Botswana
Introductory Notes

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I. Origins and Historical Development of the Constitution

The British formally declared a protectorate[1] over Botswana, then known as Bechuanaland, in 1885, at the invitation of one of the prominent indigenous local chiefs. Until then, the peoples who lived in this territory were ruled by different chiefs (*dikgosi*) and lived alongside each other as independent entities. Many reasons for the British occupation of the territory have been put forward.[2] For example, it has been suggested that the British wanted to prevent the Boers from using this territory for the reinforcement of their troops in their war with the British, and stop the Germans from having a 'coast to coast' presence in the sub-region.[3]

Until its independence in 1966, British interest and effective presence in Botswana was fairly minimal. A rudimentary form of governmental administration was established in 1891. Almost as soon as the territory came under British protection, the British passed on its administration into the hands of the Government of the Cape of Good Hope, or the Cape Colony as it was known—then a British colony, and today part of South Africa.[4]

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[1] A protectorate was a territory which the protecting power undertook to defend from external aggression without the responsibility for internal administration. A British protectorate—unlike a colony—was, in principle, not British soil, its people were not British subjects, and the local rulers' powers as to domestic issues were unimpaired. However, in practice, a protectorate was treated in exactly the same way as a colony.

[2] One of the reasons given—that it was because the British wanted to secure control over the mineral wealth that the territory was reputed to have—is not convincing, because the minerals were only discovered after the British had left. Thomas Tlou and Alex Campbell, *History of Botswana* (MacMillan Botswana Publishing Co, Gaborone, 1997) 199–211.

[3] As Hoyt Alverson, in *Mind in the Heart of Darkness: Value and Self Identity Among the Tswana in Southern Africa* (Yale University Press, New Haven, 1978), points out at p 25, the establishment of German protectorates in Southwest Africa and Tanganyika, combined with the possibility of German alliances with the Boer Republic of Transvaal and its mini-protectorates of Stellaland and Goshen, galvanized the British to act.

[4] The British Government at the time believed that the (then) Bechuanaland, along with its other smaller Protectorates of Basutoland (present day Lesotho) and Swaziland, would eventually be incorporated into the (then) Union of South Africa. This, of course, never happened. In the opinion of one revisionist 'there was no intention on the part of Britain to create an empire in Africa or establish any permanent presence there', although it did both. As regards the assumption of responsibility for Botswana, Lesotho, and Swaziland, the same author argues that the British felt obliged to extend jurisdiction over the three territories because, quoting from Lord Hailey, 'it seemed essential to prevent action being taken by the Transvaal Republic or Orange Free state which might menace the peace of the Cape Colony or Natal.' See JH Pain, 'The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland' (1978) 11 CILSA 138, 162–163.

A British Order in Council of 9 May 1891, made by the Queen of England in the exercise of powers conferred upon her under the Foreign Jurisdiction Act of 1890,[5] gave the High Commissioner appointed to administer Botswana powers to, 'amongst other things, from time to time by Proclamation provide for the administration of Justice.'[6] The High Commissioner, who had his seat at the same place as the Government of the Cape Colony in Cape Town, acting under the 1891 Order in Council, published a Proclamation on 10 June 1891 which endowed the territory with a complete system of administration, established courts, and provided for the appointment of various officials. The several High Commissioners who were appointed administered the territory from their seat in Cape Town and later, from other towns in South Africa. They often legislated for the territory simply by extending Proclamations designed for what is now South Africa to Botswana. The day-to-day administration of the territory was carried out by the local chiefs and because the British did not want to spend too much money on the administration of the territory, they used the indigenous system to rule. The main feature of the system of administration that was retained by the British was the *Kgotla*, a traditional assembly of the adult members of the community where the chiefs met with their subjects and discussed issues concerning their communities.

As the colonial administration became more influential and began to overshadow the local chiefs and the *Kgotla*, people started clamoring for a forum of consultation at the national level. The administration acceded to these demands by establishing a Native Advisory Council, later renamed the African Advisory Council, in 1919. It was merely an advisory body with no effective powers and met once a year in Mafikeng in South Africa. A year later, a European Advisory Body was established to advise the administration of matters affecting the handful of white people living in the protectorate. The two councils operated side by side until 1950 when a Joint Advisory Council, made up of eight members of each of the two councils and representatives of the administration, was established. It too had only advisory powers, met twice a year, and discussed issues of interest to both races.

Repeated demands in the 1950s by the African Advisory Council for the establishment of elected legislative councils were ignored by the British. The general anti-colonial campaign of the early 1950s gained momentum in 1957, when Ghana became independent. In 1958, the Joint Advisory Council passed a resolution calling for the establishment of a legislative council. A constitutional committee was set up by the Joint Advisory Council with the support of the colonial administration in 1959, and it was charged with drafting a constitution. Based on a report presented by this committee in 1960, the African, European, and Joint Advisory Councils were replaced with a legislative council headed by the resident Commissioner. It was composed of both elected and nominated representatives of the two communities, but the number of whites far outnumbered the blacks. By the time it met in 1961, political parties were being formed to campaign for independence. Among them were the Bechuanaland Democratic

[5] According to JH Pain, n4 at 149, the Foreign Jurisdiction Acts were passed to regularize the machinery by which the Crown exercised jurisdiction in foreign countries and to subject such jurisdiction to parliamentary control.

[6] Bechuanaland and Protectorate General Administration Order in Council of 9 May 1891.

Party and the Bechuanaland People's Party. When Britain realized that independence was inevitable, it announced a timetable for independence. This provided for a period of self-government, to train the Batswana in government, and ended with full independence. During a conference held in Lobatse in 1963, a constitution for a self-governing Botswana was agreed upon. As part of the program for self-government, the legislative council was replaced in 1963 by a National Assembly of thirty-two directly elected members and four specially elected members. A Prime Minister was to be elected from members of the National Assembly. There was a Cabinet, presided over by the resident Commissioner and made up of the Prime Minister and five Ministers appointed from the National Assembly. A House of Chiefs—the successor to the African Council—was established, with powers to advise the National Assembly and the Government on customary law and related matters.

The 1963 Constitution actually came into effect on 3 March 1965. Elections were held shortly after this; the Botswana Democratic Party (formerly the Bechuanaland Democratic Party) won 28 of the 31 seats and the Botswana People's Party (the former Bechuanaland People's Party) won the remaining three seats. The 1965 Constitution was later modified and adopted by the Bechuanaland Independence Conference, held in London in February 1966. Those who attended the Conference were the newly-elected government, represented by the Prime Minister Seretse Khama and his deputy, Mr Masire; the opposition, represented by its leader; a representative of the chiefs; and five other participants representing the resident Commissioner and the British Government. The Constitution was brought into force as a schedule to the Botswana Independence Order of 1966. Unlike the constitutions of some states, such as Namibia and South Africa, the Botswana Constitution was not adopted by the people through a referendum or by a popularly elected constituent assembly.

The Botswana Constitution of 1966 is a typical prototype of the constitutions that were prepared by the Colonial Office in London for former British colonies, such as Kenya, Uganda, Zambia, and Ghana. Although there have been many amendments to the Botswana Constitution, none have been significant enough to change the basic framework and structure set up by the original independence Constitution, which is still in force today. Yet Botswana has been, by and large, Africa's most successful example of an open, transparent, and liberal multi-party democracy. Like most other African constitutions, the 1966 Constitution provides for a strong executive with considerable scope for personalized government. The increasingly autocratic and imperial style of President Ian Khama, who came to power in 2008, combined with the fact that the ruling Botswana Democratic Party (BDP) has monopolized power since independence, raises some doubts about the future of Botswana's liberal democracy.[7]

[7] See *Gomolemo Motswaledi v Botswana Democratic Party, Seretse Khama,& Others*, Court of Appeal No CACLB-053-2009. Because of factional in-fighting within the ruling Botswana Democratic Party, the President of the Republic, who is also President of the party, decided in his latter capacity to suspend the appellant (the secretary general of the party) from the party, effectively preventing him from standing for parliamentary elections and even more significantly, tilting the balance between the competing factions within the party in favor of the President's faction. When the applicant challenged the legality of the President's action, the latter successfully relied on Section 41(1) of the Botswana Constitution, which states that no civil proceedings shall be instituted against the President with respect to anything done or omitted to

II. Fundamental Principles of the Constitution

Botswana, like most African countries, emerged hastily from a repressive authoritarian colonial era with an ostensibly liberal Constitution designed to offer fairly limited human rights protection. In spite of the twenty-two amendments it has undergone, in comparison to the constitutions of most other African countries that are either new or were substantially revised after the wave of democratization that swept the continent in the 1990s, the Botswana Constitution can be described today as conservative. Unlike the majority of modern African constitutions, in which most of the constitutional goals, values, and principles are expressly stated, these goals, values, and principles can often only be implied from some of the provisions of the Botswana Constitution. A few examples will suffice.

There is no provision which specifically deals with or provides for a separation of powers. Nevertheless, a separation of the traditional triad of powers can be implied from the fact that Chapter IV of the Constitution deals only with the executive, Chapter V with parliament, and Chapter VI with the judiciary.[8] Again, there is no specific provision in Chapter II of the Constitution that provides for the protection of fundamental rights and freedoms of the individual, or that deals specifically with democracy and electoral principles. Nevertheless, Botswana remains one of the few African countries that have, since independence, maintained an open, transparent, and multi-party democratic system.

At independence, Botswana was classified amongst the twenty-five poorest countries in the world. Since the late 1970s, it has combined an impressive record of dramatic economic growth, due to the discovery of diamonds in 1967, with political stability, and has in fact had the highest rate of per capita growth of any country in the world over the last 35 years. It has a market-oriented economy that encourages private enterprise and over the last decade, has been ranked as Africa's least corrupt country. Despite the long periods of economic growth, especially in the 1990s, many sections of the population suffer from high unemployment and poverty. This has been so in spite of the fact that numerous safety net programs were introduced immediately after independence to alleviate the poverty the country suffered due to colonial neglect. These included social welfare grants for destitute persons, orphans, and home-based care patients, credit-based self-employment programs, child allowances, food-for-work programs, and food subsidies.

In the last three years, with the fall in the price of minerals, which are the mainstay of the economy, Botswana has been going through a very difficult economic situation. For the first time since independence, partly due to the economic crisis, the dominant position of

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be done in his private capacity. See also Kenneth Good, 'The Presidency of General Ian Khama: The Militarization of the Botswana "Miracle"', at **[http://allafrica.com/stories/201003170880.html?viewall=1].**

[8] See generally, CM Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) 25(2) Boston College Third World Law Journal 301–342.

the ruling BDP party was threatened in the 2009 elections. The rising political tension has exposed the weaknesses of the 1966 Constitution. As will be seen below, the scope of human rights that are recognized and protected is rather limited. Nevertheless, Botswana's human rights record is good.

III. Fundamental Rights Protection

The Bill of Rights, which contains the scope of fundamental rights recognized and protected in Botswana, is contained in the whole of Chapter II—entitled 'Protection of Fundamental Rights and Freedoms of the Individual'—of the Constitution. As noted above, Botswana is one of the very few African countries where an independence constitution is still in force. Although it has been amended on several occasions, these changes have not been substantial and interestingly, none of them has affected the Bill of Rights. This has remained in the form in which it was drafted at independence and to some extent still reflects the traditional British skepticism[9] towards the entrenchment of human rights.

Although there were some consultations with respect to the drafting of the 1966 Constitution,[10] the decision to include the Bill of Rights was that of the British. There is no evidence that there was any detailed discussion on either its nature or its scope. Nevertheless, the introduction of the Bill of Rights ushered in a new era and was a fundamental repudiation of the repressive colonial period and the institutionalized system of racism that was to continue in South Africa until it was swept aside by the third wave in 1994.

We shall examine the spectrum of rights covered, their scope of application, the limitations on their application, and the system of enforcement. It is worthwhile pointing out here that whilst the Constitution remains the main source of fundamental rights, there are two other sources that must be noted.

The first of these is the common law. Until the enactment and coming into force of the 1966 Constitution with its Bill of Rights, the protection of human rights was largely left to the common law and statute. However, there was very little respect for human rights during the colonial period. In fact, in 1960, when the British realized that independence for Botswana was inevitable, they created a Legislative Council for the territory. One of the first measures taken by this Council was to remove the racial discrimination that had featured in the legal system since 1885. The General Law (Removal of Discrimination) Revision Law 1964 amended a large number of laws in order to 'remove certain provisions of a racially discriminatory nature from the laws of the territory'.[11]

Be that as it may, the limited human rights protection that the colonial administration could allow Batswana to enjoy was based on common law, which was essentially a mix

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[9] See Peter Wesley-Smith, 'Protecting Human Rights in Hong Kong', in Raymond Wacks (ed), *Human Rights in Hong Kong* (Oxford University Press, Hong Kong, 1992) 39–43.
[10] See DD Ntanda Nsereko, *Constitutional Law in Botswana* (Pula Press, Gaborone, 2001) 30–31.
[11] See Law No 28 of 1964.

of English common law principles developed by English judges to protect civil liberties, and the Roman-Dutch principles applied to Botswana during the colonial period via the Cape Colony in South Africa.[12] Section 2(1) of the Botswana Independence Act 1966 and Section 4(1) of the Independence Order saved existing laws, including the common law. It is clear from this that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law, or legislation, as long as these are not inconsistent with the Constitution.

A further basis for the continuous application of common law principles is provided by Section 127(12) of the Constitution, which states that 'the Interpretation Act, 1889 shall apply, with the necessary adaptations, for the purpose of interpreting this constitution.' With the power conferred by Sections 18 and 105 to interpret the Constitution, the resulting judicial decisions constitute precedents. These judicial precedents, as a result of the English doctrine of *stare decisis*, received as part of the general reception of English law during the colonial period, constitute a separate and independent source of law. Many judicial decisions interpreting the Constitution have laid down important principles that not only have developed human rights and constitutional law, but also other areas of the law, an excellent example of which is *Attorney-General v Dow*.[13]

Common law principles on human rights also still have relevance in those areas not covered by the Bill of Rights. This is on the premise that common law human rights principles are residual, in the sense of being what is left after the Bill of Rights principles are exhausted. In this respect, they can be used to fill any gaps that appear in the Bill of Rights. However, the ability of common law human rights principles to effectively fill any such gaps is inherently limited because of their residual character, in that they can easily be overridden and extinguished by a simple Act of Parliament. Their recognition also depends on judicial willingness to recognize their continuous relevance and application in matters not covered by the Bill of Rights. This also depends on the ability of human rights lawyers to carefully and thoroughly investigate these principles and raise them before the courts, which cannot on their own invoke and enforce them.[14]

The second source of fundamental rights that complement those provided for in the Bill of Rights is based on international law and international standards. These are discussed below (see Section VII). We shall now examine the spectrum of rights recognized and protected by the Botswana Constitution.

A. The spectrum of rights

Fundamental rights are sometimes classified into three main categories, or what is usually referred to as the three generations, of rights. It is a classification that is not free from

[12] For a full discussion of the origins of the Botswana legal system, see CM Fombad and EK Quansah, *The Botswana Legal System* (LexisNexis Butterworths, Durban, 2006).
[13] [1992] BLR 119. This case is discussed below.
[14] See further, Mac Darrow and Philip Alston, 'Bills of Rights in Comparative Perspective', in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, Oxford, 1999) 473.

controversy, because some of the rights may belong to more than one of these categories. Nevertheless, in the absence of anything better, it is a convenient approach to adopt in analyzing the scope of human rights. The first generation rights usually correspond with civil and political rights, the second generation rights with socio-economic rights, and the third generation rights refer to fraternity or solidarity rights. While the full listing of what are usually considered as the three generations of fundamental human rights is not necessary for our purposes here, the full range of human rights that are recognized and protected in the Botswana Constitution is summarized in the table below.

Rights recognized and protected in the Bill of Rights

RIGHTS	SECTION IN THE CONSTITUTION
Right to life	3(a), 4
Right to personal liberty and security of the person	3(a), 5
Right to privacy	3(c), 5, 9
Protection from slavery and forced labor	6
Protection from inhuman treatment	7
Protection from deprivation of property	3(c), 8
Protection of law, including right to a fair hearing	3(a), 10
Freedom of conscience	3(b), 11
Freedom of expression	3(b), 12
Freedom of assembly and association	3(b), 13
Freedom of movement	14
Freedom from discrimination	3, 15

Significantly missing from the Bill of Rights are most of the rights classified as economic, social, and cultural rights (that is, second generation rights) and the fraternity or solidarity rights (that is, third generation rights). Some of these include critically important rights such as the right to education, the right to health, the right to protection of the family, the right to culture, and the right to a clean environment, as well as the rights of minorities.

We shall now, by way of example, briefly examine some selected rights, especially in the light of judicial interpretation of their meaning and scope. We shall concentrate in this section on the substantive rights, and examine their limitations later. The right to life is, fittingly, the first stated in the Bill of Rights. Section 4(1) states:

> No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

It is expressed in negative terms, forbidding an individual to be deprived of his right. There is no positive obligation to sustain or support life; nor does the Constitution state that an individual has a right to life. In spite of this, it is generally accepted that the state

has a duty to create the political, social, and economic conditions conducive for sustaining a quality life. It is worth noting that Botswana is one of the African countries that still has the death penalty on its statute books and regularly hangs persons who are convicted to death. There are, however, many legal safeguards to ensure that the death sentence is not used arbitrarily or unduly. These precautions include Section 10 of the Constitution, which guarantees, *inter alia*:

- the right to a fair hearing within a reasonable time;
- the presumption of innocence;
- informing the accused person as soon as reasonably practicable, and in language that he can understand, the nature of the charges against him;
- public trial within a reasonable time before an independent and impartial court;
- the right to defend oneself;
- the right to legal representation; and
- the right to confront prosecution witnesses and to call one's own witnesses.

Sections 53 and 54 give the President the powers to pardon, conditionally or unconditionally. In exercising these powers he is advised by the Advisory Committee on Prerogative of Mercy.

The Botswana Constitution prohibits discrimination in two sections (Sections 3 and 15). Section 3, which is worded like a preamble, states that 'whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinion, colour, creed or sex …', suggesting that every person living in the country, irrespective of whether or not he or she is a citizen, is entitled to the rights and freedoms provided for under the Bill of Rights. Discrimination is also prohibited in Section 15, which in subsection (2) states that 'subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.' In subsection (3), 'discriminatory' is defined as

> affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The exact scope of protection provided by this subsection was the main issue in the well-known case *Attorney-General v Dow*.[15] The facts of this interesting case were fairly straightforward. Unity Dow, a female citizen of Botswana who was married to Peter

[15] See also Onkemetse Tshosa, 'The Application of Non-Discrimination in Botswana in the Light of *Attorney-General of Botswana v Unity Dow*: Judicial Approach and Practice' (2001) 5 International Journal of Discrimination and the Law 189–202.

Nathan Dow, an American citizen, brought the action. She applied for an order declaring Sections 4 and 5 of the Citizenship Act as *ultra vires* the Constitution on the grounds that they violated Section 3, guaranteeing equal treatment under the law, and Section 15, granting protection against discrimination. A child was born to them in 1979, prior to their marriage in 1984. Two more children were born to them subsequent to the marriage. In terms of Sections 4 and 5 of the Citizenship Act, the first-born child was a citizen of Botswana, whereas the last two born during the marriage were not. Unity Dow challenged the constitutionality of these provisions, contending that they discriminated against her and other women in similar circumstances. The discrimination lay in the fact that while male citizens married to foreign women could pass their Botswana citizenship on to the children of their marriage, a female citizen married to a foreign male could not do the same. The Attorney-General, on behalf of the Government, argued *inter alia* that the word 'sex' is not mentioned among the identified categories in the definition of 'discriminatory' treatment in Section 15(3); that this omission of sex was intentional and was made in order to permit legislation in Botswana which was discriminatory on grounds of sex; and that discrimination on grounds of sex must be permitted in Botswana society as the society is patrilineal and therefore male-oriented. The principle of *inclusio unius exclusio alterious*, to which effect is given in Section 33 of the Botswana Interpretation Act, was also invoked. By a majority of three to two, the full bench of the Court of Appeal held that Section 4 of the Citizenship Act violated Sections 3 and 15 of the Constitution and was therefore *ultra vires.* The majority felt that in construing a constitution, a broad and generous approach should be adopted, and that all relevant provisions bearing on the subject for interpretation should be considered as a whole in order to give effect to the objectives of the constitution. It also noted that where rights and freedoms were conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed. On the effect of the omission of the word 'sex' in the definition of discriminatory treatment in Section 15(3), Amissah JP, in the leading judgment said:

> I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed…
> All these lead me to the conclusion that the words included in the definition are more by way of example than as an exclusive itemisation.[16]

The learned Judge President was prepared to say that other classes or groups with respect to which discrimination would be unjust and inhuman, and which 'should have been included in the definition' but were not, such as discrimination against the disabled or discrimination based wholly or mainly on language or geographical divisions within Botswana, were protected by Section 15 of the Constitution.[17]

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[16] [1992] BLR at 146–147.
[17] Ibid at 147.

The substantive nature of the protection against discrimination is provided for in Section 15(1) and (2). Subject to a number of exceptions, Section 15(1) provides that no law shall make any provision that is discriminatory either of itself or in its effect, whilst Section 15(2) states that 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.' The Constitution therefore protects people from discrimination in two main ways: first, against the enactment of any law which is discriminatory either expressly or in its effect; and second, against any discriminatory action by persons acting under written law, or in the performance of the functions of any public office or any public authority. The broad nature of the exceptions to this, provided in Section 15(6), (7), and (8), suggests that the protection extends beyond acts of public officials into acts of private individuals.

It would, however, have been desirable for discriminatory treatment in the private sector to be explicitly prohibited. In *Zachariah & Another v Botswana Power Corporation*,[18] the Court of Appeal held that a clause in the Terms and Conditions of the workers of the Botswana Power Corporation, which prohibited employees from taking an active role in political activities or holding elected political office of any nature, did not violate Section 15(2) of the Constitution. In response to the appellant's argument that the clause was discriminatory not as between employees of the respondent, on the one hand, and employees not so employed, on the other, but as between employees of the respondent who wanted to participate actively in politics, such as the appellants, and their fellow employees, who did not so wish, Amissah JP said:

> The fallacy in the distinction lies in the fact that the clause does not say that employees of one description, should be treated differently from those holding a different opinion, but it says all its employees are subject to the same irrespective of their political opinion.[19]

In the earlier case of *Students' Representative Council of Molepolole College of Education v Attorney-General*,[20] the appellants, *inter alia*, challenged the constitutionality of the regulations of the Molepolole College of Education, which provided that female students who fell pregnant would have to leave the College for at least a year. After pointing out that, following the *Attorney-General v Dow* case, sex discrimination was one of the prohibited categories under Section 15(3) of the Constitution, the Court noted that a regulation or rule of law that provided for women alone was not necessarily discriminatory on the grounds of sex. This was because there may be need to regulate the lives or affairs of one gender in a manner that was not applicable to the other. In such situations, the Court had a duty to make sure that the law or regulation under consideration was reasonable and fair and was made for the welfare of the gender, without prejudice to the other, and was not punitive. The Court also pointed out that the bare statement by the party responsible for the enactment of the regulation or legislation that it was for the benefit of the persons affected by it was not

[18] [1996] BLR 710.
[19] Ibid at 728.
[20] [1995] BLR 178.

sufficient, and the Court was under a duty to examine it. From its analysis of the regulation, the Court concluded that the regulation was not designed primarily with a view to benefit pregnant female students, but rather to ensure that they stayed away from College for at least a year. The purpose of the regulation was therefore purely punitive, since it targeted only unmarried female students. Their male counterparts who were responsible for such pregnancies suffered no such punishment. The Court accordingly declared the regulation discriminatory and inconsistent with Sections 3 and 15 of the Constitution. *Attorney-General v Dow* is now authority for the conclusion that the categories against which discrimination is prohibited in Section 15(3) are not closed, and it also provides some guidance as to what factors may be taken into account in deciding whether or not a particular category that is not presently included could be judicially included or excluded.

However, to fully appreciate the nature of the protection against discrimination provided by Section 15, it is necessary to briefly look at the scope of the permissible exceptions and their actual or potential impact. First, although the words 'every person' in Section 3 of the Constitution indicates that every person living in Botswana, whether a citizen or an alien, is entitled to the equal protection of the law, Sections 15(1) and (4)(b) make it clear that the protection against discrimination does not apply to 'persons who are not citizens of Botswana'. Botswana, like most other countries, does not allow aliens to vote or to stand in elections. It has also imposed restrictions on their right to own real property or to gain employment in both the public and private sectors, and requires reciprocity from their countries of origin before they can be allowed to practice certain professions.[21] It is a policy that does little to stem the rising culture of xenophobia in the country, particularly the hatred of blacks from other African countries, who are referred to disparagingly as '*makwerekwere*'.

What could, in very broad terms, be referred to as an exception relating to matters of customary law, is covered by Section 15(4)(c) and (d), which states that subsection (1) shall not apply:

> (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
> (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not.

The effect of these provisions is that laws may be valid even though they are discriminatory in various areas of personal or family law. This is perhaps the most controversial exception. Besides these two provisions, it can be argued further that Section 15(2), which only prohibits people from being treated in a 'discriminatory manner by any person acting by virtue of *any written law*', implicitly excludes the

[21] See eg Sections 5 and 6 of the Legal Practitioners Act. This requires an alien who applies to practice law in Botswana to prove, *inter alia*, that there is a reciprocal law in his country of origin which would allow a suitably qualified Botswana citizen to practice law in that country.

application of customary law, which is based on *unwritten law*. The preservation of gender inequality which is inherent in the continuous application of customary laws in many of the areas covered by Section 15(4)(c) and (d) is clearly a glaring anomaly and an anachronism, and difficult to reconcile easily with the spirit, purport, and objects of the Bill of Rights.

Section 15(4)(e) expressly authorizes affirmative action in relation to disadvantaged persons. It states that subsection (1) shall not apply to any law so far as that law makes provision

> whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to person of any other such description, is reasonably justifiable in a democratic society.

It has been argued that the express inclusion of an affirmative action provision such as this is *ex abundanti cautela*, because these consequences necessarily follow from the equality provision in Section 3 of the Constitution. However, the very contentious and sensitive nature of the concept of affirmative action makes it necessary for this to be expressly spelt out in order to ensure that it could not be arbitrarily used to create its own inequities.

Freedom of assembly and association is recognized and protected by Section 13(1), which states:

> Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.

In spite of its apparent broad nature, Section 13(2)(c) 'imposes restrictions upon public officers, employees of local government bodies or teachers'. It is on the basis of this restriction that public officers in Botswana are forbidden to form or belong to trade unions, or to openly or actively engage in political activities. It is felt that open and active political activity by public servants may compromise their neutrality. The question has, however, arisen as to whether this prevents public officers from exercising their freedom of assembly and association after working hours. In the *Zachariah & Another v Botswana Power Corporation* case, the appellant contended that a clause that purported to control and restrict his activities outside working hours was unreasonable and *ultra vires* the Constitution. The Court of Appeal rejected the contention. It said:

> I have no doubt that there are certain cases of employment in which certain types of conduct of the employee, whether at or after work, would reflect adversely on the business of the employer. Public servants, for example, are one such class of employees whose conduct reflects on the business of the Government. It would be intolerable for a public servant, who is expected by the public to be even-handed in his work, to claim that he could behave publicly in a partisan a manner

> as he liked, just because such behaviour was outside working hours. Nobody would in that case believe that because he was acting in a partisan manner outside working hours, this had nothing to do with his employer's business or image. It would be ludicrous to contend that the public, to whom public servants ought to show even-handedness in their work, would distinguish between the public servant's actions at work and in his free time.[22]

The Court pointed out that where an individual, such as the appellant in this case, freely agrees by contract not to exercise his freedom of assembly and association, he cannot later be heard to complain that he has been deprived of his right.

Freedom of conscience is recognized in Section 11(1) of the Constitution, which states:

> Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his or her religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his or her religion or belief in worship, teaching, practice and observance.

Section 11(2) specifically recognizes the right of religious communities to establish and maintain educational institutions.

As pointed out above, the list of rights contained in the Bill of Rights should not, for the reasons explained earlier, be taken as exhaustive of all the human rights recognized and protected by the Botswana legal system. The residual principles of common law or those international human rights principles which have become part of customary international law may still be relied upon to fill any gaps in the Bill of Rights. However, the recognition of rights is one thing, and their enforcement is another.

C. Scope of application

One of the most fundamental issues in modern constitutional law that has provoked serious debate amongst comparative constitutional law jurists is the dissatisfaction with the present system of vertical application of constitutional law, especially the Bill of Rights. There are at least two reasons for this dissatisfaction. First, mainly as a result of globalization, many private actors now exercise functions that were traditionally exclusively reserved to the state. Many services previously provided by the state have been or are in the process of being privatized, such as the provision of water, electricity, and healthcare. The withdrawal of the state from the provision of some of these essential services does not free it from its duty to ensure that its citizens enjoy their right to health or right to education. Of necessity, it means that there is a duty on the state to oversee how these other actors now provide these services and ensure that they do not violate the citizens' human rights. The challenge that this poses is how to adjust the state's obligations to provide these critical services, especially to the poorest in society, whilst recognizing the role and responsibilities of the new private actors. Second, because most

[22] [1996] BLR 710 at 721.

constitutions only create rights and duties on the state, the quality of human rights is considerably diminished because many abuses are committed by non-state actors, especially private individuals. For example, Section 15 of the Constitution prohibits discrimination on grounds of 'race, tribe, place of origins, political opinions, colour or creed', but this does not prevent a landlord from refusing to let a flat to a person on grounds of race, sex, gender, or any other similar discriminatory grounds, however perverse or manifestly racist these grounds may be. There is, therefore, need for reforms that will address these problems and expand the quantum of available human rights protection by imposing duties on all these other potential or actual violators.

D. Limitations

Human rights have never, anywhere or at any time, been absolute rights. Some limitations and restrictions are therefore necessary and inevitable. The scope of these limitations also affects the quality and quantum of human rights protection enjoyed in a particular country. Whilst some Bills of Rights have a general limitation clause, the Botswana Bill of Rights, after recognizing a right, states the exceptions that apply to that right. This approach is spelt out in the first provision, Section 3, which states 'every person in Botswana is entitled to the fundamental rights and freedoms of the individual … but subject to respect for the rights and freedoms of others and for the public interest', and adds:

> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

The Botswana courts interpret restrictively any clauses that limit the realization of the fundamental rights. In *Clover Petrus v The State*, Aguda JA referred to the 'well known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions.' [23] In essence, constitutions are now regarded as *sui generis*, requiring generous and purposive construction. To avoid what has been called 'the austerity of tabulated legalism',[24] the ordinary rules of statutory interpretation and presumptions are not rigidly applied.

The exact nature of the limitations varies with the rights concerned. For example, the limitations with respect to the right to life are contained in Section 4(2), which states that a person could lawfully be deprived of his life if this is permitted by law or the result of force reasonably justifiable when used in certain specified circumstances, such as self-defense, lawful arrest, or to prevent the escape of a person lawfully detained and for purposes of suppressing a riot, insurrection, or mutiny. Botswana is one of many African countries that use the death penalty as punishment. Currently, only three offences—murder, treason, and piracy—carry the death penalty. The right to personal liberty is

[23] [1984] BLR 14 at p 679.
[24] Per Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319 at 329.

protected by Section 5(1), but paragraphs (a)–(k) list numerous limitations to these rights. These include instances when a person is deprived of his personal liberty in execution of the sentence or a wide range of court orders, for the purpose of preventing the spread of an infectious or contagious disease, for the purpose of ensuring the safety of an aircraft in flight, and for the purpose of preventing the unlawful entry of that person into Botswana. The protection against forced labor, in Section 6, does not include, *inter alia*, labor required in consequence of the sentence or order of a court, and labor reasonably required as part of reasonable and normal communal or other civil obligations. Similar restrictions and limitations apply to all the other fundamental rights recognized in the Bill of Rights.

It is generally acknowledged, even under international human rights instruments,[25] that there may be periods of national emergency which threaten the very existence of the state that may warrant extraordinary measures entailing the temporary suspension of certain human rights in order to effectively deal with the situation. The challenge has usually been how to provide for dealing with such exceptional situations without leaving too much discretion to a repressive government to use this as an excuse to curtail the rights of the people. Section 16 contains the general derogation from fundamental rights and freedoms provision. Section 16(1) states:

> nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 or 15 of this Constitution to the extent that the law authorises the taking during any period when Botswana is at war or any period when a declaration under section 17 of this Constitution is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.

In essence, Section 16 authorizes the enactment of laws that are reasonably justifiable to deal with the situation of war or an emergency under Section 17. The President is given extraordinary powers under Section 17 to act in cases of emergency, but the circumstances under which these powers are to be exercised are reasonably circumscribed, and the exercise of the power is subject to parliamentary control. In dealing with both war and emergency situations, laws that derogate from Sections 5 and 15 are allowed, but the circumstances of their use are subject to both judicial and parliamentary control, which ensures that these powers are not abused.

E. Enforcement

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[25] See eg Article 4 of the International Covenant of Civil and Political Rights, which states as follows:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

The primary means of enforcement of fundamental rights is, formally, through the courts. There are, however, other 'informal' means of enforcement, such as the legislature, the Attorney-General, the Director of Public Prosecutions, and the legal profession, who all play a role.

The role played by the courts is expressly defined in Section 18 of the Constitution, which is entitled 'Enforcement of protective provisions' and states:

> (1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
> (2) The High Court shall have original jurisdiction –
> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; or
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) (inclusive) of this Constitution.
> (3) If in any proceedings in any subordinate court any question arises as to the contravention of any provisions of sections 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.
> (4) Parliament may confer upon the High Court such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.
> (5) Rules of court making provision with respect to the practice and procedure of the High Court for the purposes of this section may be made by the person or authority for the time being having power to make rules of court with respect to the practice and procedure of that court generally.

A number of important comments need to be made about the scope and breadth of this provision. First, any aggrieved party may bring an action not only in cases of actual violation of the rights conferred by the Bill of Rights, but also in cases of potential or threatened violations. This right of action does not prevent the aggrieved party from bringing 'any other action which is lawfully available on the same matter.' However, it is not very clear what possible concurrent actions can be brought on the same matter.

Second, although the High Court is conferred primary original jurisdiction in such matters, this does not prevent any other subordinate court—which clearly means the magistrates' courts—before which an issue concerning the interpretation of the Bill of Rights may arise, from dealing with the matter, provided that the person presiding over that matter 'may, and shall if' any party to the proceedings so request, refer the matter to the High Court. Whilst the matter must be referred to the High Court if the parties so

request, the discretion of the person presiding to refuse a referral only arises where he comes to the conclusion that the raising of the matter is merely frivolous or vexatious.

Third, there is a clear advantage in raising these issues before the High Court rather than the magistrates' courts, because Section 18(2)(b) gives the former very wide powers indeed in terms of the remedies that it can impose. The High Court is given the powers to 'make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement' of these provisions. These are very significant powers, which the High Court has probably been apprehensive of using. For example, after the Court of Appeal declared certain provisions of the Citizenship Act unconstitutional in the *Dow* case, it took the Government several years to repeal the section. The same delay has been evident with respect to the amendment of other Acts whose provisions were declared unconstitutional by the courts.[26] The implications of these delays are not difficult to imagine: they usually mean that a person or group of persons could be deprived of their fundamental rights for the period of time that it takes the Government to repeal the provision in an Act declared unconstitutional for violating the Bill of Rights. Whilst it is clear that once a provision in a law is declared unconstitutional it becomes in law *pro non scripto* and of no force and effect, even if the Government does not repeal it formally, the reality is that civil servants who act on instructions they receive will continue to implement the old law until they receive new instructions, even if they are aware that the law has been declared unconstitutional.[27] Section 18(2)(b) gives the courts considerable powers that can be used to overcome governmental inertia by, for example, issuing 'constructive' orders or directions, which order or direct that the unconstitutional provision should be amended either in a certain way or within a specified time or, even more generally, advise the Government on better ways of implementing the Bill of Rights. Such measures are dictated by the practical realities and whatever reservations the judiciary may have concerning such apparently intrusive or interventionist orders; it must be accepted that government sometimes needs to be pushed out of its slumber.[28] Finally, perhaps to underscore the importance given to human rights protection, the Bill of Rights gives Parliament the discretion to confer upon the High Court such powers, in addition to those conferred by Section 18, that they consider necessary.

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[26] See eg *Kamanakao I & Others v Attorney-General & Another* [2001] 2 BLR 654.

[27] There were reports in the papers that after the *Dow* case, many parents rushed to the immigration department to have the status of their children rectified. For quite a while, immigration officials could do nothing until they received new instructions, whilst the law itself was only changed many years later. For more on this, see EK Quansah, 'Unity Dow v Attorney-General of Botswana – The Sequel' (1993) 5 African Journal of International and Comparative Law 206, and the Botswana Guardian, 12 June 1992.

[28] Another glaring example of governmental inertia is the *Kamanakao* case, decided in 2001. It was only on 8 June 2007—six years later—that the Government introduced a *Bogosi* Bill 2007, which stated as follows in clause 4 of the Memorandum:

> In a recent decision of the High Court in the case of *Kamanakao and Others v The Attorney-General and Others*, it was held that the definitions of the words 'chief' and 'tribe' contained in the Chieftainship Act (Cap. 41:01) were too restrictive and discriminatory, and as such offended against section 3(a) of the Constitution. The High Court went on further to recommend that the Chieftainship Act should be amended by redefining those words in order to accord equal treatment to all tribes in the country.

It is rather amusing that a court decision handed down six years previously is referred to as 'recent', and this raises the fundamental question of whether it requires such a long time to repeal an unconstitutional law.

There have been, since 1966, numerous cases in which the courts have had the opportunity to interpret and apply various provisions of the Bill of Rights. Most of the cases have dealt with the protection of the law,[29] freedom from discrimination,[30] and freedom of association.[31] Others have involved protection from inhuman treatment,[32] protection from deprivation of property,[33] freedom of expression,[34] the right to personal liberty,[35] freedom of conscience,[36] and the right to life.[37] The number of cases and the range of issues with which the courts have dealt do show that Batswana have freely resorted to the courts whenever they have felt that their constitutionally recognized and protected freedoms have been violated or threatened.

Parliament plays a crucial role in both the recognition and protection of human rights. In discharging this role, it acts under general and specific powers conferred by the Constitution. With respect to the general powers, Section 86 states that 'subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good governance of Botswana.' The phrase 'subject to the provisions of this constitution' makes it abundantly clear that these powers are not absolute. Any laws enacted by Parliament must be consistent with the Constitution. As the *Dow* case and many others show, the courts have not hesitated to invalidate any legislation or provisions in legislation enacted by Parliament which violate the Constitution, especially the Bill of Rights.

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[29] See *State v Merriweather Seboni* [1968–1970] BLR 158; *State v Monyoso* [1964–1967] BLR 249; *Maposa v The State* [1989] BLR 556; *Samaribela v The State* [1987] BLR 37; *Molathegi v State* [1990] BLR 477; *Marumo v The State* [1990] BLR 659; *Lesetedi & Another v The State* [2001] BLR 393; *Bojang v The State* [1994] BLR 146; *Rabana v Attorney-General & Another* [2003] 1BLR 330; *Maskuku v State* [2004] 2 BLR 239; *Charles v State* [2005] 1 BLR 421; *Basupi v State* [2000] 2 BLR 1; *Basima v State* [1999] BLR 202; *Standard Chartered Bank of Botswana Ltd v Jotia* [1999] 2 BLR 1; *Motshwane & Others v State* [2002] 2 BLR 368; *Ahmed v Attorney-General* [2002] 2BLR 431; *Attorney-General v Muzila* [2003] 1 BLR 471; *Kelaotswe v Attorney-General* [2005] 1 BLR 306; *Otlhomile v State* [2002] 2 BLR 295; *Sejammitlwa & Others v Attorney-General & Others* [2002] 2 BLR 75; and *Tlhogo v State* [1993] BLR 287.

[30] See *Attorney-General v Dow* [1992] BLR 119; *Makuto v State* [2002] 2 BLR 130; *Good v Attorney-General* [2005] 1 BLR 462; and *SRC of Molepolole College of Education v Attorney-General* [1995] BLR 178.

[31] *BPC Workers' Union v BPC* [1999] BLR 159; *Zachariah & Another v BPC* [1994] BLR 492; and *Zachariah & Another v BPC* [1996] BLR 710.

[32] See *Petrus & Another v The State* [1984] BLR 14; *Desai v The State* [1987] BLR 55; and *Moatshe & Another v State* [2003] 1 BLR 65.

[33] See *Azad Hauliers (Pty) Ltd v Attorney-General* [1985] BLR 144.

[34] See *State v Mbaiwa* [1988] BLR 314; *Zachariah & Another v BPC* [1994] BLR 492; *Media Publishing (Pty) Ltd v Attorney-General* [2001] 2 BLR 485; *Zachariah & Another v BPC* [1996] BLR 710; and see also B Maripe, 'Freezing the press: Freedom of Expression and Statutory Limitations in Botswana' (2003) 3 African Human Rights Journal 52–75 and Charles M Fombad, 'The Protection of Freedom of Expression in the Public Service Media in Southern Africa: A Botswana Perspective' (2002) 65 Modern Law Review 649–675.

[35] See *Serurubela v Attorney-General* [1998] BLR 661; *Botswana Cooperative Bank Ltd v Noor & Others* [1990] 1 BLR 248 and [1991] 1 BLR 443.

[36] See *Zachariah & Another v BPC* [1996] BLR 710.

[37] See *Ditswanelo & Others v Attorney-General & Another* [1999] 2 BLR 56.

More specific powers are conferred by Section 18(4) which, as we saw earlier, gives Parliament the authority to 'confer upon the High Court such powers in addition to those conferred by the section' as may be necessary to enable it to efficiently discharge its functions of enforcing the Bill of Rights.

Although Section 86, in conferring the general law-making powers upon Parliament, uses the mandatory word 'shall', whilst Section 18(4) uses the optional language 'may', there is no duty on Parliament under either provision to make these laws. The role of Parliament becomes particularly critical where the rights conferred by the Constitution are either limited in scope or couched, as is usually the case with constitutions, in broad terms, necessitating detailed laws. Whilst Parliament cannot use its mandate to enact legislation that blatantly and arbitrarily infringes upon the fundamental rights recognized and protected by the Bill of Rights because of the likelihood that the courts may be asked to intervene and declare it unconstitutional, it could nevertheless refuse to act, or use the wide discretion given to it by the broad language of the Constitution to introduce legislation that is rather restrictive of the recognized human rights and freedoms. Ultimately, the ability of Parliament to act as an effective protector of human rights will depend on voters electing, as their representatives, persons committed to promoting human rights, or a government that has this in its election manifesto, or the ability of the public to exert pressure on their representatives to promote and support legislation that enhances human rights.

The recent creation of a specialized prosecution service, the Director of Public Prosecutions (DPP)[38] (previously a division within the Attorney-General's Chambers), is a positive development that is expected to impact favorably on the protection of human rights in Botswana. It is a fact that most human rights violations in Africa are the direct result of government action. It was therefore rather awkward to expect the Attorney-General's Chambers, which, functionally, is part of the executive branch, to effectively investigate and prosecute human rights violations committed by other branches of the executive.

In effectively accomplishing the task of prosecuting those responsible for human rights crimes, the DPP has two particularly difficult challenges to overcome. First, there is the need to find the necessary financial and human resources urgently needed to investigate and prosecute the perpetrators of these crimes, at a time of an increasing wave of human rights violations caused mainly by the economic crisis that has crippled countries like Zimbabwe, resulting in a massive daily flow of illegal immigrants into Botswana. Second, there is the ability of the DPP to negotiate its way and act independently without executive interference, because of the rather vague 'supervisory' powers conferred upon the Attorney-General over the DPP by Section 51 A(6) of the Constitution.

Under Section 51(3), the Attorney-General is the principal legal adviser to the Government. One of the main functions carried out by the Attorney-General is the drafting of legislation, and he has the last word in determining the wording and form of

[38] See Constitution (Amendment) Act, Act 9 of 2005.

any bill before it is submitted to Parliament.[39] In performing this role, he undertakes a pre-legislative review of the bill by scrutinizing it to ensure, *inter alia*, that it does not conflict with Botswana's international obligations. This procedure is usually effective in ensuring that a law that violates an international human rights instrument that has been signed and ratified by the Government, or that has otherwise become part of national law, is not enacted. Nevertheless, it is worth noting that there is no obligation on Parliament to heed any advice it may receive from the Attorney-General that a particular provision of a bill violates Botswana's international obligations; nor will any sanctions follow should the Attorney-General fail to notice any contradictions between a bill and the country's international obligations. Perhaps a more effective means of pre-legislative scrutiny of legislation to ensure its conformity with international human rights instruments would be for a human rights commission to be created and given the mandate to, *inter alia*, advise Parliament on the compatibility of bills with Botswana's international human rights commitments.

The legal profession in Botswana has played a rather limited role insofar as human rights protection and activism is concerned. There are at least two reasons for this. First, although the Bill of Rights guarantees a right to legal representation,[40] apart from those charged with murder there is no legal assistance available to poor persons in society who wish to present a defense. In spite of Botswana's impressive economic growth rates in recent decades, the majority of its population is poor and unable to afford adequate legal services. Section 56(a) of the Legal Practitioners Act 1996, in dealing with the membership of the Law Society, requires members to perform *pro deo* or *pro bono* work. There is no evidence that the Law Society actually insists on an undertaking to do *pro deo* or *pro bono* work, or that when such an undertaking has been made, it follows up to actually ensure that this is done. One of the direct consequences of this is that *pro deo* representation, for now, mostly occurs in murder cases. Even then, it is problematic because the amount paid to the lawyers who do such work is minimal as compared to the average fee paid to private lawyers. As a result, the *pro deo* cases are usually handled by 'lawyers who lack the skills, resources and commitment to handle such serious matters.'[41] This means that because many of these poor people cannot afford adequate legal services, they are unable to fully benefit from the right to legal protection provided in Section 10 of the Constitution. Second, the right to legal representation is qualified by Section 10(12)(b) of the Constitution, which excludes legal representation in customary courts. However, it has been suggested that as many as 90 per cent of civil cases and 85 per cent of criminal matters are heard or tried by these customary courts, and some have the powers to impose sentences of up to 5 years of imprisonment.[42] Because these courts are manned by persons who have no legal training, there has been concern about the quality of justice they disseminate and the possible effect this has on the human rights of those who appear before them, particularly in light of the full implications of the protection of the law guaranteed in Section 10 of the Constitution.

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[39] See generally, CM Fombad and EK Quansah, *The Botswana Legal System*, n12, chapter 12.
[40] See Section 10(1)(d) of the Constitution.
[41] See **[http://www.ditshwanelo.org.bw/index/Current_Issues/Legal_Aid.htm].**
[42] Ibid.

IV. Separation of Powers

The Constitution implicitly recognizes the separation of powers by dealing with each of the three organs of government in separate and distinct provisions.[43] In a recent case,[44] one of the parties challenged the jurisdiction of the Industrial Court on the ground that it was subsumed under the executive arm of the state and was thus in conflict with the doctrine of separation of powers embodied in the Constitution. Although there is a separation of powers in Botswana, it is more akin to the British system, which is marked by the extensive fusion and overlapping between the executive and legislature, and a fairly independent judiciary.[45] Botswana has a centralized government with a strong executive at the center and rural and urban councils at the local level.

A. The Executive

The whole of Chapter IV of the Constitution deals with the executive. Part I covers the President and Vice President, Part II the Cabinet, and Part III the executive functions. In spite of this, Section 47 explicitly vests executive functions with the President.

The fact that executive functions are bestowed on a single individual, while legislative functions are vested in a group of people and judicial functions in a group of judges, may seem a bit baffling. The President is the sole repository of executive power. The reason for this is the need for accountability and speed and decisiveness in decision-making.[46] Although Section 47 appears to give the President absolute powers, any apparent concentration of powers is, however, qualified by a number of other provisions. For example, Section 47(2) allows him to 'act in his or her own deliberate judgment', unless 'it is otherwise provided'. Section 48(3) provides that 'nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the president', and Section 86 vests on Parliament the powers to 'make laws for the peace, order and good government of Botswana', and the President is subject to such laws. Nevertheless, the office of President remains the most powerful office in the land.

The qualifications for election as President are spelt out in Section 33(1) and are similar to those for the election of Members of Parliament. The single important difference between the two is that the person standing in elections for the position of President must be a citizen by birth or descent. Citizens by settlement, adoption, registration, or naturalization do not qualify for election as President, but they can contest parliamentary

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[43] The executive is dealt with in Chapter IV (Sections 30–56), the legislature in Chapter V (sections 57–94), and the judiciary in Chapter VI (sections 95–106) of the Constitution.

[44] *Direng v Furniture Mart* [1995] BLR 826.

[45] See generally C M Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) 25 Boston College Third World Journal 301–342.

[46] Commenting on a similar provision in the US Constitution, Justice Breyer of the US Supreme Court, in *Clinton v Jones*, 520 US 681 at 712 (1997), said

> [t]he founders created this equivalence by consciously deciding to vest executive authority in one person rather than several. They did so in order to focus, rather than to spread, executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive and speedy execution of the laws by placing in the hands of a single constitutionally indispensable, individual the ultimate authority.

seats. The President is not elected directly by universal suffrage but rather indirectly under Section 32, after parliamentary elections, from the newly elected members of Parliament. He can only hold office for an aggregate period of ten years and if the office falls vacant, the Vice President takes over. This explains why, apart from the first President, all subsequent Presidents have come to the office from the position of Vice President after the office of President became vacant either due to the death of the incumbent (Sir Seretse Khama in 1980) or his resignation (Sir Ketumile Masire in 1997 and Festus Mogae in 2008).

The President appoints the Vice President and such number of Ministers and Assistant Ministers as are determined by Parliament. They must all be Members of Parliament at the time of their appointment. If they are not, they must become Members of Parliament before the expiration of four months after their appointment, or vacate the position. This therefore means that there is no strict separation of powers in Botswana.

As noted above, executive power vests in the President, and Section 49 states that the Vice President acts as his 'principal assistant' and works under his direction. He is responsible for such business of government (including the administration of any department of government) that the President may assign to him. The usual pattern has been to assign a specific department to the Vice President. By contrast, Cabinet Ministers and Assistant Ministers are responsible for advising the President with respect to policy and such other matters that he may refer to them. Nevertheless, Section 50 makes it clear that the Cabinet shall be responsible to Parliament for all things done by or under the authority of the President and Vice President in the execution of their duties. This generally means that the Cabinet as a whole, including the President, is collectively responsible to Parliament. Ministers are also individually responsible to Parliament and the public at large for the running of their Ministries.

B. Parliament

Parliament, according to Section 57, consists of the President and the National Assembly. The latter is composed of the President, as *ex officio* member, 57 elected members, and four specially elected members. Although Botswana has earned considerable praise for maintaining a fully-fledged liberal multi-party democratic system since independence, one party—the Botswana Democratic Party—has won all elections since independence and remains a dominant party in a system marked by weak and fragmented opposition parties.

The Botswana Parliament exercises three main functions: making laws, controlling public finance, and scrutinizing and controlling government. Section 86 vests Parliament with the 'power to make laws for the peace, order and good government of Botswana.'

Before a piece of legislation becomes law, it goes through two main stages: the pre-legislative stage and the legislative stage. Analytically, the pre-legislative stage can be said to involve at least four steps: the initiation of a bill, consultation with respect to the bill, the intervention of Cabinet, and the drafting of the bill.

The source of legislative proposals are many and diverse and may include parliamentary questions, public opinion, pressure group campaigns, government manifesto commitments, recommendations of a law reform commission, a commission of inquiry, the decision of a court of law, the initiatives of an individual Member of Parliament, the recommendations of a service department, or from the Cabinet. Before these are put in the form of a bill, there is usually consultation with as many organizations and pressure groups that are interested in the matter as possible. The exact nature and extent of the consultation will depend on the government department with responsibility for the legislative project. But almost all laws that have reached the statute book would have emanated from measures discussed and approved in the Botswana Cabinet and introduced by way of government bills. The Cabinet intervenes at two decisive stages in the life of a bill. Before the Attorney-General's Chambers produces a draft of any bill, the instructing Ministry must first have prepared a Cabinet Memorandum informing Cabinet of the action it requires to be taken, identifying the problem to be addressed and the solution that is proposed. It is only after Cabinet has examined the proposal and approved it that the proposal can then be sent to the Attorney-General's Chambers with instructions to draft the bill. In the final analysis, whilst the departments and Cabinet may have the last word on matters of policy, the Attorney-General as draftsman has the last word on matters of form and law. Once this is done, the bill is ready for presentation to Parliament.

The procedure for presenting bills before Parliament is laid down by Parliament itself, acting under Section 87(1) and in accordance with the Standing Orders of the National Assembly of Botswana. The Standing Orders provide for 'three readings' of a bill. In addition, there is a special procedure that must be followed when dealing with amendments to the Constitution. The first reading is merely an opportunity for Members of Parliament to become acquainted with the bill. The second reading is probably the most important stage because it enables Members of Parliament to discuss the general merits and principles, but not the details, of the bill. At the committee stage, the details, but not the general principles, of the bill can be discussed, and amendments may be proposed. Once a bill has gone through the second reading and the final, committee stage, the third reading is usually a formality. However, the bill only becomes law under Section 87 after it has received the assent of the President.

Three special procedures are, however, provided under Section 89(1) for amending the Constitution. The ordinary provisions of the Constitution (that is, the provisions that are neither entrenched nor specially entrenched by the Constitution) can be amended by following the same procedure that is used for enacting or amending any law. A slightly more complex process for amending the Constitution is reserved for entrenched provisions (that is, provisions that are considered vital for preserving the country's liberal democracy). Examples of such entrenched provisions are Chapter II, dealing with the protection of fundamental rights, and Sections 30 to 44, dealing with the executive. A far more stringent procedure is provided with respect to amendments relating to the specially entrenched provisions specified in Section 89(3)(b). These are provisions that are of absolute importance to the existence and survival of a democracy, and include Section 57

on the establishment of Parliament, Section 63 on constituencies, and Section 64 on the delimitation commission. The obvious purpose of this is to ensure that a government with a strong majority, such as the BDP Government, should not be able to amend the Constitution on a whim, in a way that could entrench or perpetuate its rule.

Another important function of Parliament, which is provided for under Sections 117 to 124, is to control the use of public finances. As a consequence of this control, the Government must obtain legislative authority before it can engage in certain financial activities, such as levying taxes, imposing rates, and charging fees. The office of the Auditor-General is set up under the Constitution to act as a watchdog over the way in which government departments spend public funds. The reports that it regularly submits to Parliament are examined by the Public Accounts Committee, which is a sessional select committee of Parliament. In spite of the broad constitutional powers given to Parliament to control the use of public finances, the effective exercise of this control is minimal in practice, mainly because of the complexity of financial issues and the limited understanding of these matters by most Members of Parliament.

The final function of Parliament—to scrutinize and control the Government—is carried out in at least three different ways. The first is through question time, motions, and ministerial statements. The Standing Orders of the National Assembly allow any private Member of Parliament to address a question to a Minister relating to a public matter for which he is responsible. An alternative to question time is the motion, which enables a Member to move a motion on any topic by giving three days' notice of his intention to do so. In a dominant party system like Botswana's, the chances of an opposition Member's motion being moved are slim. Another avenue for governmental accountability is by way of statements made by Ministers on public matters for which they are responsible.

The second form of scrutiny is by way of the committee system. There are three main types of committees that operate within the Botswana parliamentary system. One is the standing committee, which is created for the duration of a parliamentary term; another is the sessional select committee, whose lifetime is limited to a session of Parliament; and the third type is the special select committee. The latter is set up for a specific task and stands dissolved after the task is accomplished. The committees are a very important means of controlling the Government. They often sit in private, have limited membership which includes members of the opposition, and since they are thematic, they provide an opportunity for Members of Parliament to develop expertise. One major advantage they have is that backbenchers are usually freer within such committees to scrutinize and criticize the Government. Some select committees, such as the Public Accounts Committee and the Committee on Subsidiary Legislation and Government Assurances, have been quite active and effective.

The third means of scrutinizing and controlling the Government is by way of a vote of no confidence, and this is provided for in Section 92 of the Constitution. It requires the Government to resign if the majority of Members of Parliament pass a vote of no confidence on it. In a one party-dominated system such as Botswana's, the prospects of this happening are very slim, so this form of control could only ever be effective in

ensuring that the Government does not lightly ignore the views of the people's representative when an effective opposition party with enough votes to threaten the Government's majority emerges.

Besides Parliament, there is also the *Ntlo ya Dikgosi*, which until the constitutional amendments of 2005 was known as the 'House of Chiefs'. According to Section 77, it is to be composed of 'not less than 33 nor more than 35 members', some of whom are persons performing the functions of *kgosi* in certain specified districts, some who are appointed by the President, and others who are selected under Section 78(4)(c). Although it has some role to play in the law-making process, the *Ntlo ya Dikgosi* is not a second chamber of Parliament in any sense. Its limited role in the law-making process is specified in Section 85, which enables it to:

i) consider the copy of any bill which may affect the designation, recognition, or removal of powers of *Dikgosi* or *Dikgosana*; affect the organization, powers, or administration of customary laws; affect customary law, or the ascertainment or recording of customary law; or affect the tribal organization or tribal property;
ii) be consulted by any Minister on any matter on which he seeks its opinion; or
iii) discuss any matter within the executive or legislative authority which it considers it to be desirable to take cognizance of in the interests of the tribes and tribal organizations it represents, and make representations to the President or send messages to Parliament on this.

The *Ntlo ya Dikgosi*, therefore, only plays a consultative and advisory role.

C. The Judiciary

Courts are necessary institutions in any democratic society. In fact, it can be said that apart from the police, the courts are perhaps the most visible feature of the operation of the legal system. They provide an impartial forum in which disputes between individual citizens or institutions and between citizens and the state can be peacefully resolved.

In Botswana, the Constitution, in Section 127, implicitly distinguishes between superior courts and inferior or subordinate courts. Section 127, in defining 'subordinate court', states that this 'means any court established for Botswana *other* than—

(a) the Court of Appeal;
(b) the High Court;
(c) a court martial; or
(d) the Industrial Court.' (emphasis added)

Generally, the jurisdiction of superior courts is neither limited by the value of the subject matter nor geographically, and these courts tend to deal with the more important and difficult cases. By contrast, the jurisdiction of inferior courts is limited both geographically and according to the value of the subject matter of the dispute. Another

distinctive feature of inferior courts is that they are amenable to the supervisory jurisdiction of the High Court. The most important inferior courts in Botswana are the magistrates' courts and the customary courts.

Another important distinction is that between courts of general, ordinary, or normal jurisdiction and courts of special jurisdiction. Courts of general jurisdiction are those which deal with practically any kind of case, whether civil or criminal, that may be brought before them. Courts of special jurisdiction, however, may deal only with stated and limited kinds of issues. The courts of general jurisdiction are organized in a hierarchy and consist of (i) the Court of Appeal, (ii) the High Court, (iii) the magistrates' courts, and (iv) the customary courts. This structure reflects the dual system of laws operating in the country, in that the first three courts are concerned primarily with administering the common law and statutes enacted by the legislature, while the customary courts deal essentially with customary law. The courts of special jurisdiction consist of the Land Tribunal, the Juvenile Court, the court martial, and the Industrial Court.

The adjudicators of disputes in the superior courts are the Judge President of the Court of Appeal, the Chief Justice of the High Court, and such other judges of the High Court and the Court of Appeal as Parliament may prescribe. Their role in the administration of justice is set out in Part VI of the Constitution. These constitutional provisions and other laws regulate matters such as their appointment and dismissal, their tenure, their status, and their independence from the two other branches of government.

There are a number of constitutional provisions designed to protect the independence of the judiciary. These include the provisions on the appointment and tenure of the office of judge. There are also statutory provisions and common law principles designed to ensure the independence of the judiciary. For example, Section 122 of the Constitution provides that the salary of judges shall be paid from the Consolidated Fund and shall not be altered to their disadvantage. The effect of this is to ensure that judicial salaries are permanently authorized and cannot be arbitrarily reduced to put pressure on or influence them. Botswana judges are also protected from unwarranted external pressure by the offence of contempt of court, which enables them to cite offenders for contempt and commit to prison anybody who attempts to denigrate or flout their decisions.

The Chief Justice of the High Court and the Judge President of the Court of Appeal are appointed, according to Section 96(1), by the President in his absolute discretion without the participation of any other person or authority. By contrast, the judges of the High Court and the Court of Appeal and magistrates are also appointed by the President, but he acts on the recommendations of the Judicial Service Commission (Sections 96(2) and 104(2)).[47] The judges are appointed from the ranks of practicing lawyers or academics who have taught for at least ten years, and a Chief Magistrate who has held office for not less than five years (Sections 96 and 100).

[47] Members of Customary Courts are constituted in accordance with a procedure laid down in Section 8 of the Customary Courts Act.

The tenure of judges is assured, and in fact the Constitution states that the office of a judge cannot be abolished whilst there is a substantive holder thereof (Sections 95(2) and 99(3)). However, such tenure is limited to a compulsory retirement age of 70, although some other age may be prescribed by Parliament (Sections 97(1) and 101(1)(i)).[48] The Constitution envisages a tenured position for judges, but until quite recently, the practice has been to appoint judges on contract. These contracts were usually for three years and were renewable.[49] Contractual appointments of judges were generally confined to expatriate judges, who dominated the bench of the superior courts until recently because of the paucity of citizen attorneys/advocates who qualified for appointment to the bench.

The conditions for the removal of judges are set out in the Constitution. It states that a judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehavior. The Constitution makes it clear that a judge may not be removed unless a specified procedure is followed.[50] According to this procedure, if the President considers that the question of removing a judge ought to be investigated, he shall appoint a tribunal of at least three members to enquire into the matter and present a report to the President in which it will advise as to whether the judge ought to be removed from office for inability to perform his functions or misbehavior.[51] The judge under investigation may be suspended by the President pending the outcome of the investigations. A judge can therefore only be dismissed after an investigation carried out by this tribunal ends in a recommendation for such dismissal being made to the President.

A corollary of the principle of judicial independence is the principle of judicial immunity, which grants immunity to judges from both civil and criminal proceedings. Immunity from civil proceedings is provided for in Section 25(1) of the High Court Act, and immunity from criminal proceedings is provided for in Section 14 of the Penal Code. To further enhance judicial independence, the salaries of judges and members of the Judicial Service Commission are charged on the Consolidated Fund, meaning that their payment is permanently authorized and cannot be arbitrarily reduced by the Government as a means of putting pressure on them.[52]

Notwithstanding the constitutional and statutory provisions for the maintenance of judicial independence in Botswana, the practical reality is that for judges to be effective in their constitutional mandate, they must act in concert with the executive arm of government, in particular, and the legislature in general. In this collaborative venture the attitudes of the executive and the legislature towards the independence of the judges in the carrying out of their constitutional mandate is crucial. The *de jure* independence of the judges and their *de facto* dependence on the executive is, in practice, often a problem in many African countries. In Botswana, however, the executive has been careful not to

[48] Section 101(1) provides an exception to the 70 years age limit in certain specified circumstances.
[49] See para 1.4.4 of the *Report of the Presidential Commission on the Judiciary* (Government Printer, Gaborone, 1997).
[50] See Sections 97(2) and 101(2) of the Constitution.
[51] See Sections 97(3)–(5) and 101(3)–(5) of the Constitution.
[52] See Section 122(5) of the Constitution.

interfere with the work of the judges and has cooperated with them within the limits of available resources. This non-interference has been acknowledged by the judiciary. Aguda CJ recognized this when he said:

> Here in this country, I am happy that the Judiciary has been allowed by the executive to administer justice without fear or favour, affection or ill-will to all who have had reason to come before it for succour, regardless of whether they are rich or poor citizens, or be they the State or State agencies. In this respect we are extremely proud of our country.[53]

The judicial landscape is replete with politically sensitive cases which could have warranted some kind of executive interference in their outcome, yet they were decided without fear of retribution from the executive. Examples include the challenge to the election of the Minister of Education in the general election in 1989,[54] the prosecution of an Assistant Minister for corruption in 1993,[55] the Wayeyi tribe's challenge of the constitutional provisions on the recognition of tribes in Botswana in 2001,[56] the committal for contempt of court of the legal adviser to the President in 2005,[57] and the challenge of the use of the President's powers under the Immigration Act to declare a non-citizen a prohibited immigrant in 2005.[58] In all these cases the legal process was allowed to take its course without any obvious interference by the executive.

However, the prospects for judicial independence have diminished since the coming to power of President Ian Khama in 2008. A long-time critic of the judiciary, he has taken control over judicial appointments, sometimes without the involvement of the Judicial Service Commission.[59] In fact, recent judicial appointments have given cause for concern about the future of an independent judiciary in Botswana and whether it will be able to resist political interference.

There has been no noticeable friction between the legislature and the judiciary over the years. Apart from the occasional criticism leveled against the Ministry of State President, under which the administration of justice falls, during the annual consideration of the budget of the said Ministry the relationship has been warm. It is incontrovertible that judges in Botswana enjoy a measure of independence in administering justice. They have generally cooperated with the other arms of government without being subservient or sacrificing their independence.

V. Federalism/Decentralisation

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[53] At the opening of the 1973 Judicial Conference. See B Othlogile (ed), *Ways of the Bench: Speeches by Chief Justices, Attorneys-General and the Bar* (Government Printers, Gaborone, 1996) 175.
[54] See *Pilane v Molomo* [1990] BLR 214.
[55] See *Tshipinare v The State* [1993] BLR 434.
[56] See *Kamanakao and Others v Attorney General* [2001] 2 BLR 654.
[57] See *Pilane v Attorney General and Others*, Misca. No 397/2005 (3 September 2005) (unreported).
[58] See *Kenneth Good v Attorney General*, Misca. No 90/2005 (31 May 2005) (unreported), and *Kenneth Good v Attorney General*, Civil Appeal No 28/2005 (CA) (27 July 2005) (unreported).
[59] See eg 'BCP Snipes Khama's Judicial Appointments', Sundaystandard, 6 April 2011, at **[http://www.sundaystandard.info/article.php?NewsID=8978&GroupID=1].**

Botswana is a centralized and unitary state. Since independence, a system of local government that can be attributed to its *kgotla* system has firmly been in place, although this is not mentioned in the Constitution. This system of local government has served as a vehicle for decentralization and public participation in governance at the local level. It operates at four levels: councils, district administration, land boards, and tribal administration.

The councils consist of city councils and town councils in urban areas and district councils in rural areas. As statutory bodies, the extent of their powers and financial autonomy is determined by statute. Their main functions are primary education, primary health, roads, village water supply, community development, and social welfare. The next pillar of local government, which operates as a form of de-concentration of power, is the district administration. The District Commissioner, who heads the district administration, operates as a representative of central government and performs any functions allocated to him by central government. The main function of the District Commissioner is to coordinate rural development activities at the district level. The land boards hold tribal land in trust and their primary function is to allocate it to citizens for residential, agricultural, and commercial purposes. Half of the members of the land boards are elected at the *Kgotla* and the other half are appointed by the Minister of Lands. They derive their powers from statutes and work in cooperation with the tribal administrations, district councils, and District Commissioners. The last pillar of local administration is the traditional administration, headed by the local chiefs. This is essentially a continuation of an important pre-colonial institution that has served the country well. The chiefs act as chairmen of the *Kgotla*, which is a traditional forum where important issues of local interest are discussed. The chiefs also preside over the customary courts, which try most of the criminal matters brought before the courts in Botswana.

VI. Constitutional Adjudication

There are at least two provisions of the Botswana Constitution that deal with the issue of constitutional adjudication. The first is Section 18(1), which provides that any person who alleges that Sections 3 to 16, which deal with the fundamental rights and freedoms of the individual, have been violated or are likely to be violated in relation to him, may apply to the High Court. There is the possibility of appeals on these matters to the highest court in the country: the Court of Appeal. The second is Part IV (Sections 105 and 106), which gives the High Court, and later by way of appeal, the Court of Appeal, the power to resolve any disputes involving the interpretation of the Constitution. Both situations also provide circumstances under which the High Court and the Court of Appeal may be required to verify a statutory provision for conformity with the Constitution.

With respect to matters dealing both with the fundamental rights and freedoms of the individual and questions concerning the interpretation of the Constitution, Sections 18, 104, and 105 make it clear that the High Court shall have original jurisdiction, with the

possibility of an appeal to the Court of Appeal.[60] These organs of control are therefore located within the hierarchy of the ordinary courts, but jurisdiction in constitutional matters is reserved for the two highest courts in the hierarchy. It is decentralized in that such matters can be brought before any of the two High Courts in Francistown, in the north of the country, or Lobatse, in the south, and final appeals can be heard by the sole Court of Appeal located in Lobatse.

Although Section 18(1) allows any aggrieved citizen to apply to the High Court if he feels that the specified provisions of the Constitution have been, are being, or are likely to be contravened in relation to him, when it relates to legislation, this refers to enacted legislation that is law, and not merely draft legislation in the form of a bill. In other words, the mode of control contemplated by the provision, as well as Section 105, which deals with the interpretation of the Constitution, is *ex post facto* control, after the enactment of legislation.

Generally, but for some few exceptions, the procedure for handling disputes involving the constitutionality of laws in Botswana is the same as that which applies for other cases. Thus, at the level of the High Court, the matter may be disposed of by or before a single judge.[61] Two special features mark appeals in these matters to the Court of Appeal. First, Section 10(b) of the Court of Appeal Act states that appeals from any decision of the High Court in the exercise of its powers or duties under Sections 18 and 106 of the Constitution shall lie, 'as of right', to the Court of Appeal. This means that neither the leave of the High Court nor that of the Court of Appeal itself is required. Second, Section 9(c) provides that when hearing an appeal from a judgment of the High Court under Section 18, or an appeal brought under the powers conferred by Section 106, the Court of Appeal shall be duly constituted if it consists of any five members selected by the President. Its decision shall be based on the opinion of the majority of the members hearing the matter. Thus, in *Petrus and Another v The State*,[62] the Court of Appeal had to postpone the hearings in order to constitute a court of five judges when it became clear that the issue involved Section 106 of the Constitution.

One of the most notable instances of the exercise of this jurisdiction was the famous case of *Attorney-General v Dow*,[63] where the Court of Appeal declared Section 4 of the Citizenship Act *ultra vires* the Constitution. Two other cases are significant.[64] In the *Petrus* case, mentioned above, one of the issues that the Court of Appeal had to decide was whether Section 301(3) of the Criminal Procedure and Evidence Act was unconstitutional as being in conflict with Section 7 of the Constitution. Section 301(3) of the Act prescribed repeated and delayed infliction of corporal punishment, whilst Section

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[60] However, under Section 106, no appeal will lie to the Court of Appeal from any decision of the High Court dismissing an application on the ground that it is frivolous or vexatious, or where it relates to a matter coming under Section 69(1) of the Constitution.
[61] See Section 6 of the High Court Act.
[62] [1984] BLR 14.
[63] [1992] BLR 119.
[64] Mention should also be made of *Student Representative Council of Molepolole College of Education* v *Attorney-General*, n20, where the Court of Appeal declared a College regulation that sanctioned pregnant female students to be discriminatory and contrary to Sections 3 and 15 of the Constitution.

7 of the Constitution prohibited any person from being subjected to torture or to inhuman or degrading punishment or other treatment. The Court of Appeal held that the corporal punishment prescribed by the Act was *ultra vires* Section 7 of the Constitution and consequently, that that provision in the Act was null and void. In *Desai and Others v The State*,[65] the Court of Appeal also decided that the three-fold mandatory punishments, consisting of imprisonment, fine, and corporal punishment and provided for under Section 3(2)(a), (b), and (c) of the Habit Forming Drugs Act, constituted inhuman and degrading treatment and was thus *ultra vires* Section 7(1) of the Constitution.

These three cases show that both the High Court and the Court of Appeal in Botswana have not hesitated to declare legislation or sections thereof null and void when these are considered to have violated provisions in the Constitution.

VII. International Law and Regional Integration

A. International law

In this era of globalization, liberalization, and regionalization, the national attitude towards international law in general and international treaties in particular plays a crucial and enriching role in national legal development. It is therefore important that the precise status and role of international law in the national legal order is made clear.

Unlike in most other countries, there is no provision in either the Constitution or any other piece of legislation that clearly defines the status of international law in Botswana's domestic law.[66] The status and role of international law in the national law of Botswana is based on the received Roman-Dutch/English common law principles. There was no difference between the Roman-Dutch and English common law approaches in their treatment of international law—particularly customary international law—in domestic law.[67] Under both legal systems, customary international law is directly applicable in domestic law, while treaties require transformation. This means that it makes no difference whether the position of international law in Botswana is examined from the Roman-Dutch or the English common law perspective. Both legal regimes treated international customary law and treaties in national law in the same way. Nevertheless, it is important to note that the incorporation approach to customary international law was different from that adopted for international treaties.

Customary international law and any general or conventional rules of international law which have matured into customary international law, such as the principle of self-determination and the prohibitions against the use of force, torture, and genocide are automatically part of the national law of Botswana. They do not require legislation to give them domestic effect. This legal position has been indirectly endorsed by the courts.

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[65] [1987] BLR 55.
[66] See generally O B Tshosa, 'The Status and Role of International Law in the National Law of Botswana', in CM Fombad (ed), *Essays on the Law of Botswana* (Juta & Co, Cape Town, 2007) 229–245.
[67] J Dugard, *International Law: A South Africa Perspective* (Juta & Co, Lansdowne, 2005) 30–34.

An example is the case of *Republic of Angola v Springbok Investments (Pty) Ltd*.[68] This involved an application by the Republic of Angola to set aside an attachment by Springbok Investments (Pty) Ltd of the funds standing to the credit of its bank account with the Standard Bank. The applicant argued that such funds were immune from attachment on the basis that the applicant was a sovereign state and therefore, in international law, enjoyed immunity from the jurisdiction of courts in Botswana. On the question of whether or not the customary rules of sovereign immunity are part of the national law of Botswana, Justice Ian Kirby first noted that unlike diplomatic immunity, which is regulated by the Diplomatic Immunity and Privileges Act, sovereign immunity is not so regulated. The learned judge, in considering the question of whether customary international rules of sovereign immunity apply in Botswana, said:

> The position in this country is thus similar to that which obtains in Zimbabwe, where there is also no Act and to that which obtained in the United Kingdom and South Africa before their Acts were introduced. All these countries have moved away from the formal view (doctrine of transformation) that all aspects of international law require to be introduced by statute, or by specific decision of judges, or by long-standing custom, before they become part of the law of the country. Instead they have embraced the doctrine of incorporation, which holds that the rules of international law, or *ius gentium*, are incorporated automatically into the law of all nations and are considered to be part of the law unless they are in conflict with statutes or the common law.[69]

The judge concluded:

> I have no doubt that the rules of international law form part of the law of Botswana, as a member of the wider family of nations, save insofar as they conflict with Botswana legislation or the common law, and it is the duty of the court to apply them.[70]

The direct application of customary international law rules is subject to two exceptions. First, where a rule of customary international law is contrary to or inconsistent with a statute, such rule will not have any application in national law.[71] Second, in applying customary international law as part and parcel of the municipal law of Botswana, courts are obliged to have regard to the doctrine of *stare decisis*, in terms of which the decisions of superior courts are binding on inferior courts. This means that a decision of a higher court which derogates from customary international law is binding on lower courts. Nevertheless, in applying the *stare decisis* rule, the courts endeavor, as far as is

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[68] [2005] (2) BLR 159 (HC).
[69] Ibid at 162.
[70] Ibid. Although the Judge's use of the expression 'international law' here is vague, the context clearly indicates that he was referring to customary international law. The expression 'general rules of international law' is regarded as embracing customary international law (in addition to other sources of international law, such as general principles of law).
[71] This exception was judicially endorsed in *Republic of Angola v Springbok Investments (Pty) Ltd* [2005] (2) BLR 159, at 162, where Justice Kirby said that 'the rules of international law are incorporated automatically into the law of all nations and are considered to be part of the law unless they are in conflict with statutes.'

practicably possible, to reconcile domestic law with a particular customary rule in order to ensure that the international obligations of Botswana are fulfilled.[72]

In contrast, as in English law, treaties in Botswana are governed by the dualist theory, according to which they require legislative transformation to be part of municipal law. However, a distinction is made between two major categories of treaties: those requiring parliamentary action, in the form of legislation, and those not requiring such action. The main deciding factor is whether a treaty was intended to affect the rights and duties of individual citizens. Generally, treaties that were intended to affect the rights and duties of individual citizens require changes in domestic law to achieve that purpose. But those treaties which do not affect the rights and duties of citizens, and are mainly of an administrative and financial nature, such as treaties for the provision of technical and financial assistance, do not require parliamentary action.

Treaties can either be incorporated in their entirety in one Act of Parliament, or their provisions may be incorporated in different Acts of Parliament. There are only a few treaties that have been domestically incorporated in their entirety. Examples of these are the 1951 Convention relating to the Status of the Refugees and its 1967 Additional Protocol,[73] the four 1949 Geneva Conventions on international humanitarian law, and the 1969 Vienna Conventions on diplomatic and consular relations.[74] These treaties have statute-like effects in the country. More commonly, only certain provisions of treaties are incorporated, in different Acts of Parliament. In this latter situation, the domestic status of those portions of treaties which Botswana has ratified internationally but not specifically incorporated in any Act of Parliament remains unclear and uncertain. According to classical dualist theory, treaties of this kind are not part of Botswana municipal law.

The position with respect to unincorporated treaties in Botswana law was discussed in *Kenneth Good v Attorney General*.[75] The applicant, an Australian citizen, was employed as a lecturer in political science by the University of Botswana on periodical contracts that were renewed from time to time over the last 15 years. On 18 February 2005 the President, acting under the provisions of Section 7(f) of the Immigration Act, declared him to be an undesirable inhabitant of, or visitor to, Botswana. On the same day, he was declared a prohibited immigrant and received a notice requiring him to leave Botswana within three days. The applicant made an urgent application to the court, arguing that his deportation would be a violation of his constitutional rights guaranteed in Chapter II of the Constitution, and obtained an interim order staying his expulsion pending the institution of the proceedings in terms of Section 18 of the Constitution. The President's sworn affidavit stated, in part:

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[72] *Attorney-General v Dow* [1992] BLR 119, at p 178. See also *Kenneth Good v Attorney General* [2005] (2) BLR 333.

[73] These conventions were enacted into law by the Refugees (Recognition and Control) Act of 1967.

[74] The four Geneva Conventions were enacted into law by the Geneva Conventions Act, Cap. 39:03. The 1969 Vienna Convention on Diplomatic Immunities has been incorporated by the Diplomatic Immunities and Privileges Act No 51/1968, Cap. 39:01; the Vienna Convention on Consular Relations was written into law by the Consular Relations Act No 52/1968.

[75] [2005] (2) BLR 337.

> in consequence of information received by me from sources I deemed to be reliable, I, in the exercise of the powers conferred upon and vested in me by the provisions of section 7 (f) of the Immigration Act, ... did, on 18 February 2005 declare Kenneth Good to be an undesirable inhabitant of or visitor to Botswana, in the interests of peace, stability and *national security* of Botswana…[76]

The court held that the President had the power to declare the appellant a prohibited immigrant, based, *inter alia*, on the ground of national security, and was not obliged to disclose the reasons for doing so. The court made reference to international conventions protecting the rights of individuals, including non-citizens, such as the 1966 International Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights. On the domestic status of these treaties, Tebbutt JP observed that

> Botswana … is a signatory to a number of international treaties. It is trite and well recognised that signing such a treaty does not give it the power of law in Botswana and its provisions do not form part of the domestic law of this country until they are passed into law by parliament. Those treaties do not confer enforceable rights on individuals within a State.[77]

A rather limited recognition of the possible role of international treaties within the Botswana legal order has been provided under the Interpretation Act of 1984. The Act states as follows:

> For the purposes of ensuring that which an enactment was made to correct and as an aid to the construction of an enactment a court may have regard to any *relevant international treaty, agreement or convention* and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates in the Assembly.[78]

The Interpretation Act authorizes courts in Botswana, when interpreting domestic legislation—especially legislation that is designed to incorporate an international treaty—to have regard to the treaty. The purpose is usually to ensure that the courts strive as much as possible to interpret the legislation in a manner that does not contradict the treaty. This Act serves as a basis for invoking international conventions in any sphere of international law to interpret and ascertain the meaning of ordinary domestic legislation. The Interpretation Act can also be used to interpret constitutional provisions.[79] Thus, the Act empowers the judiciary in Botswana to have recourse to rules of international law embodied in treaties in discharging their role of interpreting ordinary domestic law and the Constitution. It is, however, worth stressing that although Section 24(1) of the Interpretation Act authorizes Botswana's courts to interpret national law by reference to international agreements, it clearly does not of itself make international agreements part

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[76] Ibid at 340.
[77] Ibid at 345–346.
[78] Ibid Section 24(1) (emphasis added).
[79] See Section 127(13) of the Constitution. This clause provides that the General Provisions and Interpretation Act shall apply, with the necessary adaptations, for the purpose of interpreting the Constitution. For a discussion of the General Provisions and Interpretation Act, see *Attorney General of Botswana v Dow* [1992] BLR 199 (per Justice Amissah).

of municipal law. It only means that, under certain circumstances, international conventions may be used to interpret and ascertain the meaning of municipal law where that law is uncertain, unreasonable, and vague or unclear, in order to fill in the gaps in the law. The extent to which the Interpretation Act can be used in such a manner was discussed in the *locus classicus* case of *Attorney-General v Dow*.[80]

B. Regional Integration

Although the Constitution does not deal with the issue of international relations and regional integration, the Government of Botswana has over the years recognized the strategic role and complementary contribution of international organizations. Botswana is an important member of, and actually hosts, the Southern African Development Community (SADCC) and is a member of other international organizations such as the United Nations, the African Union (AU), the UN Educational, Scientific and Cultural Organization, the World Health Organization, and the Commonwealth.

Since President Ian Khama came to power, the country's foreign position on many issues has been controversial. For example, within SADCC, Botswana has been pushing for firmer and more decisive action against the Mugabe regime in Zimbabwe. It has also been outspoken about the so-called Arab Spring uprisings in Tunisia, Egypt, and Libya. Its most controversial action has been not merely the refusal to join the New Partnership for African Development/African Peer Review Mechanism (NEPAD/APRM), but the reason given for refusing to join: that it had nothing to learn. It has also refused to sign AU and UN anti-corruption conventions, as well as many international human rights instruments. Years of receiving lavish praise as Africa's least corrupt country and a shining example of democracy have given rise to good governance complacency and isolationism.

VIII. Concluding Remarks

The Botswana Constitution has stood the test of time. The fact that it is still in force today is certainly not because of its exceptional quality, as similarly-worded constitutions failed in most other former British African colonies.[81] The well-deserved praise and admiration that the country has earned for its successful multi-party democracy and clean and relatively transparent and accountable government cannot therefore largely be attributed to the Constitution. It can be argued that this success has been mainly due to the quality of its leadership: an exceptional breed of competent, honest, and patriotic leaders who appear to have put the interests of the country first. They have certainly not been saints, but whilst other African leaders have recklessly mismanaged their countries, looted and plundered their countries' wealth, and murderously suppressed dissent, the Botswana economy for the most part since the late 1970s has grown in leaps and bounds in an atmosphere of peace and serenity. Although this may only partly explain the country's success, it is a factor that cannot be ignored or taken for granted. Political stability,

[80] [1992] BLR 119. See the judgments of Justices Amissah and Aguda.

[81] See C M Fombad, 'The Protection of Human Rights in Botswana: An Overview of the Regulatory Framework', in C M Fombad (ed), *Essays on the Law of Botswana*, n66, at 23.

economic progress and, more specifically, good human rights protection should not depend, as one may argue is the current situation in Botswana, on the good will and benevolence of the political leadership, but rather on the solid constitutional framework within which these operate. For now, a weak constitutional framework, a resurgent opposition, and dissatisfaction with the economy have coalesced with a new leadership that shows little patience for dissent, to make the future rather uncertain and unpredictable.

Botswana
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