

**The Mutation of Parliament into a “Registration Chamber”:
Executive Dominance over the Legislature in Botswana¹**

David Sebudubudu, Bugalo Maripe,
Mokganedi Z. Botlhomilwe
& Ikanyeng S. Malila*

Abstract

With forty-seven years of its existence, Botswana has widely been described by scholars as an example of a functioning multi-party democracy in Africa. Despite this major and rare achievement, Botswana’s parliament is weak in relation to the executive arm of the government. The parliament has so far failed to be vibrant and a truly independent body for representing the voice of the electorate. It is in this context that this article argues that far from being a nerve centre for democracy, the parliament in Botswana has been reduced to, in the thesis of Poulantzas, a mere “registration chamber” of executive decisions. Yet, how Botswana has perceptibly remained a democracy against the background of a weakened parliament remains a mystery. This article examines some structural, legal and operational challenges to explain this state of affairs.

Introduction

It is generally assumed that Botswana inherited a Westminster style of government from the British colonial master. This assumption stems from the practice adopted by the British government at the time of her disengagement from her former colonies and protectorates, when the latter attained independence. This practice generally entailed a bequest of a constitution to the newly independent states, and a public administration system similar in character to that obtaining in Britain itself, consisting mainly in the separation of powers between the organs of state and ascendance to power through elections. However, certain features in the

*Corresponding Author: Professor, Department of Political and Administrative Studies, University of Botswana. He is also Head of the Department of Political and Administrative Studies, University of Botswana, E-mail: sebudubu@mopipi.ub.bw

system introduced in the newly independent states, and Botswana, in particular, belie this assumption. The characterization of a system as being Westminster assumes the presence of certain defined features. In the United Kingdom, this would be illustrated by a separation of the offices of Head of State and Head of Government. It would also be identified by the supremacy of the Legislative branch over all other branches, including the constitution itself, unwritten as it may be. Even the Head of Government, the Prime Minister, is himself an elected member of Parliament, holding an elective constituency, and is equal in stature to other members of Parliament or Ministers save for powers conferred on his office by reason of his being the *primus inter pares*, the first among equals. The system in Botswana lacks some of the fundamental features that characterize the Westminster model, and has some that are absent from the Westminster model. While Britain is generally a constitutional monarchy, Botswana is a sovereign republic. In Botswana, the Presidency combines offices of the Head of State and Head of Government (section 30 read with section 47 of the constitution), thus making it a very powerful office. The operations of the state are embodied in a written constitution which is the supreme law of the land, from which all other laws derive validity. Parliament is subjugated to the constitution in that while it is supreme in the exercise of its legislative powers, it may not make laws that are inconsistent with the constitution. This is in stark contradiction to the British Parliament which enjoys supremacy without constraints of constitutional subjugation, especially lately European law. Two cases, one from Botswana, and the other from the United Kingdom, illustrate this legal disparity very well. In *Clover Petrus and Another v. The State* (1984), the Botswana Court of Appeal stated that:

Under a written Constitution such as we have in the Republic of Botswana, the National Assembly is supreme only in the exercise of legislative powers. It is not supreme in the sense that it can pass any legislation even if it is *ultra vires* to any provision of the Constitution. Every piece of legislation is subject to the scrutiny of the courts at the instance of any citizen who has the necessary locus to challenge the constitutionality of the legislation.

However, in *R v. Jordan* (1967), the English Court said:

There is no judicial body in the country by which the validity of an Act of Parliament can be questioned. An Act of the legislature is superior in authority to any court of law ... and no court could pronounce a judgment as to the validity of an act of Parliament.

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According to Sebudubudu and Osei-Hwedie (2006), in Botswana, neither parliament nor opposition effectively performs the oversight role over the executive as would be expected of a liberal democratic polity. Thus, although Botswana is often characterized as a parliamentary democracy it is not a pure parliamentary system. It is best described as a hybrid of presidential - parliamentary systems with the president occupying the dominant power position (Holm, 1996). Due to the centrality of the Constitution within the country's legal-political matrix, in terms that it is the basic or supreme law of the land, and the fact that it establishes all the organs, it is more apt to describe the Botswana system as a Constitutional democracy. The Botswana parliament, consisting of elected representatives in the main, like its British equivalent, represents the people themselves and is or must therefore be the centre-piece of power. It is this feature that forms the subject of this paper. It will be argued that the Botswana parliament has not fulfilled this role due to a variety of factors as it will be shown below.

Complex debates relating to the advantages and disadvantages of parliamentary or presidential systems that have been occupying constitutional theory for a long time (Albert, 2010) fall outside the purview of this paper. Albert (2010) and Fombad (2005), among others, provide interesting analyses of the debates in the Western and African contexts respectively. Regardless of what system of government may be in place - parliamentary, presidential or presidential-parliamentary or hybrid, in most African countries the executive tends to dominate the legislature (van Cranenburgh, 2009; Hatchard et al, 2004). That is, there are no adequate safeguards to keep the executive in check. Donors have tried to help parliaments in Africa to build capacity but not much evaluation on the impact of these international support programs has been done (Nijzink, et al. 2006:5). Many countries have revised their constitutions to, amongst others, limit presidential terms and enhance horizontal accountability. Despite these reforms, there is consensus that with the possible exception of South Africa (Hatchard et al, 2004:78) and Mauritius (van Cranenburgh, 2009:60), the balance of power in most African countries is weighted in favour of the presidency. In general, the power matrix in African countries is characterised by the following features (van Cranenburgh, 2009) which are by no means new (Stultz, 1968; Munslow, 1983). First, it remains the case that in many countries for the most part there are few constitutional instruments available to restrain executive power especially presidential powers. Even then, the basic design and structure of the Westminster model has endured (Hatchard et al, 2004:23). Second, there is weak or low separation between the

legislature and the executive which tends to weaken the former. Third, the prevalent electoral systems, especially the winner-takes-all model, do not make for dynamic parliaments. According to Bogaards (2004:173), post-1990s democratisation produced dominant parties and dominant party systems in the continent, hardly a recipe for horizontal accountability if we consider that parliaments are usually dominated by the parties of the presidents. However, there is more to the problem than just the widely used winner-takes-all electoral model. An analysis of practices in African countries that have incorporated proportional representation appears to show that proportional representation is no panacea to the problem of domination by presidential parties (van Cranenburgh, 2009: 56). All these problems may well breed scepticism regarding the value of some of the reforms that are often recommended as the solution to existing imbalances in power and low separation of institutions.

Although many of the problems faced by African parliaments in so far as their relationship with the executive may be similar, the permutations are somewhat different depending on amongst others, the system of government. Presidential power over cabinet and separation of power between the executive and parliament varies across countries (Nijzik, 2007; van Cranenburgh, 2009). Differences among countries imply that although general patterns may be similar, weaknesses may lie in somewhat different areas and manifest differently. However, the end result is the same; a weak legislature in relation to the executive. Having said this, the characterization of systems of government should be regarded with caution because in practice there are ambiguities, and the expected congruence between regime type and balance of power does not always exist (van Cranenburgh, 2009: 51). This paper merely attempts to demonstrate, using Botswana as a case study, how the executive can, and does, actually render parliament (legislature) an ineffective institution. It is hoped that this case study will contribute towards a re-thinking of executive power, particularly in the African context.

Theoretical Issues

Although the democratisation wave of the 1990s that swept across the continent rekindled hopes for change, what remains as a major point for debate is the extent to which democratic institutions and practices have taken root in Africa. However, what can be said with some degree of certainty is that elective democracy has generally been accepted as the normative ideal in the continent as a whole since this wave of democratisation. Even then it

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must be noted that elections do not always result in a peaceful transfer of power. It is also equally true that not much has changed in terms of the balance of power between the legislature and the executive despite the reforms of the 1990s.

The dominant explanation offered for the collapse of multi-party representative democracy seeks to explain the problem in terms of Africans' unpreparedness for democracy rather than the non-suitability of the model imposed on them by departing colonial powers (Munslow, 1983:219). It locates the problem of governance failure in Africa within the framework of modernisation theory which ostensibly also informed the transplantation of the Westminster model to Africa, particularly former British colonies. In terms of this perspective, the failure of political institutions is a symptom of the failure to "modernise", and in essence a failure of "political development"; a view that has been criticised even by early leading exponents of the theory (Munslow, 1983:219-20). Munslow (1983) contended that modernisation theory, as a conceptual and theoretical tool, is not adequate in explaining governance failure in Africa, and he referred to this as a "crisis of theory". As an alternative, he proposed a more historical approach that would transcend the problems of theory. Some later writers would seem to concur with this approach as they believe that democracy in Africa has been encumbered by "ill-suited institutions" and an "unhelpful inheritance from the past" (Hatchard et al, 2004). This approach may be properly characterised as socio-historical in that it also seeks explanations in both colonial history and the nature of local cultures. For instance, in regard to the latter, it has been suggested that important as it may be, restraints on power do not depend solely on the structure of the constitution but rather on a range of factors including conventions which form part of the national ethic (Hatchard et al, 2004: 96; Munslow, 1983:223). It seems that there was little appreciation of the significance of this fact when the Westminster Model was transplanted to African countries. Traditional African societies tend to emphasise deference to authority (Hatchard et al, 2004:96) and encourage the development of the "Big man Syndrome" i.e. patrimony. It is, therefore, not entirely surprising that in Africa "...little importance is attached to constitutional sanctions against abuse of power and there is often lack of democratic ethic amongst politicians ..." (Hatchard et al, 2004:96). To this extent, this in part accounts for the weakness of the legislature in relation to the executive. Having said this, it is the Botswana parliament that we now turn to.

The Botswana Parliament

The Botswana Parliament is unicameral. It is one of the three organs of the state, the other two being the executive and the judiciary. Unlike the other two, it does not arise by appointment. It comes into being by elections. It is supposedly a custodian of the interests of the electorate. Its functions are spelt out under the Constitution. Its primary mandate is to "make laws for the peace, order and good government of Botswana" (section 86). The principle of separation of powers in Botswana is formally in existence but in reality the executive is more powerful than the other two organs. The President, himself the sole repository of executive power (section 47), in addition to so many other powers conferred upon him by various provisions under various statutes, appoints judges of the Court of Appeal (section 100), judges of the High Court (section 96), judges of the Industrial Court (section 16 of the Trade Disputes Act), and Magistrates (section 104 of the Constitution). He is empowered to prorogue and dissolve Parliament (section 91). Thus, it is evident that notwithstanding the professed separation of power, executive influence may actually be brought to bear on the other branches' sphere of operation. It would appear that the executive can exercise residual power wherever the Constitution does not expressly designate power to any of the three organs. The other two may only exercise power expressly designated to them. This points to the dominance of the executive over the other two branches. Parliament is supposed to be the supreme law-making body but in effect the laws that are passed by the legislature mostly originate from the top, that is, the executive. Rarely does Parliament initiate law-making on its own. Of the two Private Members' bills that have ever been presented before Parliament, only one, the Domestic Violence Bill, got enacted into law. Bills to be presented before parliament are first discussed and approved by cabinet before being tabled in Parliament. Cabinet ministers (who form the executive) are also Members of Parliament (MPs) and their numerical strength, coupled with the principle of collective responsibility by members of cabinet, has meant that such bills find easy passage in parliament. According to van Cranenburgh (2009), this blending of offices, which manifests itself in many African countries, enhances executive domination. Fombad (2005:322) neatly summarizes, among other things, the weakness of the Botswana parliament vis-à-vis the executive when he argues that:

The extent of executive influence over the legislative branch is particularly evident in the law making process. Although the parliament's principal function is to make laws, as in all parliamentary

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democracies, the whole of this process-especially the most decisive pre-legislative stages-is controlled and driven completely by the executive. Almost all bills are discussed in cabinet meetings chaired by the president, and are presented in parliament by a cabinet member who, along the whips ensures the bill goes through without significant modifications. Because of the executive's ability to ensure that desired legislation is passed, it is fair to conclude that, to all intents and purposes, the executive controls parliament.

It is evident that the weakness of the Botswana Parliament is not unique to the country. Other democracies are also controlled and/or influenced by the executive. Burnell (2003:59) attests to this when he notes that "legislatures the world over appear to be undergoing secular decline, unable to arrest the accumulation of executive power driven by national, global financial, economic and political forces". In Africa, this is in part because "on the one hand African presidents possess great institutional power and, on the other hand, there are inherent limits to restraining executive power through the most important institution for horizontal accountability: parliament" (van Cravenburgh, 2009:63). As a result, 'there is a deficit of political accountability' (Burnell, 2003:47). This however, does not auger well for the process of democracy itself which emphasizes the need for the executive to be accountable (Ball and Peters, 2005). Although it would be unrealistic to expect parliament to be completely independent from the executive, a parliament should at least have a semblance of independence, *even in spirit*.

The Botswana Parliament as a "Registration Chamber"

In his contribution to the debates about the theory of the capitalist state, Nicos Poulantzas (1978) claims to have witnessed the emergence of a new form of the capitalist state which he terms "authoritarian statism". The main characteristics of this form of state include, among others, the concentration of power within the executive, the reduction of the role of parliament to a mere "registration chamber", and effective power "increasingly focused in the office of the President or Prime Minister at the apex of the various administrative structures with the resultant appearance of a personalized Presidential/Prime Ministerial system" (Jessop, 1990: 67-8). According to Jessop (1984:171):

In discussing 'authoritarian statism', Poulantzas focuses upon the 'irresistible rise of the state administration'. He relates this mainly to the growing economic role of the state as this is modified through the

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political situation. For state intervention means that law can no longer be confined to the general, universal norms whose enactment is the preserve of parliament as the embodiment of the general will of the people-nation. Instead legal norms are subject to even more elaborate specification by the administration in respect to particular conjunctures, situations, and interests and even their initial formulation has passed almost entirely from parliament to the administration.

Thus, to Poulantzas, under “authoritarian statism”, Parliament becomes a mere ‘registration chamber’ with very limited powers, while “the state bureaucracy is becoming the leading actor as well as the principal site in the elaboration of state policy under the aegis of the political executive” (Jessop, 1984:171). According to Poulantzas (1978), the term “registration chamber” was first used by a British Marxist, Harold Laski. It simply refers to a situation where Parliament loses its primary functions and degenerates into a rubberstamp of decisions made elsewhere especially from the executive. Poulantzas (1978:222) has this to say about parliament as a ‘registration chamber’:

Nearly everywhere, draconian limits are set upon parliaments’ power of control, investigation, verification, criticism, proposal and suggestion. The full-scale *de jure* and, above all, *de facto* shift in governmental responsibility away from parliament to the summits of the Executive has brought with it a decisive curtailment of parliaments’ authority over the administration: government has become autonomous from parliament, and the administration distanced from the process of national representation.

The above description of parliament as a “registration chamber” fits the situation that obtains in Botswana where parliament is weak, and too much power is concentrated on the executive. It is to these far-reaching presidential powers to which we now turn.

Presidential Powers in Botswana

Sebudubudu (2006) has argued that the feebleness of parliament in Botswana is embedded in the Constitution. Section 47-56 of the Constitution of Botswana bestow upon the President immense and sweeping powers. For example, under Section 47 the functions of the President are enumerated as follows:

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- (1) The executive power of Botswana shall vest in the President and, subject to the provisions of the Constitution, shall be exercised by him either directly or through officers subordinate to him.
- (2) In the exercise of any function conferred upon him by this Constitution or any other law the President shall, unless it is otherwise provided, *act in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority* (emphasis ours).
- (3) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.

Similarly, Section 48 designates the President as the Commander-in-Chief of the Armed Forces, in which capacity he is vested with the supreme command of the armed forces. The President also appoints the Vice-President (Subject to endorsement by Parliament), Cabinet Ministers and Assistant Ministers (without consulting anyone), and Specially Elected Members of Parliament (subject to endorsement by Parliament).

Although Section 50(2) on the one hand provides that the President shall, so far as practicable and subject to the provisions of this Constitution, consult the cabinet on matters of policy and the exercise of his functions, on the other hand, Section 50(3) states that the obligation of the President to consult his cabinet and for cabinet to accept responsibility under this section shall not apply to the exercise by the President of his powers in relation to the appointment of the Vice-President, Ministers and Assistant Ministers, the dissolution of parliament, the Prerogative of mercy, the assignment of responsibility to the Vice-President or any Minister and the specification of the functions of an Assistant Minister. Thus cabinet's role as advisor to the President is limited.

The President also has the power to declare a foreign national a prohibited immigrant in terms of the Immigration Act. The Court of Appeal affirmed this in *Good v. the Attorney General* (2005) that such a decision "cannot be challenged [in a court of law] and [the president] is statutorily not obliged to assign reasons for declaring a person a prohibited immigrant" (Botlhomilwe, Sebudubudu and Maripe, 2011: 334). It should be noted that the number of foreign nationals deported in terms of the Immigration Act are worryingly high since Ian Khama ascended to the presidency. A senior member of the ruling party, MP and former Minister, Daniel Kwelogobe, noted his unease

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about this, noting that “we cannot continue to deport expatriates without giving reasons, while we want to attract foreign direct investment”. He went on to say that he is “particularly disturbed by the current high rate of foreigners’ deportations without legal due process in the country...” (*Echo*, 14-20 February 2013). The Khama regime has also placed a firm grip on the state media, which has since become biased and partisan.

In addition to judicial appointments as alluded to above, the President also appoints the Attorney-General, diplomats, head of the Directorate of Corruption and Economic Crime (DCEC), head of the Directorate of Intelligence Services (DIS), the Ombudsman and the Secretary of the Independent Electoral Commission (IEC), among others. Among the powers conferred on the President is that of constituting and abolishing offices in government (section 56). The prerogative of mercy and powers of pardon over convicts also rest with him (section 53). It is worth noting that some of these powers were recently exercised when he pardoned some members of the Botswana Defence Force who had been convicted by the High Court of murdering a civilian in cold blood (whilst they were on duty) and their conviction confirmed by the Court of Appeal (*State v. Mothobi and Others*, 2011). The said members of the army have now been reinstated in their positions in the army. This action by the President may plausibly be construed as interference with the judicial process especially that the reasons informing this decision were never disclosed. In any event he is not statutorily obliged to assign any reasons for his actions. He is also constitutionally immune from any civil or criminal proceedings whilst holding the office of President. Section 41 provides:

While any person holds or performs the function of the office of President no criminal proceedings shall be instituted or continued against him or her in respect of anything done or omitted to be done by him or her either in his or her official capacity or in his or her private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him or her in respect of anything done or omitted to be done in his or her private capacity.

The scope of this provision was determined for the first time in *Motswaledi v. Botswana Democratic Party, Ian Khama and Others* case (2009) where both the High Court and Court of Appeal affirmed that the section meant that the President was immune from suit even for acts of a private matter having

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nothing to do with his official responsibilities. In the words of Nganunu CJ, which were confirmed on appeal:

The provision grants the president total immunity on all civil wrongs he could be accused of committing in his private capacity, in the same way that he is granted immunity against criminal prosecutions for acts that he may be accused of having committed in his private capacity.

It is undisputable from the above that the President of Botswana is vested with too much power. The dangers of concentrating unlimited power on one person or group of persons have long been discussed by philosophers such as Montesquieu and Locke. They argued that such concentration of power on one person or group has the potential to breed tyranny hence the need for a clear separation of powers. To them, the separation of powers is the best guarantee of the liberty of the people since when the executive and legislative powers are given to the same person they are bound to be misused. Liberty cannot exist when, for example, the same person makes the law and executes it. It was in this context that the great American philosopher, Madison, following Montesquieu, wrote:

The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced as the very definition of tyranny.

Such is the situation in Botswana, where the President enjoys all the important powers under the Constitution as well as other statutory enactments. Parliament is not able to bring its powers of control on the presidency in the exercise of executive power, for reasons spelt out below, and this translates into a limitation or weakness of Parliament. In the section that follows, we discuss the main weaknesses of the Botswana parliament vis-à-vis the executive.

Weaknesses of the Parliament of Botswana

The Parliament of Botswana has numerous and far reaching weaknesses which severely impact on its autonomy and independence in the implementation of its constitutional function or mandate. Some of these weaknesses are legal, while others are administrative or organizational. The Botswana parliament has historically been a very weak institution, whose weaknesses have at times been concealed by the benevolence/favourable

disposition of past Presidents, but whose weaknesses are increasingly being exposed by the more intolerant and stentorian regime of President Ian Khama that was installed on 1st April 2008 at the expiration of President Festus Mogae's constitutional term of office.

First and foremost, it is to be noted that in terms of Sections 90, 91 and 93 of the Constitution of Botswana, all powers relative to the summoning, prorogation and dissolution of Parliament lie with the President of the Republic, and not with Parliament itself. Even more revealing is that no conditions upon the exercise of the power to prorogue have been laid out. It thus seems they are excisable at will and at the pleasure, convenience and call of the President. This seems to exhibit notions of absolute power that are frowned upon in modern day systems of constitutional law and governance. In relation to powers to dissolve Parliament, the Constitution does provide certain conditions, and those relate mainly to disagreements between the National Assembly and the President where the former insists on the assent of the President to bills the former has approved, and the latter withholds his assent. In this stalemate situation, the President may dissolve Parliament. Dissolution of Parliament is not necessarily an advantage to the members of Parliament themselves, and the power to dissolve Parliament would invariably be viewed as executive dominance over the legislature (Sebudubudu, 2006; Maripe, 2013). In 1998, former president Festus Mogae threatened to dissolve Parliament if the members did not endorse his choice of Vice-President. Needless to say Parliament obliged. This is an instance of executive control of the legislature *par excellence*. So powerful is the President that he can recall a dissolved Parliament, if he considers that owing to the existence of a state of war or emergency in the country and members of the dissolved Parliament are obligated to obey the recall. For instance, President Mogae "declared the first state of emergency in 1999 to summon Parliament for it to change the Electoral Act so that some 67, 000 possible voters who were nearly disenfranchised could vote" (Sebudubudu, 2006:196). Again Parliament is in session or dissolved at the whim, will and pleasure of the President; another instance of executive control of the legislature. Presently, the composition of the National Assembly is as follows:

- a) The President;
- b) 57 elected members;
- c) 4 specially elected members

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This effectively means that there are 62 voting members of the National Assembly. In terms of the Ministerial Offices (Maximum Number) Act Cap 02:02, there shall not be more than 16 Ministers and not more than 8 Assistant Ministers. As such there are 26 Cabinet Ministers (including the President and the Vice President) in this 62 member house. It will thus be noted that Cabinet Ministers comprise substantially more than one-third of the total membership of the National Assembly. While the principle of separation of powers in Botswana is formally in existence, this is only to a limited extent, in the case of the judiciary, since members of the executive are drawn from the legislature. To this extent, it is more appropriate to speak of division rather than separation of powers (Tilleman and Alen, 1992).

Parliament is supposedly the supreme law making body but in effect the laws that are made by the legislature mostly originate from the top, that is, the executive. It is only rarely that parliament on its own has initiated law making (Fombad, 2005). In terms of Section 50(1) of the Constitution of the Republic, Cabinet Ministers are bound by collective responsibility, which enjoins them to agree with or support, at least on the floor of the National Assembly, all legislative measures brought by government. Effectively, what this means then is that every legislative measure or proposal that is brought by the government already has the support of 26 people (that is, Cabinet Ministers) and all what is needed is the support of an additional 6 Members of Parliament. As such the disproportionate number of Cabinet Ministers relative to the total membership of the National Assembly is not merely statistical, but may also affect issues of freedom to debate and the quality of debate.

In discussing the weaknesses of the Botswana parliament, it is of paramount importance to consider the role of the ruling party parliamentary caucus (the ruling Botswana Democratic Party has 77% of the seats) which, depending on their *a priori* position with respect to any proposed measure can ensure that it passes with minimal debate, if any, or can frustrate or kill it altogether particularly where that measure emanates from an opposition member. An illustrative example is a parliamentary motion by Dumelang Saleshando of the opposition Botswana Congress Party (BCP) calling for a law on declaration of assets and liabilities for politicians and top civil servants which was rejected under disturbing circumstances (Botlhomilwe, Sebudubudu and Maripe, 2011) is a case in point. The ruling party parliamentarians led by the then Vice President Lieutenant General Mompoti Merafhe shot down the motion despite its clear merits. General Merafhe argued that as the ruling

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party they could not support a parliamentary motion tabled by the opposition because, as he put it, “we also want people to like us” (*Botswana Gazette*, March 2010).

In another related development, a ruling party parliamentarian, Botsalo Ntuane, had intended to table a parliamentary motion calling for a comprehensive review of the country’s constitution to include, among other things, a limitation on the powers of the presidency and the abolition the system of automatic succession to the presidency in which a sitting president appoints his successor (Botlhomilwe, Sebudubudu and Maripe, 2011). Before the motion could reach Parliament, the ruling party parliamentary caucus met and decided that the motion be withdrawn. What is interesting about the ruling party parliamentary caucus is that its decisions are binding on their Members of Parliament. In fact, the ruling party constitution provides for a disciplinary sanction against any member who goes against the decision of the caucus. Thus the ruling party parliamentary caucus also contributes to the weakness of Parliament. As it is decisions of bodies that are not structures of the legislature are often brought to bear, and do in fact have an influence on, Parliament, in the discharge of its constitutional mandate. To the extent that Parliament’s work can be restrained by decisions of extraneous structures, this can only point to its weakness. The foregoing validate the point made by Ghai et al (1989) in relation to ruling parties in East Africa (Kenya, Uganda and Tanzania), that they usually initiate constitutional reforms to entrench their power rather than to increase accountability. In this sense, Botswana reflects and remains very much of the African pattern.

Another contributory factor towards the weakness of the Botswana parliament has to do with the fear by members of the ruling party backbench. They have personal interest in being appointed Cabinet Ministers and would not want to jeopardize their chances of appointment by going against the wishes of government. This is evident in other African countries such as Kenya as ‘backbenchers may aspire to a position in the government as (assistant) minister and are therefore reluctant to criticise the government’ (van Cranenburgh, 2009:56). Closely related to this point is the fear of President Ian Khama by members of the ruling party. President Ian Khama is no ordinary President (Poteete, 2012). He is the son of the first President of Botswana, Seretse Khama, who ruled the country from independence in 1966 until he died in office in 1980. Seretse Khama was also the chief of the Bamangwato. The Central District, where the Bamangwato are spread, is the

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largest district in the country and contains approximately 37 percent of the country's total population (Henderson 1990). He was a hugely popular figure and the first Motswana to marry a white woman (Sebudubudu and Botlhomilwe, 2013). At the time it was a rare privilege for a Black man to marry a white woman and it is highly possible that this marriage elevated him to the status of a "hero" among Batswana (Botlhomilwe and Sebudubudu, 2011). Seretse's name is, to date, still a household name. In short, the fear and/or respect of Ian Khama can be traced to his father's personal history and descent. Ian Khama himself has a very short yet *pleasantly surprising impressive* history that is captured by Good (2010: 138-9) in the following terms:

His experience is restricted to three areas alone: the military; chieftaincy and dynastic politics; and state power, briefly at the highest level. His formal education appears to have peaked at the Sandhurst Military Academy in Britain, 1972-74. His big experience of preferment was in 1977 when his father, the founding President Seretse Khama, appointed him at the age of only 24 as Brigadier in the new BDF, bypassing more experienced and better educated officers in the Police Mobile Unit. His next career step came in April 1979 when he was installed as Kgosi Khama IV of the Bamangwato in Serowe. The third occurred swiftly in 1998, when he formally resigned as Commander of the BDF on 31 March, registered as a member of the BDP, and was appointed as Minister of Presidential Affairs on 1 April. The next day Khama was nominated as Vice president, without reference to any local or national electorate.

The above quotation demonstrates Ian Khama's "meritorious" career. He ascended to the presidency at the end of President Festus Mogae's term of office in 2008, thanks to Botswana's system of automatic succession in which a sitting President appoints his successor without any recourse to an election (Sebudubudu and Botlhomilwe, 2013). Presidents Festus Mogae and Ian Khama are the first and second beneficiaries of the system of automatic succession respectively. *Mmegi* newspaper described the system as "outdated and a very undemocratic piece of legislation" (*Mmegi*, 9.10. 2009).

Interestingly, senior members of the ruling party correctly predicted democracy under Ian Khama's government. These predictions were made whilst Ian Khama was still the Vice President of the country. A former BDP MP for Sebina Gweta, Olifant Nfa, once cautioned parliament that "he feared

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the transfer of power from [Festus] Mogae to [Ian] Khama as president would mark the end of democracy and free speech and that the liberated would only be the dead and those languishing in prison" (Botlhomilwe, Sebudubudu and Maripe, 2011: 337). Although this revelation by MP Mfa startled some, others were in agreement. Relatedly, a senior member of the ruling party and current Vice President, Ponatshego Kedikilwe who unsuccessfully challenged Ian Khama for the ruling party Chairmanship in 2003, once said this about the Khama regime:

Democracy will give way to autocracy. Many people in the top echelons of the party are today scared to speak their minds because of the stature of Khama. Many are no longer following any principles, but merely taking a side which they think will guarantee them longest stay on positions of powers. For instance even people you would expect to know...are merely competing at who licks hardest the boots of the man at the top (*Botswana Gazette*, 18.6. 2003).

Indubitably, ruling party parliamentarians are also fearful of being denied the opportunity to run for elections under the ruling party ticket if they defy and/or criticize President Khama. For example, just before the 2009 general election, Khama recalled Pono Moatlhodi who had been democratically nominated the ruling party parliamentary candidate for Tonota South constituency (Botlhomilwe, Sebudubudu and Maripe, 2011). The "offence" committed by Moatlhodi was that he once, in a parliamentary debate, criticized the Khama regime for what he called the "militarization" of the civil service. He was only "pardoned" following the intervention of former Presidents Ketumile Masire and Festus Mogae and after having tendered a public apology to Khama. Moatlhodi was seen on national television in tears apologizing to Khama and calling him "father" (*botate*) even though he is older than him. Another ruling party Member of Parliament, Botsalo Ntuane was forced to apologize to Khama after he complained that under the leadership of Khama, Botswana was drifting towards a "fundamentalist state". This was in reference to the Khama sponsored new Liquor Act that drastically restricted the operation hours of outlets dealing in alcoholic beverages.

One of the greatest, but continuing, tragedies of the National Assembly has to do with the apportionment of time between government business on the one hand and other business on the other. Parliamentary time has historically been skewed heavily in favour of government business at the expense of

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other important parliamentary business. Thus, government business has priority on all days, except Fridays. This has resulted in backlogs with respect to private members motions, many of which have been carried forward from one session to the next, and on occasions from one parliament to the next. Another serious casualty in this disproportionate time allocation is the absence of time to consider the reports of parliamentary committees, which are invariably tabled, but for which no time has been allowed in the parliamentary calendar. The result is that parliamentary committees spend a lot of time, and use substantial amounts of money, investigating or studying issues but which the wider National Assembly does not see or make time to consider and discuss. This situation affects even very important and far reaching reports, including those of the Public Accounts Committee. It should be noted that Parliament Standing Orders are not explicit on what happens to Committee Reports once tabled by the Chair of the Committee.

The above has also resulted in a situation where the Executive views Parliament solely from the standpoint of government business, and it has been known to desire the adjournment of meetings of the National Assembly upon the conclusion of government business, notwithstanding the substantial arrears with respect to private members motions and the reports of parliamentary committees. The only parliamentary committee whose reports get to be discussed on the floor of the National Assembly is that of the Finance Committee, and even then only because the committee reviews and recommends supplementary budget expenditure. For the most part, the Executive is impervious to the work of parliamentary committees even in areas affecting their own portfolio responsibilities; but, then, so are most Members of Parliament who are not members of a particular committee.

In addition, it is widely accepted that practically every enactment requires or entails subsidiary legislation to actualize or operationalize it, hence it is provided in practically every Act that the responsible Minister shall have power to make regulations. That power which is conferred on the Minister is in fact a delegation by the National Assembly of its law-making power, and over which the National Assembly has continuing control and responsibility. Sadly however, the National Assembly of Botswana has remained supine and is seemingly indifferent to the exercise of power by Ministers and has not sought to actively police or control subsidiary legislation. In terms of Section 9 of the Statutory Instruments Act, all subsidiary legislation is required to be laid before the National Assembly which can pass a resolution negating the same within 21 days if the National Assembly disapproves of

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them. Notwithstanding compliance with Section 9(1), the appropriate parliamentary committee has not to our knowledge risen to its challenge and duty with respect to the scrutiny of subsidiary legislation. It is surprising, for the National Assembly to be overseeing public enterprises, when it has failed so dismally in relation to that which is under its very nose, subsidiary legislation. Botlhale (2012: 56) reminds us that:

Although parliament is vested with powers to call anyone, including the president, to account for omissions and commissions within the scope of their official duties, it rarely, if ever, does that. Thus parliament robs itself of the chance to call the executive to account for the implementation of legislation and policy-before, during and after implementation. As it is, the executive, in particular the Cabinet, accounts to the president and reports neither to parliament nor to special parliamentary committees afterwards. The only time that cabinet accounts to parliament in regard to the implementation of legislation and policy is when MPs ask questions. Hence, the reporting is done on the 'need to know' basis.

Another indicator of the weakness of the Botswana parliament has to do with the position of the Leader of the Opposition. Historically, the position of Leader of the Opposition has been remunerated at the same level as that of Assistant Minister, and the Leader of the Opposition is entitled to the same perquisites and fringe benefits as are enjoyable by an Assistant Minister. Such perquisites and fringe benefits are contained in Botswana's equivalent of a ministerial handbook, commonly referred to as the "green book" (a highly classified document). The only reference to the Leader of the Opposition in the "green book" ought to be in relation to his/her benefits, as these are comparable to those of an Assistant Minister. But of late (since 2012), there has reportedly been an amendment to the "Green Book" whereby the Leader of the Opposition has been subjected to restraints and controls as though he is a Cabinet Minister, and is required to seek and obtain presidential approvals with respect to travels and meetings outside his constituency (Interview, April 2013).

The other key weakness has to do with the location of Parliament within the national budgetary mechanisms and systems. Parliament falls under the Office of the President, from where its budgetary requirements are determined. This alone is an instance of subjugation of Parliament to the executive for it effectively makes Parliament a department of the Office of the

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President. Thus, according to Maripe (2013), “at the structural, organizational and institutional levels, Parliament is not independent and it cannot reasonably be expected that it would effectively carry out any oversight responsibility.” These weaknesses reveal themselves with respect to the functioning and administration of the National assembly. For instance, parliament has no control over the remuneration of its members nor does it have its own staff. Parliamentary staff are ordinary civil servants on secondment, and can be transferred out of the institution to other departments in the public service. Furthermore, the external travel of MPs (including the Speaker) and National Assembly staff is on exactly the same terms as those of the rest of the public service, that is, subject to the approval of the Permanent Secretary to the President. The approval of car and housing loans for MPs is on exactly the same terms as the rest of the public service. Another handicap for parliament is the absence of key personnel, that is, researchers to undertake specialized studies and support parliamentary committees, lawyers and legal draftsmen to draft private member bills etc. All these attest that parliament functions like a Department under the Office of the President.

One of the functions of Parliament is the formulation of government policy. Once adopted, it is incumbent upon the executive to implement them. Policies are usually adopted through White Papers tabled for deliberation by the executive, or through motions passed and adopted by the house. There is usually no problem where a policy adopted through a White Paper, for that reflects government’s intention to act in a particular way, and it would therefore be easy to implement. The problem arises where a policy was adopted through a motion, and particularly where the executive was opposed to the motion. Parliament does not have the wherewithal, capacity and the legal mechanism to ensure enforcement of its resolutions, for it depends on the executive to do so. It cannot even call the executive to account for failure to implement the policies, save through questions posed by Members of Parliament, responses of which never really mean anything and in any case are treated with contempt for those who ask questions. As observed by a former member of Parliament, Cabinet Minister and Speaker of the National Assembly:

The other deficit arises out of the executive’s non-realization that once a resolution to adopt the policy has been passed it becomes incumbent on them to implement it, and that failure to do so invites censure from the House. Once the policy has been passed, it ceases to be a

requisition by the executive but becomes a parliamentary resolution that is now owned by Parliament, which includes the executive (Molomo, 2012:143).

Perhaps the clearest exposition of the legislature-executive power relationship is demonstrated by the events following the Parliamentary resolution of 2007, calling upon the Government to suspend the decision to privatize Air Botswana, a state enterprise running the national airline. Shortly after the adoption of the motion, the Attorney General issued a press statement in which she took the view that Parliamentary motions were not binding on the executive but on Parliament itself, and that therefore the process of privatizing Air Botswana could not be halted by a Parliamentary motion as the two organs were, in terms of the separation of power principles, operating within different spheres and were not to interfere with one another in their respective official businesses. The Attorney General's position, although contested by some (for example Bayford, 2007 and Maripe, 2013), provided the "legal" justification for the disregard by the executive of Parliamentary motions. And the Attorney General, at least at the time, was a member of both Cabinet and Parliament! Other motions adopted by Parliament and not acted upon by the executive include the motion on declaration of assets, and the other on floor crossing. These have not been brought into effect by legislation, and to all intents and purposes are gathering dust at the Office of the President, from where the enabling Bills are expected to be generated. Parliament has no measures in its armoury to enforce this. So in all the circumstances, it would appear that the executive trumps Parliament in the separation of power axis and only uses Parliament to its own convenience. The weakness of the Botswana Parliament, especially in so far as it relates to its independence, is even acknowledged by parliamentarians themselves. The section that follows addresses this point.

A Study on the Independence of the Parliament of Botswana

By the admission of Botswana's parliamentarians themselves, their parliament lacks independence and is therefore in need of powers to make it independent to enable it to effectively carry out its constitutional mandate. As far back as March 1988, the Botswana Parliament passed a motion that read thus:

That this Honourable House strongly urges Government to take steps forthwith to ensure that Parliament as a supreme body in Botswana becomes an independent institution detached from the Office of the

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President where it has all the time been relegated to the lower status of a minor department (Republic of Botswana, 2003:2).

Of significance is that this motion was not acted upon until 2002 when the then Speaker of the National assembly, Ray Molomo, appointed a Task force of eight (8) Members of Parliament led by Bahiti Temane to work out the Terms of Reference for a Consultancy on the independence of the House. The Report of the *Study on the Independence of the Parliament of Botswana* was submitted to the Speaker on 10th December, 2003. The terms of reference for the study included, *inter alia*:

1. To define the role of Parliament in relation to its main task as a Legislature (legislative body) by means of an Act.
2. To establish the role of the National Assembly in relation to the mandate of the Executive to rule and/or govern in as far as the National Assembly has the power to exercise its functions as a public watchdog.

In the report, the role of Parliament as an oversight of the Executive in a parliamentary democracy is emphasized, and that this can be achieved by amending the Standing Orders “so as to make the Executive more accountable to parliament; and secondly by training Members of Parliament in the ‘best practices’ adopted by Parliamentarians in other countries” (Republic of Botswana, 2003:2). Interestingly, this recommendation is in line with recent survey results. Unpublished Afrobarometer survey results of June-July 2012 showed that support for a parliament that plays an oversight role on the executive (president) stood at 71%. This percentage was at 52% in the Afrobarometer survey of 2008.

Another interesting recommendation was that of giving Parliament power to ratify the appointment of, and removal from, certain offices such as the Auditor General, the Ombudsman, Director on Corruption and Economic Crime, and Secretary of the Independent Electoral Commission. In fact in some countries, notably the United States of America (USA), judicial appointments must be ratified by the legislature. This may be a good exercise to copy. These important offices should also be required to report to the National Assembly and their budgets approved by same as a way of enhancing public accountability. The report also recommends a Parliament with its own budget and conducting its own affairs, including staff recruitment, so as to move away from a system where Parliament is under

the Office of the President and therefore an appendage of the presidency. This is an indication that Members of Parliament are well aware of the fact that their institution lacks powers and autonomy. What is surprising, however, is that the report had not been tabled before parliament for adoption at the time of writing. When members of parliament complain about parliament's lack of independence, they debate the issue as if this report does not exist, that is, as if it is a new issue. This, in itself, raises questions about the seriousness of Botswana parliamentarians. The ball is entirely in their hands to table a parliamentary motion calling for the adoption of the report. Having said this, the Executive might as well employ some of the tactics alluded to elsewhere in this paper to frustrate such effort. It is indeed doubtful if the Executive has any interest in seeing a strong and autonomous Parliament; a move that may be a threat to the *status quo*. The paper therefore suggests a comprehensive review of the Constitution. Unpublished Afrobarometer survey results of June-July 2012 suggests that 55% of Botswana interviewed were in favour of reviewing the Constitution whilst 40% felt that it should be unchanged.

Conclusion

This paper has attempted to make a case that despite the fact that Botswana has won international accolades as a "shining example" of democracy in Africa, with some scholars even going to the extent of describing it as an "African miracle" (Samatar, 1999), it is characterized by a very powerful executive and a very weak legislature. This scenario raises important questions about the true nature of her democracy especially since the role of the legislature as a watchdog and /or provider of checks and balances against executive despotism is regarded as one of the pre-conditions of a democracy. In fact, a liberal democracy requires that there be a separation of powers between the three main arms of government. We have argued that the executive powers bestowed on the Presidency in Botswana have resulted in a "toothless" parliament that has been relegated to the status of a mere "registration chamber". A number of factors have been advanced to account for the weaknesses of the Botswana parliament. We have identified some legal and operational/administrative challenges that have a bearing on the autonomy and independence of the Botswana parliament in the implementation of its constitutional mandate. There is therefore a need to implement the recommendations of the *Study on the Independence of the Parliament of Botswana*. Equally important is a constitutional amendment and/or review to reduce the powers of the President especially in view of the

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fact that he/she is not popularly elected. As Molomo (2000: 97-8) correctly maintains:

The powers of the President are wide-ranging; they straddle all arms of government, the executive, judiciary and legislature. By virtue of his position, the President heads and controls the executive arms of government, and also has considerable authority over the legislature. The executive presidency in Botswana symbolizes the bastion of political power. The supreme command of the Botswana Defence Force is vested with the President, as Commander-in-Chief. By virtue of the authority vested in him, he has the powers to appoint and fire members of the force. More fundamentally, he alone has powers to declare war.

As we have argued in the paper, the Botswana parliament has from the very beginning been a weak institution, and that this weakness has been concealed by the benevolence/favourable disposition of past Presidents. The current President does not have any difficulty in exercising his powers to the letter of the Constitution. To this extent, it can be argued that Ian Khama has made the weakness of parliament as well as other oversight institutions even more pronounced. In part, this explains why Matumo (2013) argues that "The current President of the Republic, Lt Gen. Ian Khama has given Botswana the opportunity to retrospect and educate themselves about the Constitution and the powers that it vests on the Presidency". This is particularly important as even what Burnell (2003) refers to as institutions of "horizontal accountability" as well as civil society (the lifeblood of democracy) are enfeebled in Botswana.

Notes

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