevent according to Mawere and Mayekiso. Despite some showcase projects, the policies of the traditional leadership have also become a hindrance to overall development in certain cases.

Unlike in Botswana, in Moses Kotane relations between traditional and governmental institutions were not marked by competition or confrontation. Communal conflicts and disputes were primarily about the administration and ownership of land or about existing and prospective mining deals. Further conflicts among the Bakgatla-ba-Kgafela were fought over the questions of social belonging and leadership. In the village of Motlhabe, the contested claim for secession and autonomous leadership has dominated discussions about local development. While one element of the struggle involved land claims, the other formed a lineage dispute to be recognised as Bakgatla-ba Kautlwale.⁷⁷⁵ This exemplifies that in comparison to Kgatleng District, conflicts were not inter-institutional but mostly between traditional leadership and community members. Within this context, it needs to be pointed out that the municipal council in Mogwase was an ANC council. As has been stated, the ANC has promoted the status of traditional leadership to secure its allies and voters in the rural areas. It remains questionable whether relations between traditional and local government institutions might differ in areas where the ruling party was not as favourable towards traditional leadership, like the ANC or the IFP in KwaZulu Natal⁷⁷⁶. A deviation of the supportive relationship between local government actors and traditional institutions in the area of the Bakgatla-ba-Kgafela was the lack of cooperation at grassroots level, which was actually not a case of conflict but of ignorance. This made it impossible to make use of synergetic effects in jointly identifying and addressing local needs.

⁷⁷⁵ Interview with a male senior respondent, Motlabe, 16/09/2013 (INT 44-1); meeting with two representatives of the LRC (Legal Resources Centre Cape Town) in Mogwase in September 2013 and in Cape Town in December 2013.

⁷⁷⁶ See Williams 2010 for the amicable relationship between traditional institutions and the IFP politicians.

In their strategic policies, the Bakgatla-ba-Kgafela in South Africa have put strong emphasis on fostering economic diversification and reducing dependence on platinum mining. In addition, they have implemented measures aimed at attracting external investment. The creation and extension of local infrastructure subsequently also promotes rural transformation. The Bakgatla vision and Master Plan strive for the establishment of a 'post-apartheid city' which is the most significant alteration that a rural village can undergo. Despite the ambitious development planning, outcomes were assessed differently by community members and activists, as the previous chapters have proven. Gapps and Mnwana's research focus is also the Bakgatla-ba-Kgafela. They have shown that the present legal framework and enhanced status of traditional institutions have not automatically led to the empowerment of communities in the rural mining areas and to their development-orientated transformation. On the contrary, people have only limited options to participate, to benefit from community property and to enforce their rights.

*"Rather than leading to the development of the mine-hosting villages [authors remark: the Bakgatla villages of Lesethleng, Motlhabe, Sefikile] investigated in this study, it has delivered land alienation, the radically unequal distribution of mining benefits and a near-universal perception of chiefly corruption. At the same time, post-apartheid legislation has further strengthened the role of the chiefs as tribal trustees, while the courts have generally upheld versions of 'custom' that emphasise these powers [...]."*⁷⁷⁷

In South Africa, the Bakgatla-ba-Kgafela, like other tribal groups in the Platinum Belt, have begun to take over certain sectors of service delivery which formally lie within the scope of the municipalities. They include the rendering of electricity, water and social development services and infrastructure provision to the communities. In contrast, those services are provided by central government in Botswana. In the field of service delivery, the Bakgatla were therefore directly contributing to local uplifting. Additionally, other projects by the Bakgatla leadership have created short- and long-term employment opportunities, both for labourers and for specialists, like the new shopping mall in Moruleng which opened in October

⁷⁷⁷ Capps, Gavin/Mnwana, Sonwabile 2015: 'No chief ever bought a piece of land!' Struggles over property, community and mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province, Working Paper 3 (SWOP: Society, Work & Development Institute), March, p. 36.

2013. According to interviews with representatives of the tribal headquarters and community members, people from the surrounding Bakgatla villages were employed during the construction phase and afterwards in the shops, management and maintenance of the facilities. Moreover, the mall has reduced the distances people had to travel to local amenities. This is one of the examples where the integration and adaptation of traditional institutions has brought positive and sustainable changes to the rural environment.

Further interviews have shown the negative aspects of this kind of job creation, as foreign labourers were attracted to the area and local residents were discriminated against. Criticism was voiced about the way in which programmes were implemented. An important point in this regard was the lack of education and skills training before the mall, the mines and manufactories were opened.⁷⁷⁸ Education was seen as a powerful instrument which enables people to actively contribute to the development of their own communities in the long run. It was therefore rated as a critical omission by the leadership not to invest enough money and efforts in the education of community members.⁷⁷⁹ Training might have led to higher qualified residents who could then have taken jobs in the mall and in the mines and who would spend their money locally. Instead of benefitting from new facilities and business activities, educated and specialised people from other parts of South Africa and beyond were coming to take the jobs. The increased competition with non-locals has led to several fights.⁷⁸⁰

This issue corroborates additional research. When people were asked about the most important challenges South Africa was facing that government should address, unemployment was indicated to be by far the most pressing problem.⁷⁸¹ These responses were in line with the answers provided by younger community members in the Bakgatla area in 2013. The initiatives of the traditional leadership were theoretically suitable to support government in this regard and to increase employment opportunities in the area, as the paragraph above has also indicated.

Coming to an assessment of the institutional pluralism and the performance of traditional leadership in Moruleng, criticism was voiced that traditional institutions

⁷⁷⁸ Interview with an employee at the tribal administration, Moruleng, 12/09/2013 (INT 38-1).

⁷⁷⁹ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

⁷⁸⁰ Interview with a senior male community member, Moruleng, 27/08/2013 (INT 30-1).

⁷⁸¹ Cf. Afrobarometer 2011: Round 5, pp. 52-54.

administer community wealth but that outcomes have remained underwhelming.⁷⁸² This also became obvious in a direct comparison of the Bakgatla territories in Botswana and in South Africa. Apart from certain prestigious areas and buildings, the majority of people in and around Moruleng were facing similar infrastructural standards and a development status that was not significantly different to the one in Kgatleng. Benefits from land ownership and mining were not trickling down to the Bakgatla villages. Moreover, the pace of transformation was slowed down by the behaviour of certain actors. Many community members have expressed their dissatisfaction with the opportunist behaviour of traditional leaders and of the ANC government. Both parties, they stated, were too interested in their personal benefit.⁷⁸³

Concluding this section, it can be said that the institutional pluralism theoretically increases development potentials in rural areas, like that of the Bakgatla. While government has created the overall frame like delivering basic infrastructure and housing, traditional leadership has complemented these efforts by communicating needs, by using land and resources to bring training and employment opportunities, attracting investments and by promoting economic diversification. On the contrary, mismanagement of funds, corruption and the lack of control mechanisms have become serious hindrances to rural development and transformation that restrict the potentials that were opened by the legal framework and institutional pluralism.

⁷⁸² Interview with a female representative of local government, Moruleng, 27/08/2013 (INT 28-1).

⁷⁸³ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

PART V: CONCLUSION, OUTLOOK AND PROSPECTS

8 Digression: Institutional pluralism and cross-border rule

Numerous chiefdoms in Africa share a history of cross-border rule, based on voluntary or forced separation, migration and colonial boundary demarcation.⁷⁸⁴ Other chiefdoms have experienced secession or final splits and have established autonomous entities in different countries. Those that have remained associated over time had to endure the challenges of establishing cross-border leadership and adapting to different legal and institutional frameworks. While some were able to uphold cohesion, others were confronted with periods of conflict and separation.⁷⁸⁵

In Southern Africa, the legal and institutional environment in the aftermath of democratisation has often caused contrasting socio-economic developments on each side of the borders. In most cases, the legal frameworks do not provide for cross-border rule or recognition of traditional leadership. The Bakgatla-ba-Kgafela chiefdom is only one among several examples in Southern Africa. Further Tswana chiefdoms that are situated in Botswana and South Africa are the Bahurutshe, Batlokwa, Babirwa, Bamalete and Barolong. Some of those in the immediate borderlands were divided after 1966 and community members had to cross fences or border posts.

The case of the chiefdom of the Barolong-boo-Ratshidi demonstrates one variant of the impact of cross-border division. The tribal headquarters of the Barolong used to be in Mafikeng, the former capital of Bechuanaland Protectorate. During colonialism, the chiefdom fell under the rule of the Cape Colony, Bechuanaland Protectorate, the Transvaal Republic and the Orange River Colony. After 1910, one part of the Barolong-boo-Ratshidi was assigned to the Bechuanaland Protectorate and the other part to the Union of South Africa.⁷⁸⁶ Since the 1940s, a representative based in Good Hope was in charge of the administration of the tribal units in the Protectorate. In 1965, Mafikeng was relinquished in favour of Gaborone. After independence, Botswana's government did not accept cross-border rule from a foreign tribal capital and requested the acting chief to decide upon remaining in

⁷⁸⁴ For the impact of colonial boundaries, see Griffiths, Ieuan 1986: *The Scramble for Africa: Inherited Political Boundaries*, in: *The Geographical Journal* 152, No. 2, pp. 204-216.

⁷⁸⁵ See Asiwaju (Ed.) 1985.

⁷⁸⁶ Cf. Matthew, Z. K. 1945: *A Short History of the Tshidi Barolong*, Fort Hare Papers, Vol. 1, June, pp. 9-28; Schapera 2004, 31-38.

Mafikeng and abandoning his jurisdiction over the Barolong in Botswana or resettling to Good Hope himself. The chief declined and sent his younger brother to Good Hope where he constituted a separate and independent chiefdom in 1970.⁷⁸⁷

Coming back to the Bakgatla-ba-Kgafela, the present chapter will shift the focus from the national perspective to the cross-border dimension of the institutional pluralism. Since 1869, the chiefdom has experienced almost 150 years of cross-border division and contrasting development of the administrative, legal, political and socio-economic environments in Botswana and South Africa. During the research in 2013, key respondents from the Bakgatla tribal leadership have confirmed the differing role and status of traditional institutions in Botswana and South Africa.⁷⁸⁸ The dual institutional pluralism in Botswana and in South Africa and its cross-border context have posed serious obstacles to the cohesion and unity of the Bakgatla-ba-Kgafela throughout the years. Nevertheless, the overall conditions have also facilitated beneficial approaches and strategies with local, national and cross-border impact.

In 1869, most members of the traditional community and representatives of each of the royal houses of the Bakgatla-ba-Kgafela left the Transvaal and resettled in the territory of the Bakwena.⁷⁸⁹ In those initial years, it remained unclear whether the Bakgatla-ba-Kgafela constituted an independent chiefdom, whether they had become a subject group of the chiefdom of the Bakwena or whether they were still subjects of the Boers in the Transvaal. Discussions to transfer the territory of the Bakgatla from the then Bechuanaland Protectorate to the Transvaal to unite the chiefdom under one single colonial administration were never realised. The establishment of the tribal reserves in 1899 marked the official recognition of the Bakgatla as an independent chiefdom and also meant an acknowledgement of their cross-border relations with the Bakgatla in the Transvaal.⁷⁹⁰

⁷⁸⁷ Cf. Comaroff/Roberts 1981, pp. 22-23; Comaroff, John L. 1980: Class and Culture in a Peasant Economy: The Transformation of Land Tenure in Barolong, in: *Journal of African Law* 24, No. 1, Land Reform in the Making: Tradition, Public Policy and Ideology in Botswana, pp. 86-92.

⁷⁸⁸ The interviews with male senior representatives of the Bakgatla took place in Mochudi on 27 June and 24 July 2013 (INT 05-1, INT 18-1) and in Moruleng on 12 September 2013 (INT 37-1, INT 40-1). Additionally, a member of the traditional council in Moruleng was interviewed on 22 August 2013 (INT 26-1).

⁷⁸⁹ Interview INT 40-1.

⁷⁹⁰ Cf. Makgala 2009, pp. 102-121; Schapera 1980, pp. 11-15.

The then Paramount Chief Linchwe I applied different strategies to adapt to the changing legal and administrative context and to restore and secure the cohesion of the Bakgatla-ba-Kgafela in Bechuanaland Protectorate and in the Transvaal. His approaches included economic and political strengthening of the chieftom by enlarging land and cattle holdings and by integrating refugees from other tribal groups.⁷⁹¹ Another important aspect was their commitment in the South African War, lasting from 1899 to 1902, where the British defeated the Boers and re-annexed the Transvaal.⁷⁹² As Linchwe I could not receive formal recognition as Paramount Chief of the Bakgatla in Kgatleng and in the Transvaal, he appointed his brother Ramono as regent to rule on his behalf in Moruleng, while he and his successors remained the formal heads of the chieftom.⁷⁹³ Nyalala Pilane was the first leader in Moruleng who was not an immediate descendant of the previous regent and who came from South Africa.

Under Tidimane Pilane's regency in Moruleng, Botswana and South Africa experienced far-reaching political changes that also affected the status of domestic and cross-border traditional leadership. While Paramount Chief Linchwe II lost most of the competencies and powers traditional institutions used to have in the Protectorate, Tidimane, on the other hand, experienced empowerment of so-called traditional authorities in Bophuthatswana and became actively involved in politics as party leader. The focus of the leadership in Mochudi and in Moruleng remained on domestic transformations, something which alienated people and policies from each other. Moreover, pass laws and the international border reduced the frequency of cross-border visits. Accordingly, the formerly close relations of the Bakgatla in Botswana and those in South Africa and the cohesion of the chieftom as a whole loosened.⁷⁹⁴

During the apartheid years, the Bakgatla-ba-Kgafela in Botswana were active opponents of the segregation policies in South Africa. Since the foundation of the ANC in 1912, several members of the tribal leadership in Mochudi have either been

⁷⁹¹ Cf. Morton 1985: Chiefs and Ethnic Unity, pp. 132-134.

⁷⁹² Cf. Morton 1985: Linchwe I and the Kgatla Campaign, pp. 169-191.

⁷⁹³ Cf. Schapera 1980, pp. 20-21.

⁷⁹⁴ For further information about the deterioration of the relations and the impact of legislation on border-crossing, see Morton 1985: Chiefs and Ethnic Unity.

members or affiliates of the organisation.⁷⁹⁵ Cantwell has analysed the resistance and activism of the Bakgatla-ba-Kgafela in Mochudi and of Linchwe II during those years. Linchwe played an important role in the supportive network of the liberation struggle by offering logistical assistance in transporting and storing ammunition and weapons for the ANC's underground machinery and support for political refugees and members of the liberation movement on their transit between Zambia and Tanzania and South Africa.⁷⁹⁶

In the case of the Bakgatla-ba-Kgafela, the different South African governments have recognised the cross-border character of the chiefdom. One respondent from the tribal leadership cited several examples whereby the Paramount Chief in Botswana was invited to participate in official activities and functions in South Africa. This occurred during the rule of the Boers, but also beyond. He referred to the period of former President Nelson Mandela's release from prison and the appointment of Nyalala Pilane as regent in Moruleng. According to him, Nelson Mandela ordered Linchwe II to come to South Africa and confirmed his support for the Paramount Chief in Botswana and the recognition of the cross-border status. In addition, he agreed on Nyalala Pilane as future regent in Moruleng. For further meetings with the President, a representative of the Paramount Chief in Botswana was sent to South Africa.⁷⁹⁷

The underlying problems of the cross-border relations and cohesion of the Bakgatla-ba-Kgafela came to the forefront in 1993. Under Tidimane Pilane, the Bakgatla traditional community in South Africa had gained a high degree of autonomy. The Paramount Chief in Botswana was still recognised as senior leader but had no decision-making powers or influence over traditional affairs in Moruleng.⁷⁹⁸ Due to the loosening ties, Tidimane Pilane had favoured a final separation of the two Bakgatla traditional communities and the formation of an independent chiefdom in South Africa, with an autonomous line of succession under the rule of his eldest son. In 1993, Tidimane was forced to retire as regent and in his stead, Linchwe II

⁷⁹⁵ Interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

⁷⁹⁶ Cf. Cantwell, Louisa 2015: Chiefly Power in a Frontline State: Kgosi Linchwe II, the Bakgatla and Botswana in the South African Liberation Struggle, 1948–1994, in: *Journal of Southern African Studies* 41, No. 2, pp. 255-272.

⁷⁹⁷ Interview INT 04-1.

⁷⁹⁸ Interview conducted with a male representative of the tribal headquarters and member of the traditional council in Moruleng, 22/08/2013 (INT 26-1).

appointed Nyalala Pilane as temporary successor. The emerging succession dispute finally became subject to a court decision. In the course of the rift between Linchwe II and Tidimane, both Bophuthatswana's President Lucas Mangope and Nelson Mandela confirmed the cross-border rule of the Bakgatla in Mochudi, the authority of Linchwe II and the appointment of Nyalala Pilane.⁷⁹⁹ This deviation in the choice of the regent in Moruleng has stirred further conflict since then. As has been indicated, Nyalala Pilane was not the direct offspring of Tidimane's family and his appointment against the will of other royal family members has led to local and cross-border friction.

Under Nyalala Pilane, the Bakgatla experienced a revival of cooperation and intertribal relations of Mochudi and Moruleng. As Pilane's status remained controversial within the royal family and the traditional community, he needed the ongoing support of the Paramount Chief in Botswana in order to stay in office. Fuelled by the growing mineral wealth of the Bakgatla in the 1990s and the potentials associated with it, Nyalala Pilane was confronted by several opposition factions. Moreover, he faced charges for corruption, fraud and misuse of tribal funds.⁸⁰⁰ His contested leadership position increased the relevance and support of Mochudi as the senior royal house. The tribal leadership in Mochudi, on the other hand, had started to receive salary payments and further financial contributions and had also gained access to the tribal funds in Moruleng.⁸⁰¹

Two community activists from South Africa have reported further consequences of the restored relations between the royal houses from a different perspective. After decades of quasi-independent rule by Tidimane Pilane, Linchwe's sudden engagement among the Bakgatla in South Africa was answered with scepticism by many community members, as he was not perceived as the actual leader in Moruleng and was criticised for being another self-interested actor competing for the mineral

⁷⁹⁹ Cf. *Pilane v. Linchwe and Another* 1995 (8) BCLR 932 (B).

⁸⁰⁰ Cf. Dibakwane, Winnie 2008: Bakgatla call for Molewa's removal, in: *Sowetan LIVE*, 23 June; Dibakwane, Winnie 2008: Jubilation after CHIEF convicted, in: *Sowetan LIVE*, 4 June. Accusations concerning potential misuse and mismanagement of funds as well as opposition against Nyalala Pilane's position as traditional leader of the Bakgatla in South Africa were brought forward and confirmed during several interviews conducted in Mochudi and in Moruleng and surrounding villages in August and September 2013.

⁸⁰¹ Interviews conducted with a male community member in Mochudi on 18 June 2013 (INT 02-1), and with a royal family member and male representative of the tribal administration in Mochudi on 27 June 2013 (INT 05-1).

wealth. In addition, his ongoing support of Nyalala Pilane against local opposition had limited downward accountability and control in South Africa.⁸⁰²

The long-term impact of apartheid on present cross-border relations and cohesion of the Bakgatla-ba-Kgafela was assessed differently. Nevertheless, contrasting legal frameworks, combined with low levels of contact and cross-border visits led to people to start to question Mochudi's claim to rule over Moruleng in the 1990s.⁸⁰³ Accordingly, community members have viewed the revival of cross-border leadership relations critically. One community activist has recounted his first personal encounter with Linchwe II in the 1990s. He had asked him about his reasons for coming to South Africa and exercising influence on community and leadership affairs across the border.

“After they have dethroned Chief Tidimane Pilane, Chief Linchwe immediately came on the front. I questioned him. I said ‘Chief Linchwe of Botswana, I honour you, I respect you, that you are a chief at Botswana. But I want to know who you are because I don't know you. I never met you.’ By then, I was 44 years. I asked him ‘For all these years when Chief Tidimane Pilane was the chief here at Bakgatla-ba-Kgafela: where have you been? We suffered, we enjoyed, we celebrated, we did all these things as Bakgatla-ba-Kgafela in South Africa. You were nowhere to be seen, you were nowhere on the scene. Where do you come from now?’ He could not answer.”⁸⁰⁴

Similar statements were also provided on Kgafela's leadership claim in South Africa. Generally, the majority of interviewees from all different socio-economic and professional backgrounds have pointed to the fact that the Bakgatla in Botswana had no influence or jurisdiction in South Africa due to the international borders and the sovereignty of the two countries.⁸⁰⁵ Botswana has not enacted formal legislation on cross-border governance of traditional institutions. With regard to the Bakgatla-ba-Kgafela, a government representative stated during one of the interviews that there was no problem in their cross-border rule and also in their cross-border transfer of

⁸⁰² Interviews conducted with community activists from Mothlabe on 16 September and from Kraalhoek on 18 September 2013 (INT 41-1, INT 44-1).

⁸⁰³ Interview with a male community member, Mochudi, 08/07/2013 (INT 09-1).

⁸⁰⁴ Interview INT 44-1.

⁸⁰⁵ Interview INT 41-1.

tribal funds. Yet, he emphasised that the tribal leadership has to make sure that they respect the laws of Botswana and of South Africa.⁸⁰⁶

With regard to tribal cohesion, the funeral of Linchwe II in 2007 was an important cross-border event which brought together Bakgatla from Botswana and South Africa. Another particular highlight was Kgafela's enthronement ceremony in the following year. It was the first time many in the audience were able to witness the coronation of a Paramount Chief. The tribal administration in Moruleng provided financial resources and logistical support for the event in Mochudi that was also attended by Bakgatla from South Africa.⁸⁰⁷

Based on the initial success of the cooperation of the leadership, Kgafela II made plans for new projects. They included initiatives which focused on the cultural and traditional relations of the Bakgatla and the revival of formerly common cross-border events. Under Linchwe II, the traditional communities opened specific Bakgatla-ba-Kgafela museums in Mochudi and Moruleng that were dedicated to the history and traditions of the chieftdom. These museums have started to cooperate with the aim to modernise and professionalise their exhibitions and programmes, to document indigenous knowledge systems, to restore ancient sites and to offer access to archives on the history and culture of the Bakgatla. While the project in Moruleng, the so-called Moruleng Cultural Precinct, was implemented successfully, the attempts in Mochudi were halted by Kgafela's relocation and the subsequent lack of funding due to the growing dispute.⁸⁰⁸ The initiation schools which Kgafela II had revived and reintroduced to Moruleng in 2009 were major cultural events that involved participants from Botswana and from South Africa. The previous revival of this rite of passage under Linchwe II in the 1970s remained limited to Mochudi. The *bogwera* and *bojale* ceremonies of Kgafela II also encompassed initiates from South Africa who were invited to Mochudi and who became members of mixed age

⁸⁰⁶ Interview with a male representative of the Department of Tribal Administration, Gaborone, 25/06/2013 (INT 03-1).

⁸⁰⁷ Cf. Gaotlhobogwe, Monkagedi 2008: Bakgatla in Court, in: *The Monitor* 25, No. 157, 27 October; Gaotlhobogwe, Monkagedi 2008: Platinum Glitters At Kgafela II Coronation, in: *The Monitor* 25, No. 140, 22 September.

⁸⁰⁸ Interviews conducted with the museum directors in Mochudi, 08/07/2013 (INT 09-1) and in Moruleng on 15 August 2013 (informal).

regiments. Moreover, the return of the initiates to South Africa was publicly celebrated in Moruleng.⁸⁰⁹

Another element strengthening the cross-border ties of the Bakgatla was the financial support of the Paramount Chief and the tribal administration in Botswana by the leadership in Moruleng that continued after 2008. It included monthly and ad hoc payments, inter alia for the construction of Kgafela's office building in Mochudi, and for the fees of his diverse court cases. The money was an essential form of support that helped Kgafela and his predecessors to remain financially independent from Botswana's government.⁸¹⁰

The cross-border relations between Nyalala Pilane and Kgafela II were close and cooperative until Kgafela's at first temporary and then permanent relocation and his subsequent claim to immediate leadership in Moruleng altered the balance between the two leaders. When Kgafela attempted to remove Nyalal Pilane from office to take over leadership in Moruleng, his sudden grab for power as a perceived outsider was received with opposition and confusion. Interviews with different representatives of the royal family have revealed that even before only few of them had given their consent to Kgafela's relocation. Different factions have emerged since then in Moruleng and the surrounding villages and the initiators have tried to mobilise people to fight for their cause.⁸¹¹ It needs to be taken into consideration that the factions within the royal family in Moruleng and the tense cross-border relations of the Bakgatla-ba-Kgafela were not exclusively related to Kgafela II but also to his father Linchwe II.⁸¹²

During the empirical research, community members and stakeholders were asked about the impact of geographical division and actual cross-border ties. An important factor which has challenged their relations were the mining operations and wealth from royalty payments in Moruleng. The increased autonomy of the Bakgatla-ba-Kgafela in South Africa has reduced incentives to closely cooperate with the tribal

⁸⁰⁹ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1). See also Setlhabi, Keletso Gaone 2014: *The Politics of Culture and the Transient Culture of Bojale: Bakgatla-Baga-Kgafela Women's Initiation in Botswana*, in: *Journal of Southern African Studies* 40, No. 3, pp. 459-477.

⁸¹⁰ This was confirmed by representatives of the Bakgatla leadership in Mochudi on 27 June and in Moruleng on 22 August 2013 (INT 05-1, INT 26-1).

⁸¹¹ Female interviewee, group interview in Segakwaneng, 09/09/2013 (INT 49-1); interview with Nyalala Pilane, Moruleng, 12/09/2013 (INT 40-1).

⁸¹² Interview with a male community member, Mochudi, 08/07/2013 (INT 09-1).

administration in Mochudi. Although the elders from Mochudi have tried to mediate and restore relations, it has gotten even worse with Kgafela's permanent resident status.⁸¹³

In Mochudi and in Moruleng, Kgafela claimed to solve leadership deficiencies among the Bakgatla in South Africa. In 2012, he attempted to sue Pilane and his council for corruption and misuse of tribal funds and ordered an audit of the tribal operations in Moruleng. The results shed a negative light on the tribal administration but also showed that huge payments were made for the benefit of Kgafela.⁸¹⁴ One of the interviewees in Mochudi assumes that the leadership in Moruleng welcomed the unique opportunity of local tensions and has provoked a cross-border conflict to maintain control over the financial assets and authority in South Africa.⁸¹⁵ As the office of the traditional leader in Moruleng was inseparably linked with the economic activities and the business wing of the Bakgatla, Nyalala Pilane was not willing to relinquish this prestigious position.⁸¹⁶ These incidents became the turning point of the dispute. Pilane and further members of the royal family in Moruleng started to turn against Kgafela II and withdrew their recognition of his leadership claim in South Africa.

A member of the traditional council in Moruleng has clearly summarised the limits of cross-border rule of the Bakgatla-ba-Kgafela and the background of the tensions. According to him, the legal framework does not provide for a Paramount Chief and for cross-border leadership. In addition, any form of cooperation of the Bakgatla depends on the consent of both parties. Therefore, cross-border relations are limited to respect and mutual support but are not based on actual leadership.

“During Tidimane's reign, there was no relationship. Only on certain instances that we would be calling. In terms of traditional leadership, we were not close. Nyalala Pilane was trying to build that relationship, also in terms of financial support. But Mochudi's attitude was to impose, it was taking advantage of the

⁸¹³ Interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

⁸¹⁴ Cf. Selathwa, Innocent 2013: Power struggle among Bakgatla-ba-Kgafela, in: The Botswana Gazette, 17 October.

⁸¹⁵ Interview with a male community member from Mochudi, Gaborone, 03/07/2013 (INT 06-1).

⁸¹⁶ Nyalala Pilane has stated that he would not mind handing over the traditional duties in Moruleng as the workload within the business sector was keeping him occupied and was more convenient to his personal skills and preferences. This statement was given during an interview in Moruleng on 12 September 2013 (INT 40-1).

respect that is afforded to them. He [author's remark: Kgafela II] wanted to impose on this side. But within the legal frameworks, it is not possible. He cannot dictate and remove kgosi from this side. Only on kgosi's acceptance, that he would. Or the royal family's ratification that he would. But administratively, there is no relation. We report to different masters."⁸¹⁷

Apart from the lacking history of close cross-border relations under Tidimane Pilane, members of the royal family and traditional council have brought forward different arguments as to why they have stopped supporting Kgafela or recognising his claims. One line of reasoning pointed to Kgafela's status in Botswana. His formal derecognition as Paramount Chief also nullified his claim over leadership in South Africa. Moreover, he was called a fugitive who had unlawfully left the country to escape legal sanctions in Botswana. Another group has taken a historical perspective. According to them, tribal unity of the Bakgatla-ba-Kgafela ended with the migration of 1869. Additionally, the seniority of this part of the royal family over the ones left behind in Moruleng had ceased to exist as well.⁸¹⁸

The results of the empirical research have demonstrated the limited nature of cross-border cohesion in terms of leadership and actual rule. As a representative of the royal council and the traditional council of the Bakgatla in Moruleng indicated, community members did not identify Kgafela II as their leader. Moreover, the changing balance between Mochudi and Moruleng has also fuelled the demise of formal relations.

"There is a lot of possibility that we split up in terms of authority. But in terms of blood relations, we can't divorce ourselves. There hasn't been any investigation into how united we are as a tribe. But I conducted meetings, I visited almost all of the 32 villages late last year and the sentiment was that Kgafela does not have a place here. They were actually saying to us: We as the

⁸¹⁷ Interview with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1).

⁸¹⁸ Interview with female representatives of the Bakgatla royal family, Moruleng, 11/09/2013 (INT 48-1). In addition, see Seitshiro 2012; Sikwane, Olebile 2016: Game of thrones in Pilanesberg: Three-way battle over Bakgatla chieftainship, in: Times LIVE, 10 May; Tau, Poloko 2016: Botswana 'fugitive' in fierce battle over the wealthy Bakgatla kingdom in SA, in: City Press, 29 June.

*Kgamanyane house have brought Kgafela in, we have allowed him in. [...] It's our baby, because he is a relative to us in the Kgamanyane house.*⁸¹⁹

Confronted with the research findings from Moruleng, a representative of the tribal leadership in Botswana was still confident that Mochudi would remain the senior royal house and tribal cohesion would be restored. He has emphasised that the Bakgatla-ba-Kgafela in South Africa never had a Paramount Chief and that there was no rightful heir across the border.⁸²⁰

Since the escalation of the dispute between Kgafela II and the tribal leadership, the conflicting parties have shifted their communication to the courts. The royal families on both sides of the border have tried to intervene and reach a compromise. Mutual visits by representatives of the tribal administrations were not successful in settling the dispute.⁸²¹ In 2013, cross-border relations of the Bakgatla-ba-Kgafela in Botswana and in South Africa were still based on the common origin in the Transvaal and shared culture of the traditional communities. Despite that, the tribal administration in Moruleng did not formally refer to a senior leader above Nyalala Pilane and thereby rejected the seniority of Mochudi in terms of actual leadership.⁸²²

With regard to the role of the North West Committee on Traditional Leadership Disputes and Claims, several interviewees in the tribal administration in Moruleng confirmed that the situation between Kgafela II and Nyalala Pilane in 2013 was not a leadership dispute per se which needed to be dealt with by a neutral outsider. The Committee was at first mandated to deal with a claim of Merafe Ramono, Tidimane Pilane's eldest son, and with a secession request. Moreover, its work was also the result of the unanimous agreement of the Bakgatla royal houses to determine an independent leader for South Africa.⁸²³ The whole process had already started in 2003. Kgafela had become a part of it without having an impact on the process and

⁸¹⁹ Interview with a member of the traditional council, Moruleng, 22/08/2013 (INT 26-1).

⁸²⁰ Interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

⁸²¹ This was confirmed during an interview with a male senior representative of the Bakgatla in Mochudi on 20 September 2013 (INT 05-2). He also stated that Kgafela II had insisted on pursuing his strategic course to remain in South Africa.

⁸²² See media statement by the spokesperson for the Pilane Royal Family on 30 May 2016 in their newsletter Bua Kgabo, 2nd edition 2016 [bbkta.net/web/wp-content/uploads/Bua-Kgabo-web-version.pdf> 05.05.2017].

⁸²³ This was confirmed by several members of the tribal leadership in Moruleng. Commission hearings where evidence was presented by the different houses of the royal family took place in Mogwase in 2013. Kgafela was absent during these meetings.

its outcomes in Moruleng. His sole sphere of influence was determined to be in Botswana.⁸²⁴ One key respondent has stated that the wish for independence and autonomous rule of the Bakgatla-ba-Kgafela was fuelled by the democratic transition in South Africa.⁸²⁵

The cross-border context and the resulting political and socio-economic dynamics, as well as the present leadership conflict, have also affected the traditional communities on both sides of the border and the respective legitimacy and power base of their leaders. The empirical research has addressed the two dimensions of the relations of the Bakgatla in Botswana and South Africa at community level: ties between the traditional communities and perception of cross-border leadership. In general, the majority of interviewees have pointed to the decisive role of family relationships which determine their affiliation to other Bakgatla. They do not necessarily see each other as members of the same tribe. Only few respondents, many of them of the older generation, mentioned their shared cultural and historical background. Despite the revival of events and projects, none of the respondents recognises cross-border rule as such and both traditional communities are seen as autonomous entities without significant intersections.

A male respondent from Mochudi provided a clear statement on his experience with the actual character of cross-border relations:

“To tell the truth, some of the people who tell you that they have relations to Moruleng are those who have relatives there. And to me who has no relatives or relations to anyone over there, I just take it to be the word of mouth accepted that we have another fellows there. I haven't visited that place frequently. We are maybe just connected in spirit and word as we are the Bakgatla too. The relations about we and them, I think, depends on whom you know there. Generally, because this whole thing is collective, we cannot single out.”⁸²⁶

⁸²⁴ Group interview three female respondents, Moruleng, 11/09/2013 (INT 48-1); interview with Nyalal Pilane, Moruleng, 12/09/2013 (INT 40-1).

⁸²⁵ Group interview INT 48-1.

⁸²⁶ Interview with a young male community member, Mochudi, 19/07/2013 (INT 15-1).

One of the female respondents from Mochudi confirmed this perception. Moreover, she also referred to ethnicity and the role of cultural events for Bakgatla cohesion:

“Cross-border relations are based on family ties but it's nothing that has to do with the ethnic identity. Me, we grew up all knowing that probably some of our relatives are in Moruleng or somewhere. But nothing that was societal. The only change that started [...] I think is just ordinary people were seeing when the initiations were revived. I don't know about the selection. But there were people from the same wards that we have in this side, are there. So usually about 100 people always came. What I couldn't understand was whether in the past when Kgosi Linchwe conducted the initiations, whether that was still there, where people were coming that side. But when they came, they just came for the initiation and then they went back. But apart from that it seems the ethnic identity and unity is somehow invented. Historically, it's there, we know it, but it's really not as practical unless just at the tribal leadership level.”⁸²⁷

A strong factor which limited cross-border affiliations was the identification with the respective country and its values. People in Botswana have experienced Seretse Khama's policy of eradicating tribalism and promoting national unity. A similar tendency of growing nationalism and a modified perception of tribal affiliations can be observed in South Africa where a new sense of unity and national pride has emerged since 1994. Despite the fact that the majority of the provinces in South Africa still cover the territories of the former ethnically defined homelands, the impact of the ethnic or tribal affiliation remained low. The sense of tradition and tribal belonging has decreased among the Bakgatla. During the research in 2013, the majority of respondents from the Moruleng area indicated that they were proud to be South Africans and that their national identity took precedent over ethnic or group affiliations. These tendencies were also confirmed by the Afrobarometer survey.⁸²⁸

Several younger interviewees in Moruleng and the surrounding villages stated that many customs and traditions of the Bakgatla have become of minor importance to them and that they perceive them as being old-fashioned and inappropriate within a

⁸²⁷ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁸²⁸ 79% of the respondents have supported the following statement: *“People should realise we are South Africans first, and stop thinking of themselves in terms of the group they belong to.”* Only 6% of the respondents would not agree with the statement. Cf. Afrobarometer 2011: Round 5, p. 80.

modern, democratic state.⁸²⁹ In Botswana, Tswana culture was promoted at each level and was also displayed publicly at national events and ceremonies. In South Africa, people came from heterogeneous backgrounds and only had their national identity as a common reference. Moreover, younger community members in particular have tried to fit more into a Western or international lifestyle and to go with modern times.⁸³⁰ The decreasing relevance of cultural ceremonies among younger residents was attributed to the changing environment after 1994.⁸³¹ This assessment stands in contrast to the more traditional character of the Bakgatla-ba-Kgafela in Kgatlang, where certain habits and values were still entrenched.⁸³² On the South African side of the border, several traditions and ceremonies were abandoned and local progress and development were promoted instead.⁸³³ Consequently, some of the younger interviewees have clearly stated that they were not interested in Bakgatla culture and in the revival of cultural events. They have rather criticised that one of the major events, the reintroduction of the initiation schools in Moruleng, has reinforced the feeling that both traditional communities share only few commonalities.⁸³⁴ Another respondent has confirmed the differences between Mochudi and Moruleng when it comes to culture and tradition.

“You know that the present leadership, because of its commitment to culture, that is why they have this cultural institution, the museum [author’s note: in Moruleng]. For the young kids to have a place where they can always refer to, where they can go. And that is why at the museum we have aligned ourselves with schools, because we thought that the generation they need to know where they come from and where they are going. And like in Mochudi, they have the initiation schools. And people are just excited about that in Mochudi. But here, it’s very few people who have been to the initiation schools. Perhaps more

⁸²⁹ This was expressed in interviews conducted in Moruleng and Greater Moruleng on 6 and 9 September 2013 (INT 34-1, INT 35-1).

⁸³⁰ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

⁸³¹ Interview with a younger male community member, Moruleng, 16/09/2013 (INT 42-1).

⁸³² One example in this regard are the main kgotla meetings in Mochudi with a strict dress code and seating order.

⁸³³ Nyalala Pilane has confirmed in an interview on 12 September 2013 that the focus of the Bakgatla leadership has been directed towards the promotion of development and economic diversification. Nevertheless, the initiatives like the Moruleng Cultural Precinct also stress the cultural and traditional dimension. In this context, it must be noted that there are also Tswana chiefdoms in Botswana that have abandoned certain cultural ceremonies and procedures.

⁸³⁴ This assessment was provided during a group interview in Moruleng on 6 September 2013 (INT 47-1).

women than men, more girls than boys. The men and the boys are not much into it. And it's not anything as primitive as it was. People are not circumcised there. If you want to, they refer you to a hospital. And most people, they do the circumcision on their own in their own hospitals. But the cultural thing around here, it's not as vibrant as it is in Mochudi."⁸³⁵

One woman who participated in one of the initiation schools of Kgafela II has confirmed that mainly elderly women and members of the royal family used to come from Moruleng to attend the ceremonies.⁸³⁶

The majority of the respondents in Mochudi had no particular opinion about belonging to a cross-border chiefdom. Respondents who had relatives in South Africa stated that they were only affiliated by family ties and that the shared tribal background played no role at all. Some emphasised that they originated from each other and were members of the same family.⁸³⁷ Only few respondents emphasised their shared history. Yet, the international border between them rendered it impossible to act as a single entity. One interviewee has admitted that bureaucratically and geographically other tribes were much closer to the Bakgatla in South Africa.⁸³⁸ The thoughts shared by one female respondent from Moruleng reveal some important discrepancies:

"I have been talking about it with people. How can you say that we and the people in Botswana are the same? They say that they in Mochudi can rule over us. But how can that be? There is a border between us and that border must mean something. If Mochudi wants to rule us, they have to cut the border down so that we can travel easily. We can't be ruled by someone who is jumping the fence. That can't be our place if we have to produce our passports. Over there, it's Bakgatla-ba-Kgafela. Here, it's Bakgatla in Moruleng. There are families but that's no problem. People were saying that Kgafela Kgafela was coming this side to rule over us. But I would say why? These are two different countries. We have to cross a border, we have to change money."⁸³⁹

⁸³⁵ Female interviewee, group interview in Segakwaneng, 09/09/2013 (INT 49-1).

⁸³⁶ Interview with a female respondent from Morwa, Gaborone, 20/09/2013 (INT 24-1).

⁸³⁷ Interview with a younger male community member, Moruleng, 16/09/2013 (INT 42-1).

⁸³⁸ Interview with a male community member, Moruleng, 06/09/2013 (INT 34-1).

⁸³⁹ Interview with a senior female community member, Moruleng, 27/08/2013 (INT 29-1).

This statement mentions one important aspect that aggravates relations. People who want to cross the border need to show their passports at the border ports and give reasons for the purpose of their visits. There are still lots of Bakgatla residents in South Africa without passports.

People in Moruleng and the surrounding villages issued differing opinions about Kgafela II during the interviews conducted in 2013. While some community members accepted him as the most senior leader of the Bakgatla and wanted him to rule in Moruleng, others wanted him to return back to Mochudi, both to solve his judicial issues and to stay over there. Some people were opponents of Nyalala Pilane and hoped that Kgafela would help to improve the local situation and resolve leadership issues. Several people have reported that Kgafela II felt threatened in South Africa and started to hide. According to him, opposing community members had blocked roads, entered the tribal offices and issued death threats against him.⁸⁴⁰ In December 2012, his presence at the annually Bakgatla AGM in the stadium disrupted the whole meeting and ended in a quarrel.⁸⁴¹

These mixed emotions expressed during the empirical research in South Africa have given a clear picture of the problematic side-effect of the cross-border context. Under these circumstances, many community members felt estranged by Kgafela's relocation and his claim to office. For several decades, allegiance had been exclusively paid to the senior traditional leader in Moruleng. Consequently, they have not identified Kgafela as their actual leader, neither during his rule in Kgatleng nor afterward. One interviewee voiced his criticism about how Kgafela II came to Moruleng to announce his plans to take over from Nyalala Pilane.

“When Kgafela came to South Africa, he also came to Kraalhoek. It was surprising the way Kgafela introduced himself to the Bakgatla in South Africa. The way he came here, it was surprising and very stupid. You wonder if he knew he was the chief of Bakgatla here, he came to Moruleng, we didn't know of his coming to Moruleng, nobody was informed about his coming. It was just the rumours. But from there, he took few of his relatives; he travelled with them, none of the tribal council at Moruleng travelled with him. Now he

⁸⁴⁰ Interview with Kgosi Bana Sekai, Tribal Administration, Mochudi, 24/07/2013 (INT 18-1); interviews with two male community members, Moruleng, 26/08/2013 and 16/09/2013 (INT 27-1, INT 42-1); female interviewee, group interview in Segakwaneng, 09/09/2013 (INT 49-1).

⁸⁴¹ Interview with a young male community member, Moruleng, 05/09/2013 (INT 33-1).

himself introduced himself. 'I am your chief. I am Kgafela Kgafela. I am coming to rule here in South Africa.' Where on earth can you do that?''⁸⁴²

Some interviewees strongly criticised his grab for power and expressed their disapproval of this sudden imposition. Other respondents have accused Kgafela of being another competitor for the control over the mineral assets of the Bakgatla in Moruleng. The cross-border financial transactions to the Bakgatla in Mochudi also met opposition, as the money could have been invested in development projects and for the benefit of the local communities.⁸⁴³ Another decisive argument brought forward by some of the key respondents was the actual context of cross-border rule. During a group interview, the participants emphasised that the recognition of a traditional leader required his permanent presence in the traditional community. Furthermore, he needed to be a citizen of the same country and must be subjected to the same constitution and legislation. Accordingly, a person who did not actively rule the traditional community had no right to claim leadership.⁸⁴⁴

A senior female interviewee favours the formal division of the leadership of the Bakgatla-ba-Kgafela in Botswana and South Africa as a logical consequence of the different histories, diverse legal frameworks and local affiliations.

"I think that would be best [author's remark: to establish a separate chieftdom, like Tidimane had attempted in the 1990s]. Remember even if we separate, we are not actually dividing or separating. We think people in a country must follow the Constitution of that country and be relevant to their place of living and that. And there is no way we are going to merge into the Constitution of Botswana. We are just South Africans and we want to remain South Africans. I lost family members in the liberation war. I fought for this liberation."'⁸⁴⁵

Interviewees from Mochudi have given similar reasons as to why they do not favour cross-border rule. When community members were asked about Kafela's relocation to Moruleng and the situation in Mochudi, a male interviewee has responded that the Bakgatla need a leader in each tribal administration. According to his assessment, it was not sufficient to have a chief who rules across the border and who is not present

⁸⁴² Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

⁸⁴³ These statements are based on interviews conducted with male respondents in Moruleng and Kraalhoek on 26 August and 18 September 2013 (INT 27-1, INT 44-1).

⁸⁴⁴ This group interview took place in Moruleng on 6 September 2013 (INT 34-1).

⁸⁴⁵ Interview with a senior female member of the royal family, Moruleng, 09/09/2013 (INT 35-1).

locally. Each tribal entity needs a leader who can meet local needs and take care of tribal affairs. As the Bakgatla belonged to one big family of common origin, the interviewee was not afraid that this kind of dualism might eventually lead to the establishment of two different tribes.⁸⁴⁶

The respondents who generally recognise the seniority of Mochudi have addressed another problematic aspect. In several interviews, community members complained about the lack of involvement of the Bakgatla-ba-Kgafela leaders from Botswana across the border, which is also reflected in the statement above. People were discontent that the leadership there only paid few visits to South Africa each year and that they did not come to Moruleng to help and solve matters when people were struggling. Moreover, the representatives rarely engaged with the communities during their visits and stayed in hotels outside the area. People got the impression that Mochudi did not care about their problems. Due to their perceived indifference, respondents stated that the leaders from Mochudi were not entitled to request benefits or to be included in decision-making.⁸⁴⁷ A statement given by an interviewee in a different context offers an indication that the community's perception of the leadership in Mochudi's indifference may be justified. According to a representative of the tribal leadership in Mochudi, they actually knew about the alleged and actual incidents of corruption in Moruleng and yet still remained passive.⁸⁴⁸

These considerations and statements show that in recent decades cross-border relations at community level have been quasi non-existent. The respective legal frameworks and overall developments in Botswana and South Africa have had a major impact on people's perception of the Bakgatla traditional communities. Only a small minority of the community members would recognise some form of cross-border leadership. Affiliation and actual exchange of people were limited to the sphere of family relations. With the exception of the apartheid years under Tidimane Pilane, the respective individual leaders on both sides of the border have successfully pursued strategies to promote tribal unity which were backed by diverse motives, like ethnic affiliations, the desire to increase power and to secure access to resources. In

⁸⁴⁶ Interviews with two male community members, Mochudi, 10/07/2013 and 12/07/2013 (INT 10-1, INT 13-1).

⁸⁴⁷ Interview with a male community member, Moruleng, 26/08/2013 (INT 27-1). Group interview with five young male respondents, Moruleng, 06/09/2013 (INT 47-1).

⁸⁴⁸ Interview with a senior representative of the tribal administration, Mochudi, 27/05/2013 (INT 04-1).

recent decades, the previous mutual dependence of both tribal entities was replaced by an individual and divergent development in each country which has caused a clear power shift in both economic and political terms.

9 Concluding remarks

The research findings have offered valuable insights into the background and effects of the institutional pluralism in Southern Africa. The analysis has shown that local stakeholders and communities have faced both challenges and positive consequences of a pluralistic set-up. Results from Botswana and South Africa have given an impression of the impact of the formal framework and the role of leadership personalities. While some of the findings were related to the case study of the Bakgatla-ba-Kgafela, others also gave an indication of the general situation in each country. This final chapter provides a brief summary of the research findings and immediate and future developments with regard to the institutional pluralism and the particular case of the Bakgatla-ba-Kgafela.

In South Africa, the initial trend to limit the powers of traditional institutions in the post-apartheid period was reversed. Instead, a clear policy to strengthen their role in the administration of justice, communal land management and mineral and natural resources has surfaced in the past decade. This was also confirmed by the research findings in Moses Kotane. With the introduction of traditional councils in the TLGFA in 2003, traditional institutions were given far-reaching mandates in rural local governance and development planning within the former apartheid boundaries. While traditional leadership in Botswana has suffered from its increasing formal marginalisation apart from in culture and jurisdiction, traditional institutions in South Africa have experienced empowerment beyond their traditional scope of authority and under the protection of government and the courts. While claiming to preserve traditional forms of custom and customary law, traditional leaders and government were rather producing new constructs which lacked mechanisms of checks and balances. Within the present dispensation, rural communities lack significant influence on local affairs and remain without instruments to enforce accountability and responsiveness.

In the Platinum Belt, partnerships between communities and mining operations were often administered and controlled by traditional leaders and their councils, leaving the local population with limited participation and decision-making powers. In the Bakgatla area and other villages in the Bushveld region, traditional institutions were seen as intermediaries and spokespersons of the mining communities, administrators of tribal funds and contracting parties for mining deals and shares. The present

constellation has produced distorted forms of representation and accountability, as the analysis has revealed. Moreover, corruption and a lack of transparency have excluded traditional communities from benefitting from mining assets. Although the legal framework has introduced community controlled resource management, the actual outcomes demonstrate new struggles and marginalisation of local communities. Consequently, the institutional pluralism has brought restricted development opportunities to the rural areas and the constant empowerment of traditional institutions is even going to limit democratic local governance. With regard to communities, research in South Africa has revealed critical outcomes of the institutional pluralism. The worst case scenario occurs when both local government representatives and traditional institutions each follow their own agenda and act in their own interest at the expense of communities and people. This is most severe in case of power abuse and/or misuse of funds.

A further research result relates to how people viewed the different local stakeholders and their mutual relations. The information provided in Botswana and South Africa in 2013 has shown that respondents do not consider local government and traditional institutions to be completely different governance entities. According to the research results, they are seen as parts of the same democratic system and support for both forms of governance is not mutually exclusive. People who approve or disapprove of the performance of democratic local governance do not automatically support or dislike traditional leadership. Moreover, while there was a clear differentiation between national government on the one hand and local government and traditional leadership on the other hand, the boundaries between the two spheres have become more blurred at local level.

Generally, one has to bear in mind that many residents in the rural areas were not familiar with the provisions of the legal framework and the formal duties that were assigned to their representatives. They measure the performance of local stakeholders according to their own needs and expectations. Due to this, responses provided during the empirical research need to be treated with certain caution. Some people were simply spreading or repeating rumours and some were providing wrong answers because they were not sufficiently informed. Nevertheless, the answers gave a clear indication on the general perception of community members and formal stakeholders and their levels of satisfaction. Some of the responses about the responsibilities and accountability of elected councillors have shown that civic

education on the role of local government agents and the modes of interaction needed to be strengthened.

Certain arguments and claims by critics like Mamdani or Ntsebeza need to be relativized in the light of existing surveys and the outcomes of the empirical research. Both authors have emphasised the decisive impact of resources and government support on the role that traditional institutions can play locally. In the case of Botswana, neither the withdrawal of governmental recognition of Kgafela II nor the fact that traditional institutions did not control any resources has limited compliance and support in the communities. In South Africa, legislation has promoted the role of traditional institutions. Among the Bakgatla-ba-Kgafela, mineral resources and government protection have created a favourable environment for traditional institutions to become such powerful players. Still, this influence was actually not prevalent in traditional governance or jurisdiction but in the economic and political spheres. Recent bills have shown a clear tendency to institute traditional leaders as central representatives of local communities.

One example was the Traditional and Khoisan Leadership Bill of 2015 that was supposed to repeal the TLGFA of 2003. It displayed the problematic policy trend of empowering traditional leaders which is in line with the contested Traditional Courts Bill of 2012. The bill picked up on the critical understanding of the indigenous nature of traditional leadership which had shaped the legal frameworks of the colonial and apartheid periods. The Traditional and Khoisan Leadership Bill re-introduces former homeland structures and territorial boundaries as people are grouped into tribes and are geographically subjected. Traditional leaders remain the executive heads of communities and community members are downgraded to a status of subjects of traditional institutions. Objections against this kind of revival were already issued during the public hearings on the Traditional Courts Bill in 2008 and in 2012.

With regard to the engagement of traditional institutions in mining and other community activities, the bill enhances their role as representatives of the community.

“24. (2) Kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils may enter into partnerships and agreements with each other, and with—
(a) municipalities;

- (b) *government departments; and*
(c) *any other person, body or institution.*⁸⁴⁹

Practically, traditional institutions can enter into any contract. Moreover, the bill demands that any partnership must be beneficial to the respective community, although it does not contain any provisions on the consultation or involvement of communities in the decision-making process. This is not in line with further legislation like the Interim Protection of Informal Land Rights Act, which stipulates that people with informal land rights need to be consulted and need to give their consent before government or any mining company can use the land. With the 2015 Traditional and Khoisan Leadership Bill, it is the traditional council that has the final say on access to communal land. This goes together with the intended weakening of CPAs through the Communal Land Tenure Policy (CTLTP) that was introduced in 2013. Nevertheless, the decision of the Constitutional Court to grant the Bakgatla-ba-Kgafela Communal Property Association the right to administer and control land that was restituted to the community represents a major success for community control of land and a new development. In addition, the decision of the court seems to have initiated a new policy trend. In 2017, the Ministry of Rural Development and Land Reform has published an Amendment Bill that strengthens the role and internal constitution of CPAs and the mechanisms for communities to determine their land administration institution.⁸⁵⁰ Furthermore, a new Communal Land Tenure Bill that is planned to be published in 2017 also intends to reverse the empowerment of traditional institutions. Moreover, the North West High Court is working on an additional claim from the Bakgatla community of Lesetlheng that should be decided in the first half of 2017. The community went to court to claim ownership of its land and to stop mining operations that endanger its livelihoods without benefitting the community.⁸⁵¹

One of the most contested pieces of legislation, the regulation of traditional courts, has also undergone significant transformation. The Traditional Courts Bill⁸⁵² was

⁸⁴⁹ Traditional and Khoisan Leadership Bill of 2015.

⁸⁵⁰ See Communal Property Associations Amendment Bill B12-2017 [http://www.gov.za/sites/www.gov.za/files/B12-2017_communal_property_associations_a.pdf] 19.07.2017].

⁸⁵¹ Cf. Torerai, Elfes 2016: Community awaits court ruling on their livelihoods, in: The New Age Online, 5 December.

⁸⁵² [B1-2017]

introduced at the beginning of 2017 and has altered some of the most debated provisions based on the interventions that were made on the bills of 2008 and 2012. The new bill allows people to opt out and not to have their cases dealt with at the traditional court. Moreover, it grants the option to appeal or to escalate cases to the High Court.⁸⁵³

People have issued diverse statements and criticism of the institutional pluralism. Those who benefit from the present dispensation long for a strong role for traditional leadership. On the contrary, people who were frustrated and who felt left out were looking for instruments to limit the competences of traditional institutions. In comparison, traditional leadership seemed to be further integrated and regulated in Botswana as a supporting part of local government. It proved to be much more independent in South Africa, where there are diverse forms of traditional leadership ranging from poor and rather powerless leaders to powerful ones who control large communities and resources. Education levels and political alignment proved to be increasing factors in how they are judged and in how successful they are. As a positive contribution, traditional institutions could work as complementing agents who compensate for government shortcomings in service delivery and development planning. In certain cases, it was government that remained rather toothless and had to compete with traditional leadership. A special form of authority and power thereby exists in the mining communities of the Platinum Belt.

In Botswana, Kgafela's example has shown a possible fate that may await strong leadership figures when they try to compete and interfere with government. In the long run, opposition against government and marginalisation within and as a consequence of the institutional pluralism endangers unified local support. Respondents in Botswana gave a different assessment on the desired future role of traditional institutions, as people favoured giving them increased competences and functions. Assessing the basis of the support and relevance of traditional institutions, a core factor seems to be their role in dispute resolution and stabilisation of community order. In contrast to these statements, the majority of people interviewed in Kgatleng had never been at the customary court or had any disputes treated outside their families. Many of the key respondents in Kgatleng concluded that traditional institutions should either continue or should be enhanced to play a

⁸⁵³ Cf. Sections 4 and 11 of the Bill.

significant role in the communities. They were still regarded as valuable local agents, although in different contexts.

Despite their differing environments and legal frameworks, Bakgatla leaders in Botswana and South Africa have pursued similar strategies over the past decades. Culture was viewed as important and a binding factor for legitimacy and support that unites local communities. In addition, development and transformation have become essential long-term objectives that define the relevance of local actors. The combined approach offers enhanced perspectives as leaders can address different stakeholders. They can appeal to older community members by emphasising heritage, culture and common values. Furthermore, leaders can reach younger people by laying an additional focus on performance, local development and job creation. In general, community members have welcomed enhanced service delivery, social uplifting and new future perspectives in their areas. This goes in hand with a strong resource dependency, as the case of the Bakgatla-ba-Kgafela has confirmed. In Botswana, Kgafela II has experienced the tight scope of the legal framework in which a political career seemed to be more promising with regard to influence. In South Africa, the success of the Bakgatla was closely related to land and resources. Other examples from North West also confirmed the decisive role of financial independence for the relevance of traditional institutions.

With regard to the future prospects of the in-depth case study, the Bakgatla-ba-Kgafela in Botswana and in South Africa were in the middle of a phase of upheaval and transition during the empirical research in 2013. While the situation was still pending in 2014 and most of 2015, major decisions were made at the end of the year 2016. The developments around the Bakgatla-ba-Kgafela and the role of traditional institutions will have to be captured by further analysis. Nevertheless, this section aims to give a brief outlook on major tendencies in this context and the leadership question. Up to 2017, Kgafela II could not regain his physical leadership over the Bakgatla-ba-Kgafela in Botswana and in South Africa. Despite of the legal struggles that tackled the leadership claims and opposition to the rule of the tribal administration in Moruleng, Nyalala Pilane was elected Deputy President of CONTRALESA in 2013. This emphasises the powerful network and the formal support that Pilane enjoys outside of Moses Kotane.

The North West committee of the Commission on Traditional Leadership Claims and Disputes took a long time to finalise its fact finding mission. The so-called Mafereka Commission has only delivered its final report in December 2015. Supra Mahumapelo, Premier of the North West province since 2014, has announced the outcomes of the inquiry. In line with the Traditional Leadership and Governance Framework Act, the commission and the provincial committees are only entitled to produce recommendations. The report on the Bakgatla entails far-reaching conclusions on the leadership claims in Moruleng which also affect the leadership in Mochudi. The claims of Mmuthi Pilane from the Mothlabe community were decided in favour of him. After its investigations, the North West Committee has concluded that both Nyalala Pilane and Kgafela II were not legitimate rulers in Moruleng. In line with Bakgatla-ba-Kgafela customs, the legal framework and the results of the hearings and the research, Merafe Pilane, Tidimane's son, was identified as the rightful successor to chieftainship.⁸⁵⁴ The Committee has also dealt with the cross-border context of the Bakgatla-ba-Kgafela. Due to Kgafela's derecognition by government, the Committee has nullified his claim to be recognised as Paramount Chief in South Africa. Moreover, the legal framework only provides for kings and queens or senior traditional leaders, but does not recognise any paramountcy. Additionally, the Commission has stated that Kgafela II is not entitled to appoint a leader in Moruleng.⁸⁵⁵ According to the present legislation in South Africa, the royal family plays a crucial role in determining the person who is supposed to lead the chieftdom. As the recommendations of the committee are not binding, the Premier needs to proclaim his decision and the royal family has to enter into consultation about the recommendations. The Premier has rejected the report in March 2016 because the Bakgatla-ba-Kgafela of Botswana were side-lined and not included in the work of the Commission.⁸⁵⁶ In 2016, a subsequent commission, the Maluleke Commission⁸⁵⁷, was established by the Premier of North West, following Kgafela's attempt to install David Mpule Pheto to succeed Nyalala Pilane in September.

⁸⁵⁴ See Thamm, Marianne 2016: Traditional leader deposed: A massive victory for North West Bakgatla-Ba-Kgafela community, in: Daily Maverick, 14 January 2016.

⁸⁵⁵ See Kraai, Zolani/Pheage, Tefo 2016: Kgafela, Pilane lose big, in: Mmegi Online, 15 January 2016.

⁸⁵⁶ See Pheage, Tefo 2016: Kgafela Smiles As Premier Rejects Commission Report, in: The Monitor, 7 March.

⁸⁵⁷ See Proclamation 46 of 2016, published in the Provincial Gazette, Extraordinary, No. 7696, 27 September 2016.

The pending leadership crisis and the deterioration of cross-border relations might also affect the political balance in Kgatleng in the long run. One of the respondents from South Africa spoke about the opportunities the financial support from Moruleng had created in Mochudi. The Bakgatla-ba-Kgafela have a long tradition of voting for candidates of opposition parties during elections. According to him, any financial sanctions against Kgatleng by the government could be compensated by contributions from South Africa. Due to the ongoing transfer of funds to Botswana, the people and the tribal leadership did not experience any serious consequences from a potential lack of investment by the government. It now remains to be seen how voting patterns will change if there is no alternative funding for the district.

“In Kgatleng, the Bakgatla could vote for the opposition because they used to get money from us underground. That is what made them strong. We will see for the next ten years what is going to happen because Kgafela is now off the track who used to enjoy our money and the people in Mochudi there. What is going to happen? The opposition, I want to see whether they are still going to be strong for the next years.”⁸⁵⁸

It is still unpredictable how far the end of cross-border relations and the impact of the institutional pluralism may transform the socio-political landscape and development in Kgatleng. In 2016, Botswana’s government has started to enter into negotiations with Kgafela II to enable him to return to Mochudi. Those were not yet solved at the time of writing.

⁸⁵⁸ Interview with a male community activist, Kraalhoek, 18/09/2013 (INT 44-1).

Zusammenfassung

Traditionelle Institutionen werden bis heute in den meisten Ländern des südlichen Afrikas formell anerkannt und integriert. Die Auseinandersetzung mit dem daraus resultierenden Institutionenpluralismus hat insbesondere im Zuge der Demokratisierung an Relevanz gewonnen. Verschiedene Forschungsarbeiten haben die Harmonisierung demokratischer und traditioneller Herrschaft und ihre Grundlagen thematisiert. Bisher gibt es nur wenige empirisch fundierte und zudem komparative Studien zur tatsächlichen Ausprägung und den Folgen des Institutionenpluralismus. Die Dissertation widmete sich deshalb der Analyse des formellen und informellen Rahmens der Integration traditioneller Institutionen in Botswana und Südafrika. Zentral war die Untersuchung der Auswirkungen dieser Einbindung im ländlichen Raum auf die lokale Regierungsführung, traditionelle Institutionen selbst und die betroffenen Gemeinden sowie die Identifizierung von Potenzialen und Risiken.

Vier zentrale Grundannahmen strukturierten den Analyserahmen: Rolle und Einfluss traditioneller Institutionen werden maßgeblich vom formellen Institutionenpluralismus bestimmt und begrenzt. Diese Form der Einbindung verändert lokale Strukturen und Mechanismen traditioneller Führung, die letztlich auch eine Gefährdung für die Kohäsion traditioneller Gemeinschaften bedeuten. Anstelle eines Gewinns an Partizipationsmöglichkeiten und einer effizienteren Bereitstellung von Dienstleistungen führt die Existenz mehrerer lokaler Akteure und Institutionen vielfach auch zu einer weiteren Marginalisierung der Bevölkerung. Um ihre Position zu legitimieren und zu stärken, setzen traditionelle Institutionen gezielt auf Modernisierung und strategische Retraditionalisierung.

Stellvertretend für die Situation im südlichen Afrika thematisierte die Dissertation den Institutionenpluralismus in Botswana und Südafrika am Beispiel des Sotho-Tswana Chieftoms der Bakgatla-ba-Kgafela im Grenzgebiet beider Länder. Besonderheiten der Bakgatla-ba-Kgafela, die sie zu einer idealen Fallstudie gemacht haben, sind die tatsächliche übergreifende Führung, Ressourcenreichtum in Südafrika und auf dem Rechtsrahmen basierende Konflikte zwischen traditioneller Führung und Regierung in Botswana. Für die vergleichende Untersuchung wurden der jeweilige Rechtsrahmen, Primär- und Sekundärliteratur analysiert sowie eine

empirische Feldforschung mit qualitativen Interviews und Beobachtungen in beiden Ländern durchgeführt.

Nach der Analyse der institutionellen Einbindung traditioneller Institutionen in Botswana und Südafrika wurden die konkreten Auswirkungen in beiden Ländern in bestimmten Kontexten untersucht. Inhaltliche Schwerpunkte bildeten die Grundlagen und Folgen der Legitimität und Autorität traditioneller und staatlicher Akteure und ihre Interaktion auf lokaler Ebene. Untersuchungsgegenstand waren ferner Kriterien guter Regierungsführung, zu denen Effektivität, Transparenz, Partizipation und Verantwortlichkeit zählen. Eine besondere Rolle spielte zudem die Land- und Ressourcenverwaltung.

Die Anerkennung traditioneller Institutionen und ihre Einbindung haben sich auf verschiedenen Ebenen sowohl positiv als auch negativ ausgewirkt. Grundsätzlich wurde im Rahmen der Untersuchung der starke Einfluss des Rechtsrahmens deutlich, der in Botswana eine Marginalisierung traditioneller Institutionen abseits der Rechtssprechung als konsultative und zeremonielle Akteure manifestiert und in Südafrika seit der Demokratisierung zunehmend zum Ausbau der starken Stellung traditioneller Institutionen im ländlichen Raum geführt hat. Die Interaktion der Akteure des Institutionenpluralismus wurde in den untersuchten Lokalitäten mehrheitlich als harmonisch und kooperativ beschrieben. Durch die klare rechtliche Abgrenzung und Definition der jeweiligen Rollen und Befugnisse kam es nur in Ausnahmefällen zu Wettbewerb oder Konfrontation zwischen den lokalen Akteuren.

Das Kontrollpotential der Regierung gegenüber traditionellen Institutionen war ebenfalls konträr. Die Beschäftigung und Bezahlung traditioneller Führer als Beamte sowie die formelle Aufsichtsbefugnis des Ministry of Local Government und dessen Recht, Anerkennungen auszusprechen und zurückzunehmen, ermöglichen der Regierung Botswanas weitreichende Kontrolle und ordnen traditionelle Institutionen im hierarchischen Geflecht unter. In Südafrika haben traditionelle Institutionen unter der ANC-Regierung Unterstützung, aber wenig Kontrolle gefunden. Dies wirkt sich auch im Kontext der Legitimation der lokalen Akteure und der daraus resultierenden Autorität aus. In Botswana befinden sich traditionelle Institutionen in einer eher schwachen und streng reglementierten Position. Sie werden als legitime Akteure wahrgenommen, die eng mit der Geschichte und den Traditionen des Landes verbunden sind. Die weitreichende Unterstützung, die sie in ihren Gemeinden teils

auch gegen den Widerstand der Regierung erhalten, hat dennoch keinen entscheidenden Einfluss auf ihre Position und Befugnisse genommen. Das Beispiel des Führers der Bakgatla-ba-Kgafela, Kgafela II, dem trotz Unterstützung in der Gemeinde infolge mehrjähriger Auseinandersetzungen die offizielle Anerkennung vom zuständigen Minister entzogen wurde, hat verdeutlicht, dass formelle Strukturen der Autorität der Akteure enge Grenzen setzen. Dennoch zeigt sich auch beim derzeitigen Präsidenten Botswanas, Ian Khama, die legitimierende Komponente traditioneller Herrschaft. Seine Herkunft aus einer der bedeutendsten traditionellen Herrscherfamilien des Landes inszeniert er strategisch zur Festigung seiner politischen Autorität. In Südafrika wurden Position und Autorität des dortigen Bakgatla-Führers durch den Rechtsrahmen und die Unterstützung der Regierung gegen den Willen großer Teile der Bevölkerung aufrecht erhalten und gefördert. Basierend auf den Hintergründen seiner Amtsübernahme in den 1990er Jahren und rechtlichen Auseinandersetzungen, unter anderem bezüglich fehlender Transparenz und Korruptionsvorwürfen, wurde die Legitimität seiner Führung von einer wachsenden Opposition negiert.

Zur Stärkung und Adaption ihrer Position haben die Bakgatla-Führer in Botswana und Südafrika trotz der divergierenden Rahmenbedingungen ähnliche Anpassungsstrategien übernommen. Sowohl Kgafela II als auch Nyalala Pilane, der als Regent in Südafrika fungiert, haben gezielt Maßnahmen zur Modernisierung und zur Retraditionalisierung eingesetzt. Dazu zählen unter anderem eine starke Professionalisierung der Führung, die Vermarktung von Tradition und Kultur, der Einsatz neuer Kommunikationskanäle sowie die Entwicklung von Wirtschaftsstrategien. Dem gegenüber standen zum Beispiel die Reaktivierung traditioneller Zeremonien, die Pflege der Kultur und Geschichte der Bakgatla-ba-Kgafela und die Förderung traditioneller Versammlungen. Anpassung und Weiterentwicklung sind für traditionelle Institutionen essentiell, um weiterhin relevant und wettbewerbsfähig zu bleiben und Leistung zu erzielen, auf die sich wiederum Legitimität und Unterstützungen gründen. Gleichzeitig ist eine traditionelle Ausrichtung wichtig für den lokalen Zusammenhalt und um verschiedenen Bedürfnissen und Altersklassen in den Gemeinden gerecht zu werden.

In Südafrika werden auf dem Land der Bakgatla-ba-Kgafela große Platinvorkommen abgebaut. Bergbau im ländlichen Raum stellt Gemeinden als Teilhaber und Empfänger von Lizenzabgaben vor Chancen, aber auch vor große

Herausforderungen mit Blick auf Nachhaltigkeit, Kontrolle und Gemeinwohl. Opposition und Proteste gegen Korruption und ausbleibende lokale Investitionen wurden in mehreren Fällen vor Gericht zu Ungunsten von Gemeindemitgliedern und Aktivisten entschieden.

In Bezug auf die Auswirkungen des Institutionenpluralismus zeigt der Vergleich der Bakgatla-ba-Kgafela in Botswana und Südafrika unterschiedliche Resultate für lokale Regierungsstrukturen, Gemeinden und traditionelle Institutionen. In Botswana bleiben traditionelle Institutionen als abhängige Akteure ohne Einfluss im Regierungsbereich und besitzen auf nationaler Ebene nur beratende Funktion. Die große Unterstützung, die sie in ihren Gemeinden erhalten, steigert ihre Machtbasis dennoch nicht. Außer in der Rechtssprechung besitzen sie nur wenig genuine Befugnisse. In Südafrika verfügen traditionelle Institutionen durch Regierungsunterstützung und Ressourcenvorkommen über ein hohes Machtpotential, dem kaum Kontrollinstrumente gegenüber stehen.

In den Gemeinden zeigten sich in den untersuchten Gebieten teils gravierende Folgen für die Bevölkerung. Während bestimmte Einrichtungen, wie die regelmäßig stattfindenden traditionellen Versammlungen oder die traditionellen Gerichte ein hohes Maß an Zugangsmöglichkeiten, Information und Partizipation ermöglichten, wurde die lokale Bevölkerung in anderen Kontexten zunehmend marginalisiert. Im Fall von Ressourcenvorkommen können traditionelle Institutionen einen wesentlichen Beitrag zur ländlichen Transformation leisten, indem sie Infrastruktur, Wirtschaftswachstum und Arbeitsplätze in strukturschwachen Gebieten schaffen. In Südafrika waren die Auswirkungen des Institutionenpluralismus in den Fällen besonders negativ, in denen die Bevölkerung ausbleibenden Dienstleistungen und fehlender Unterstützung sowohl von Seiten der Regierung als auch von traditionellen Institutionen ausgesetzt war. Die Vielzahl der Akteure hat damit nicht zwangsläufig zu mehr Teilhabe an Entscheidungsprozessen und einer Demokratisierung lokaler Regierungsstrukturen geführt.

Grenzüberschreitend hat die divergente Entwicklung des Institutionenpluralismus in Botswana und Südafrika zur Auflösung der Kohäsion der Bakgatla-ba-Kgafela in beiden Ländern geführt und eine tatsächliche einheitliche Führung unmöglich gemacht.

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Traditional Authority of the Bapo Ba Mogale Community v Kenoshi and Another (31876/10) [2010] ZAGPPHC 72 (29 July 2010).

Annex: Field work interviews

List of Fieldwork Interviews by Date and Place

Individual Interviews

Code	Date	Place	Sex
INT 01-1	14/06/2013	Mochudi	Female
INT 02-1	18/06/2013	Mochudi	Male
INT 03-1	25/06/2013	Gaborone	Male
INT 04-1	26/06/2013	Mochudi	Male
INT 04-2	26/07/2013	Mochudi	Male
INT 05-1	27/06/2013	Mochudi	Male
INT 05-2	20/09/2013	Mochudi	Male
INT 06-1	03/07/2013	Gaborone	Male
INT 07-1	04/07/2013	Mochudi	Male
INT 08-1	05/07/2013	Mochudi	Female
INT 09-1	08/07/2013	Mochudi	Male
INT-10-1	10/07/2013	Mochudi	Male
INT 11-1	10/07/2013	Mochudi	Female
INT 12-1	11/07/2013	Mochudi	Male
INT 13-1	12/07/2013	Mochudi	Male
INT 14-1	19/07/2013	Mochudi	Male
INT 15-1	19/07/2013	Mochudi	Male
INT 16-1	19/07/2013	Mochudi	Male
INT 17-1	22/07/2013	Mochudi	Male
INT 18-1	24/07/2013	Mochudi	Male
INT 19-1	26/07/2013	Mochudi	Male
INT 20-1	29/07/2013	Mochudi	Male
INT 21-1	30/07/2013	Mochudi	Male
INT 22-1	31/07/2013	Gaborone	Male
INT 23-1	29/08/2013	Gaborone	Female
INT 24-1	20/09/2013	Gaborone	Female

INT 25-1	05/07/2013	Mochudi	Male
INT 26-1	22/08/2013	Moruleng	Male
INT 27-1	26/08/2013	Moruleng	Male
INT 28-1	27/08/2013	Ramoga	Female
INT 29-1	27/08/2013	Moruleng	Female
INT 30-1	27/08/2013	Moruleng	Male
INT 31-1	28/08/2013	Mmabatho	Male
INT 32-1	03/09/2013	Rustenburg	Male
INT 33-1	05/09/2013	Moruleng	Male
INT 34-1	06/09/2013	Moruleng	Male
INT 35-1	09/09/2013	Moruleng	Female
INT 36-1	12/09/2013	Moruleng	Male
INT 37-1	12/09/2013	Moruleng	Male
INT 38-1	12/09/2013	Moruleng	Female
INT 39-1	12/09/2013	Moruleng	Male
INT 40-1	12/09/2013	Moruleng	Male
INT 41-1	16/09/2013	Mothlabe	Male
INT 42-1	16/09/2013	Moruleng	Male
INT 43-1	18/09/2013	Mogwase	Female
INT 44-1	18/09/2013	Kraalhoek	Male

Group Discussions / Interviews

Code	Date	Place	Sex
INT 45-1	30/09/2013	Gaborone	2 Females
INT 46-1	26/08/2013	Moruleng	2 Males
INT 47-1	06/09/2013	Moruleng	5 Males
INT 48-1	11/09/2013	Moruleng	3 Females
INT 49-1	09/09/2013	Segakwaneng	2 Males, Female

Respondents by country and group

	Botswana	South Africa
Community	19	19
(Local) Government	5	4
Traditional Institutions / Royal Family	5	9