

Taxing Foreigners out of the Real Property Sector in Botswana

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ABSTRACT

This is a commentary on changes to the law on transfer duty in Botswana brought about by the Transfer Duty (Amendment) Act of 2019. The most controversial aspect of the law was an increase in the rate of duty to be paid by non-citizens for all types of land to 30 per cent of the purchase price or value of the land, while the rate for citizens remained at 5 per cent. This was complimented by a raft of exemptions which significantly eroded the liability of citizens to pay transfer duty. This has the intended effect of discouraging acquisition of land by non-citizens, and confounding Botswana's quest for foreign direct investment. The paper so contends. It also contends that naked discrimination against non-citizens in taxation matters would not be as easy to justify under the non-discrimination provisions of the Botswana Constitution as some might be tempted to think.

1. INTRODUCTION

The paper considers changes in Botswana's transfer duty law wrought by the Transfer Duty (Amendment) Act of 2019.¹ The Transfer Duty Act² is the principal statute on taxation of land transfers in Botswana. Transfer duty is in fact the main land or property tax. It has been collected almost from the founding of a British Protectorate over Bechuanaland in 1885.³ The Transfer Duty (Amendment) Act of 2019 was the second major revision of the law after independence in 1966. The first major revision of the law after independence was under the Transfer Duty (Amendment) Act of 1976.⁴ This most notably

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1 Act 24 of 2019 which, according to the Transfer Duty (Amendment) Act (Date of Commencement) Order, SI 18 of 2020, entered into force on 1 March 2020.

2 Cap 53: 01, Laws of Botswana.

3 The last revised edition of the Transfer Duty Act before it was amended indicated that the first statute on this subject was a High Commissioner's Proclamation of 10 June 1896. The Transfer Duty Act 85 of 1955, Chapter 88, however, indicated that the first statute on this subject was 5 of 1884. This is strange as the Protectorate was only formally proclaimed in 1885.

4 10 of 1976.

increased the rate of duty payable upon transfer of agricultural land to a non-citizen to (Rand) R30 *per centum* of the purchase price or value of the property, whichever was greater.⁵ The rate for the transfer of agricultural land to a citizen of Botswana was R4 *per centum*, and the rate for the transfer of non-agricultural land to both citizens and non-citizens was also R4 *per centum*. Among other changes, the Transfer Duty (Amendment) Act of 2019 made (Pula) P30 *per centum* the rate payable for transfer of both agricultural and non-agricultural land to a non-citizen, while the rate for transfer to a citizen has been pegged at P5 *per centum* for more than a decade. In addition, the 2019 Amendment Act increased and ‘improved’ exemptions from payment of duty that can be claimed only by citizens of Botswana. The paper considers implications of this differentiation between citizens and non-citizens, not just for inflows of foreign direct investment, but also under the non-discrimination clauses of the Botswana Constitution. The paper also comments anew on salient aspects of transfer duty law in Botswana, given that the 2019 Amendment revised or replaced more than half of the provisions of the Transfer Duty Act. And in so far as my research has revealed, this may also be the first academic commentary on transfer duty law in Botswana.

2. SALIENT ASPECTS OF THE AMENDED TRANSFER DUTY ACT

Although some of its provisions may be technical, complex and inscrutable to those that are not tax law savvy, the Transfer Duty Act and what the 2019 Amendment sought to change or improve, may be explored by answering a series of simple related questions, such as: what is transfer duty, and what does it apply to; who is liable to pay the duty; how much; and when is it payable? We must however begin with a note on new arrangements for the administration of the Act.

2.1 Administration of the Act

The officer responsible for the collection of transfer duty under the Act that

⁵ Section 2 of the Transfer Duty (Amendment) Act 1976, replacing s 2 (4) of the Transfer Duty Act, Cap 53:01. Botswana was at the time still part of the Rand Monetary Area, hence the description of the rate as R30 *per centum*.

was in force at independence in 1966 was the District Officer of the district in which the property was situated.⁶ The Transfer Duty (Amendment) Act of 1976 replaced the District Officer (Commissioner) with the Registrar of Deeds.⁷ The 2019 Amendment replaced the Registrar of Deeds with the Commissioner General of the Botswana Unified Revenue Service (BURS).⁸ This now means that the same public revenue officer is responsible for collection of all premier taxes in Botswana. These include income tax, value added tax (VAT) and capital transfer tax, which all have some affinity with transfer duty. Payment of VAT, for example, entitles the payer to a full or partial exemption from payment of transfer duty.⁹ Capital transfer tax, like transfer duty, is payable upon transfer of property, but in respect of ‘a gratuitous chargeable disposal’ such as a donation.¹⁰ An amendment to the Capital Transfer Tax Act,¹¹ brought into effect on the same date as the Transfer Duty (Amendment) Act of 2019,¹² provided that transactions exempted from transfer duty under the amended Transfer Duty Act shall also be exempted from capital transfer tax.

There has also been alignment of some of the collection and enforcement rules and procedures for transfer duty and income tax. Before it was amended in 2019, for example, section 10 (2) prohibited the Registrar of Deeds from registering any sale, transfer or other alienation of immovable on which transfer duty had not been paid. It also emphatically declared that ‘no such purported sale, transfer or other alienation shall be of any force or effect, nor shall any court take cognizance of any such purported sale, transfer or other alienation’ if not duly registered by the Registrar of Deeds.

After the 2019 Amendment, the Registrar of Deeds is still prohibited from registering a transfer or other alienation of immovable property without proof of payment of transfer duty or a certificate of exemption from the

6 See sections 8 and 9 of the Transfer Duty Act 85 of 1955.

7 Sections 3 - 10 of the Transfer Duty (Amendment) Act 1976, all providing for the substitution of District Commissioner with Registrar of Deeds in the relevant sections of the Act.

8 Transfer Duty (Amendment) Act 2019 Act, s 7 providing for the substitution of s 10 (1) of the Act.

9 VAT is paid only by registered persons, at a rate currently standing at 14 per cent. Section 20 (u) provides that where VAT has been paid, transfer duty at the rate of 5 per cent shall be completely waived. Section 20 (v) provides that where transfer duty is payable at the rate 30 per cent, the amount of VAT paid shall correspondingly reduce the transfer duty payable.

10 See sections 2 and 3 (1) of the Capital Transfer Tax Act 13 of 1985, Cap 53: 02 Laws of Botswana.

11 See section 2 of the Capital Transfer Tax (Amendment) Act 19 of 2019, replacing and substituting s 4 (1) of the Capital Transfer Tax Act.

12 The Capital Transfer Tax (Amendment) Act (Date of Commencement) Order SI 17 of 2020 set 1 March 2020 as the date for the coming into operation of the amended Capital Transfer Tax Act.

Commissioner General BURS.¹³ But the non-recognition of the transaction has been expunged from section 10 (2). It now merely provides that failure to pay duty within the prescribed period ‘shall attract interest at the rate of one and a half percent compounded monthly or a part of a month during which the contravention continues...’ New sub-sections (4) to (7) of section 10 indicate that unpaid transfer duty may be recovered by the Commissioner like any civil debt. The Commissioner, however, does not need to obtain a judgment in order to have writ of execution issued. Filing ‘with the Registrar of the High Court of a statement of the amount due and payable ... shall have an effect of a civil judgment for a liquid debt of the amount.’¹⁴

The Transfer Duty (Amendment) Act of 2019 has also replaced section 24 on resolution of disputes relating to transfer duty determinations. The law previously provided for reference of such disputes to a judge of the High Court, sitting in chambers, who could direct that the matter be brought for a hearing before any court having jurisdiction by way of motion. Under the revised section 24, any person aggrieved by the Commissioner’s decision regarding transfer duty should lodge a written objection to the Commissioner within 30 days, who shall consider the objection and amend, vary, or uphold the decision. A person aggrieved by the Commissioner’s decision may also lodge an appeal with the Board of Adjudicators in accordance with the provisions of the Income Tax Act. And a person aggrieved by the decision of the Board of Adjudicators may lodge an appeal with the High Court.

It must however be acknowledged that replacement of the Registrar of Deeds with the Commissioner General BURS has brought to an end a convenient arrangement which legal professionals had grown accustomed to. Payment of transfer duty has always been linked to registration of deeds. Registration of deeds under the Deeds Registry Act is largely the responsibility of conveyancers and notaries. These are two out of the four divisions of legal practice acknowledged under the Legal Practitioners Act.¹⁵ The Registrar of Deeds has and is always likely to be a legal professional, most likely qualified to be admitted to practice as a conveyancer and/or a notary public.¹⁶ As a legal

13 Sections 11 (a) and 23 (2) of the Transfer Duty Act as amended by sections 8 and 15 of the 2019 Amendment.

14 Section 10 (4) of the Transfer Duty Act, as amended in 2019.

15 The four divisions of legal practice acknowledged under s 4 of the Legal Practitioners Act Cap 61: 01 are Attorney, Advocate, Conveyancer and Notary.

16 According to sections 8 and 9 of the Legal Practitioners Act, to qualify to be admitted as a conveyancer or as a notary public, a person must be admitted as an attorney first and, *inter alia*, satisfy the High Court

professional, the Registrar of Deeds was likely to be more conversant with the conveyancing and notarial practice elements woven into some of the provisions of the Transfer Duty Act. This may be the reason why appeals against transfer duty decisions taken by the Registrar of Deeds lay to a judge of the High Court, sitting in chambers. The Commissioner General BURS, for example, is likely to require strong support from qualified conveyancers or notaries to correctly interpret and apply some of the transfer duty exemptions listed in section 20 of the Act relating to joint ownership, administration of estates, partition and insolvency transfers. It may also take longer to secure from the Commissioner General a receipt or an exemption certificate on the basis of registration of the transfer at the Deeds Registry is predicated.

2.2 Transfer Duty Defined

Transfer duty was described in section 2 (1) of the Transfer Duty Act before it was amended in 2019 as ‘a duty ... payable and paid upon the purchase price or value of any immovable property ... sold or otherwise alienated or transferred.’ This was regardless of whether the immovable property was ‘freehold or held from Government upon quitrent or other leasehold tenure ...’ This description suggested that transfer duty was payable upon alienation or transfer of land falling within the categories of freehold land or State land, which was known as Crown land during the colonial period.¹⁷ Freehold land was appropriated from customary, communal or native land, now described as tribal land, for occupation and use by settlers during the early stages of colonial rule. Recipients of the land were regarded as having acquired absolute, indefinite titles, comparable to a freehold estate in land under English property law. Crown lands consisted of land appropriated from customary, communal or native land for occupation and use by the colonial administration, and the balance of the land not acknowledged as falling within the freehold sector or belonging to any indigenous community.¹⁸ The colonial administration arrogated to itself the

that he or she has passed such examinations as may be prescribed in the practices, functions and duties of either a conveyancer or a notary. To qualify to be admitted as an attorney, a person must be in possession of an appropriate Bachelor of Laws (LLB) degree and satisfy other admission requirements under the Legal Practitioners Act.

17 See Republic of Botswana *Revised Botswana Land Policy October 2019* Government Paper 1 of 2019 para 9.

18 Bechuanaland Protectorate (Lands) Order in Council 1904, Art 1 and Bechuanaland Protectorate (Lands) Order in Council 1910, Art 1.

power to grant, freehold, quitrent or leasehold titles out of Crown lands.

The description in section 2 (1) clearly did not suggest that transfer duty was payable upon alienation or transfer of tribal land. It could not have been the intention of the colonial administration to collect transfer duty upon such transactions when the first transfer duty law was enacted in 1896, or when native reserves were subsequently established. The Policy pursued and preferred in the Bechuanaland Protectorate was to leave recognized chiefs and other tribal leaders largely in control of tribal affairs in the native reserves.¹⁹ Native laws and customs continued to govern allocation and alienation of land rights in the reserves.²⁰ The colonial administration reserved the right to interfere only where settlers or persons of European descent were involved. Needless to say, laws relating to deeds registration, on which collection of transfer duty was predicated, never applied to alienation or transfer of native land rights.²¹

This changed after independence with the passage of the of the Tribal Land Act of 1968.²² In the main, the Act provided for the establishment of land boards, as statutory corporations, packed with Ministerial appointees, to take over the main land administration functions and powers of chiefs and other tribal leaders in designated tribal areas which, initially, were predominantly native reserves for the Tswana-speaking tribes or communities.²³ The Act also provided for the vesting of title to land in the tribal areas in the relevant land boards, to be held in trust and administered for the benefit and advantage of the people.²⁴ Land boards were further mandated to allocate land under customary law and common law grants.²⁵ Customary law grants were initially predominantly for persons subject to customary law, and for traditional land uses. Common law grants were for persons not subject to customary law, or for uses that could not

19 Lord Hailey *Native Administration in British African Territories Part V* (London HMSO 1953) 311

20 Eloquently described by I Schapera in *A Handbook of Tswana Law and Custom*, (Frank Cass London 1984) ch 11 and in *Native Land Tenure in the Bechuanaland Protectorate* (Lovedale Press 1943).

21 The first statute on deeds registration was a Proclamation of 4 July 1893, which declared that the law of the Colony of the Cape of Good Hope relative to registration deeds and other instruments in deeds Registry offices therein, shall, *mutatis mutandis*, be in force within the Bechuanaland Protectorate.

22 No 54 of 1968, Passed by the National Assembly on 9 August 1968, and published in the Gazette of 4 October 1968. The commencement date of the Act was 30 January 1970.

23 The Tribal Land Act initially provided for the establishment of nine land boards, to operate in tribal territories for the so called eight major Tswana tribes, and in a territory that was formerly the Tati Reserve. Three additional land boards were created in 1975 to serve in Chobe, Kgalegadi and Ghanzi districts, in areas which had no native reserves.

24 Section 10 (1) of the Tribal Land Act initially described the people to benefit from the trusteeship of land boards as 'tribesmen' of the particular area. The Tribal Land (Amendment) Act No 14 of 1993 described the beneficiaries as citizens of Botswana generally.

25 Part III of the Act provided for grant of land rights under customary law, and part IV for common law grants.

be readily accommodated under that system. The predominant common law grant was a lease for 99 years for residential land, and 50 years for land required for agricultural, commercial and other non-residential purposes. Provision was made for registration of common law grants under the Deeds Registry Act, and for the processing of subsequent transfers of the land in accordance with the dictates of the Deeds Registry Act.²⁶ Upon registration at the Deeds Registry, leases of tribal land qualified as immovable property in respect of which transfer duty was collectable in terms of the above description of transfer duty.²⁷ Government, however, mysteriously decided to forgo collection of transfer duty upon registration of common law grants of tribal land or cession of such grants. To be consistent, it also decided to forgo collection of transfer duty upon registration of notarial leases granted on land other than tribal land or on registration of cessions of such notarial leases.

Among other objectives, the Transfer Duty (Amendment) Act of 2019 sought to clarify that common law grants of tribal land and cessions of such grants were also duty attracting arrangements. Thus, the definition of ‘transfer duty’ in section 2 (1) was expanded to include immovable property:

- ‘(d) held under a customary land grant in the form of –
 - (i) a registered lease which runs or is capable of running at the option of the lessee for 10 years or more, or
 - (ii) a registered grant, lease or concession of tribal land.’²⁸

Similarly, the concept of ‘immovable property’ in the Deeds Registry Act was redefined to embrace:

- ‘(a) a deed of customary land grant issued under the Tribal Land Act;
- (b) any registered lease of rights to minerals; and
- (c) any registered lease of land which, when entered into, was for a period of not less than 10 years ...’²⁹

²⁶ Sections 24 (3) and 26 (2) of the original Tribal Land Act of 1968.

²⁷ Section 2 of the Deeds Registry Act, Cap 33:02, before it was amended in 2017, described ‘immovable property’ as including ‘any registered lease of land which, when entered into, was for a period of not less than ten years ...’.

²⁸ Transfer Duty (Amendment) Act 2019, s 3 (a) providing for the substitution of s 2 (1) of the Act with an elongated version.

²⁹ Deeds Registry (Amendment) Act 15 of 2017, s 2 (a) redefining some of the key terms and concepts in s 2 of the principal Act.

The concept of ‘owner’ in relation to immovable property was also redefined to include ‘a person registered as the owner or holder thereof and includes a land board established under the Tribal Land Act, ...’³⁰ This paradoxically suggests that land held under a common law grant of tribal land may have two owners - the holder of the lease and the land board which granted the lease.

In addition to grants of tribal land and cessions thereof, there are two other examples of unusual duty attracting arrangements that must be accounted for. These involve creation and registration of a personal servitude and transfer of shares in a company. Section 2 (5) of the Transfer Duty Act, which was not altered by the 2019 Amendment, stipulated that ‘all persons acquiring the right to the limited enjoyment of property burdened with the entail of *fidei-commissum*, and all persons acquiring a life usufruct only in any property ...’, shall be liable to pay transfer duty calculated in reference to the value of the estate or of the interest in the property. As limited real rights that may subsist for periods of not less than ten years, these rights or interests also qualify as ‘immovable property’ under the expanded definition of the concept in section 2 of the Deeds Registry Act.

Share transfers were duty attracting arrangements by virtue of sections 2 (6) and 3 of the Transfer Duty Act before it was amended in 2019. Section 3 declared that the issue of shares in a company, or a change in the beneficial ownership of shares in a company, which had the effect of passing from one person to another control of or entitlement to benefit from agricultural land was a transaction involving agricultural land, attracting the high rate of duty of 30 per cent where the transferee was not a citizen of Botswana. Transfer of shares in a company owning or holding agricultural land was a potential transfer duty-evasion loophole that the provision sought to close. According to section 2 (6) of the Act, ‘agricultural land’ was land ‘other than land in a township capable of being used for purposes of agriculture or horticulture or for breeding or keeping domestic animals, poultry or bees.’ And ‘citizen of Botswana’ included ‘a company incorporated in Botswana and of which a majority of every class of equity shares is held by citizens of Botswana.’³¹

30 Deeds Registry (Amendment) Act 15 of 2017, s 2 (c).

31 Compare section 3 (4) of the Land Control Act Cap 32:11, which stated that ‘citizen’ in section 3 ‘shall not include a company incorporated or registered under the Companies Act, unless the majority of all classes of shares in such company are beneficially owned by individuals who are citizens of Botswana’.

The Transfer Duty (Amendment) Act of 2019 substituted section 3 with one that has three sub-sections. In the material part, sub-section (1) now states that the issue of shares in a company or a change in the beneficial ownership of any of the issued shares in a company, shall be a duty attracting arrangement if the effect is ‘to pass the control of or entitlement to benefit from any immovable property from one person to another.’ This is regardless of the status or type of immovable property involved. As will be expounded below, the amount of duty to be paid will depend on the citizenship of the person liable to pay the duty. To facilitate collection of the duty, sub-section (2) requires any company involved in the sale, alienation or transfer of shares in the manner envisaged under sub-section (1) to notify the Commissioner General BURS within a period of 30 days from the date of the transaction. Sub-section (3) states that share dealings and transfers in a company listed under the Botswana Stock Exchange shall be exempt from payment of transfer duty even if the effect is to transfer control of or entitlement to benefit from any immovable property. This exemption was not in the original Bill published in November 2018.³² It was added later to placate those contending that the Bill would complicate dealings on the Botswana Stock Exchange.³³

Also left out of the final Act, in deference to criticisms of the Bill by Business Botswana and the Real Estate sector, was a clause proposing to redefine citizenship for companies as referring to ‘incorporation in Botswana’ and ‘ownership of the whole of its shareholding ... by citizens of Botswana.’³⁴ At a stroke, many joint ventures qualifying as citizen companies under section 2 (6) would have ceased to qualify, and to be eligible for the many benefits accorded by the Act to citizens. The proposal in the original Bill was also to drop from the Act the definition of ‘agricultural land’ rendered otiose by the replacement of ‘agricultural land’ in section 3 with the words ‘immovable property’. The omission from the final Act of the clause in the Bill that purported to revise section 2 (6) means that both ‘agricultural land’ and ‘citizen of Botswana’ must be read and understood as interpreted in the Act before it was amended. There are in consequence varying descriptions of the citizenship of a company in

32 Clause 4 of the Transfer Duty (Amendment) Bill 32 of 2018 proposed to replace section 3 of the Act with one that only had sub-sections (1) and (2).

33 Gowenius Toka ‘Hope Beckons as Bill to ease property ownership by citizens evolves’ *Sunday Standard* 14-20 July 2019 at 5.

34 Clause 3 (d) of Bill 32 of 2018, proposing to substitute section 2 (6) of the Act with a new provision.

several land statutes.³⁵

2.3 Responsibility for Payment of Duty

Who pays transfer duty, and when is it payable? are the easier transfer duty questions to answer. Section 2 (2) of the Act indicated those liable to pay transfer duty as: (a) the purchaser of the property; (b) every person entitled to the property where the underlying *causa* is not a sale but an exchange, donation, legacy, or inheritance, testamentary or otherwise; and (c) the person into whose name the property is to be transferred or registered under the Deeds Registry Act. The Transfer Duty (Amendment) Act of 2019 added the following to this list: (d) every lessee who registers a lease of immovable property which runs or is capable of running for a period of 50 years; and (e) every person who registers a grant or a concession including a tribal land lease or concession.

It would appear from these additions that other than for tribal land leases or concessions, leases that are not capable of running for a period of 50 years are not duty attracting transactions although they may be registered at the Deeds Registry if the duration is in excess of 10 years. It would also appear that the Act imposes responsibility for payment of transfer duty on the transferee when, at common law, in the absence of any stipulation to the contrary, it should be the responsibility of the seller, lessor or donor to deliver what has been agreed upon, and to assure the buyer, lessee or donee of quiet possession and use or enjoyment of the thing. In conveyancing, similarly, the transferee is responsible for meeting attendant costs of transferring the property.

There are three logical possibilities on the date or time for payment of duty: the date of the underlying *causa*; the date of registration of the transfer; or the date of entry into possession. Sections 6 and 7 of the Transfer Duty Act opted for the date of the underlying *causa*, even where there was to be delayed possession. Section 6 stated that ‘in respect of every sale, exchange or donation’ transfer duty ‘shall be payable within six months from the day of the date of the sale, exchange or donation ...’ And after the expiration of the six

³⁵ In addition to the slightly varying definitions referred to in the Transfer Duty Act and the Land Control Act, s 33 (3) of the Tribal land Act 1 of 2018, states that ‘citizen’ in part VII of the Act ‘shall not include a company incorporated or registered under the Companies Act, unless all classes of shares in such company are beneficially owned by individuals who are citizens of Botswana.’ Shares in a citizen company must in other words be wholly, (100 per cent), owned by individuals who are citizens of Botswana. Many joint venture companies have therefore been deprived of their citizenship under the Tribal Land Act of 2018, but not under the Transfer Duty Act or the Land Control Act.

months, and until payment or deposit of the amount of duty, interest shall be payable at the rate of P12 *per centum per annum*.' Because of the effect of non-payment of duty as indicated in section 10 (2) of the Act before it was amended, sound counsel to the buyer, donee or other transferee was always to tender to the Registrar of Deeds a cheque in payment of transfer duty together with the necessary transfer documents.

The Transfer Duty (Amendment) Act of 2019 substituted section 6 with a new provision stipulating that 'transfer duty in respect of every sale, exchange, share transfer, or donation of any immovable property shall be payable within 60 days from the date of assessment of the duty payable.' As noted earlier, a new section 10 (2) stipulates that failure to pay duty within the time provided shall attract interest at the rate of one and half per cent compounded monthly, but the interest shall not exceed the amount of the unpaid duty. It has also been noted that the Commissioner General can recover unpaid duty as a civil debt, invoking other debt recovery powers invested upon him or her under the Income Tax Act.

2.4 Amount of Transfer Duty Payable

Section 2 (3) of the Transfer Duty Act before it was amended stipulated that transfer duty 'shall be calculated at the rates specified in sub-section (4) on the purchase price paid for the property or on the value of the property sold, alienated or transferred, whichever is greater.' The rates specified in sub-section (4) before the 2019 amendment were: (i) P5 *per centum* in the case of a transaction involving agricultural land, where the person liable to pay the duty was a citizen of Botswana; (ii) P30 *per centum* in the case of a transaction involving agricultural land, where the person liable to pay the duty was not a citizen of Botswana; and (iii) P5 *per centum* in the case of a transaction involving property other than agricultural land, (regardless of whether the person liable to pay the duty was or was not a citizen of Botswana).³⁶

In a new sub-section (4) (a), introduced under the 2019 Amendment, the rates of duty are: (i) P5 *per centum* in the case of any transaction involving

³⁶ As noted earlier, differentiated rates for citizens and non-citizens in respect of agricultural land were introduced by the Transfer Duty (Amendment) Act No. 10 of 1976. It is notable that from 1976 to 2019 the non-differentiated rate for non-agricultural land increased only by 1 per cent, from R4 per centum to P5 per centum.

any immovable property sold or alienated, where the person liable to pay the duty is a citizen of Botswana; (ii) P30 *per centum* in the case of any transaction involving any immovable property sold or alienated, where the person liable to pay the duty is not a citizen of Botswana; and (iii) P5 *per centum* in the case of any transaction involving any immovable property sold or alienated, where the person liable to pay the duty is an entity which is neither a natural person nor a company. A new sub-section (4) (b) which, strictly, should have been an addition to sub-section (3), states that duty shall be calculated ‘on the aggregate rental payable or on the value of the immovable property leased, whichever is greater,’ in the case of a customary land grant.

Although transfer duty in terms of section 2 (3) was generally supposed to be computed in reference to what was greater between the purchase price and value of the property sold, it was in the case of sales often computed in reference to the price, reflected in separate declarations to be completed and lodged by or on behalf of both the seller and purchaser.³⁷ If the declared price appeared unrealistic, the Registrar of Deeds had the discretion to rely on local council valuation of the property, or to cause a fresh valuation of the property to be made. And local council values of property in parts of Gaborone, the Capital City, were hopelessly out of date and generally far below assessed current values. Through the substitution of sections 14 and 15, on contested values and prices in declarations, the Transfer Duty (Amendment) Act of 2019 seeks to encourage reliance on third party, independent valuations of all properties in the computation of transfer duty.

A new section 14 (1) of the Act requires that transfer duty declarations should reflect the value of any affected immovable property, and that declarations should be lodged within a period of 30 days from the date of the contract or the actual transfer or possession of the property, whichever comes first. They must also be submitted together with a valuation certificate executed by a property valuer registered in accordance with the Real Estate Professionals Act. A new section 14 (2) states that on receipt of the declaration, the Commissioner General may ‘assess and charge duty based on the declaration or market value or valuation certificate [executed] by the registered property valuer, whichever

³⁷ Section 11 of the Transfer Duty Act prohibited the Registrar of Deeds from issuing a receipt for any duty paid before completion by the seller and buyer of solemn declarations drawn as prescribed in Schedules to the Act. Without the receipt and such declarations, there could be no registration of the transaction at the Deeds Registry.

is greater.’ This is in effect an amendment to sub-section (3) of section 2 of the Act, which is surprisingly not listed in the Transfer Duty (Amendment) Act of 2019 as one of the provisions to be directly substituted.

Under a new section 15, the Commissioner General may base the assessment of duty on a ‘fair market value of the property if it appears to him or her that: (a) ‘the declared value, price or purchase money ... in case of a sale and purchase of immovable property’ is less than its just and fair value; and (b) the value in the valuation certificate is not acceptable to either the Commissioner General or the person liable to pay the duty. The fair market value determined by the Commissioner General shall be the basis for the computation of duty where it exceeds by one third the declared value or the value in the valuation report, whichever is greater. The declared value or value in the valuation certificate, whichever is greater, shall be the basis for the assessment of duty where the fair market value determined by the Commissioner General is less by one third of the declared value or the value in the valuation report, whichever is greater. There will be no reference to outdated local council valuations in the assessment of transfer duty under the new dispensation.

Strong representations were made to the Minister of Finance when the Transfer Duty (Amendment) Bill of 2018 proposed to increase the rate of duty payable by non-citizens for transfer of all types of land from P5 *per centum* to P30 *per centum*. It was decried by some that Botswana would probably have the highest property transfer tax in the world,³⁸ and the move would most likely scare off foreign investors, particularly from the urban property market. The Minister promised to address private sector concerns about the Bill,³⁹ but the final output diffidently retained the P30 *per centum* rate for non-citizens. It was also accompanied by a raft of improvements ostensibly designed to facilitate acquisition of property by citizens. Government appears to have been persuaded by the argument that foreign investors should be most welcome in Botswana if they rent rather than purchase or otherwise acquire property.⁴⁰ Through this, Government and the ruling Botswana Democratic Party were also projecting themselves as champions of ‘aggressive citizen empowerment’ in the

38 See Tloto Mbazoo ‘Botswana has the highest transfer duty in the world – Giachetti’ *Botswana Guardian*, 21 May 2019 accessed at <http://www.botswanaguardian.co.bw/news/item/4150> on 30 June 2021.

39 See Bonnie Modiakgotla ‘Transfer Duty amendment Bill could get another twist’ *Business Sunday Standard*, 21-27 July 2019 at 17.

40 Sentiments attributed to Montshwari Mooketsi of the Botswana Real Estate Advisory Council in *Botswana Guardian* of 13 September 2019.

run-up to the 2019 general elections. This is a nationalistic policy broadly aimed at ensuring that important economic resources in Botswana are controlled by citizens of Botswana.⁴¹

2.5 Exemptions, Remissions and Returns

What the Act provides on exemptions from, and remission and return of transfer duty is relevant in comprehensively answering questions such as who is liable to pay transfer duty, and how much? Part IV of the Act covered exemptions, remissions and returns of transfer duty. Sections 18, 21 and 22 in this part, which the 2019 Amendment did not seek revise or substitute, dealt with remissions, and sections 19 and 20 (n) and (o), also not revised, covered returns of transfer duty. Exemptions were comprehensively described in section 20, which was extensively revised by the 2019 Amendment.

Section 18, the leading provision on remissions, prohibits the responsible public revenue collection officer from foregoing the collection of transfer duty in respect of sales, except where the Act specifically authorizes him her or to do so, or where if duty was to be paid, it ‘would be paid directly from and out of the revenue of Botswana.’ This was an inelegant way of stating that transfer duty shall not be paid or payable upon acquisition of land by the Government of Botswana. Government cannot pay transfer duty to itself! From a strict reading of section 18, there should be no remission of transfer duty when Government funded or aided entities, such as the University of Botswana or Botswana Railways, purchase land. The Minister may, however, invoke his powers in section 20 (s) to waive, by an instrument in writing, payment of the whole or any part of the P5 *per centum* transfer duty payable by citizens of Botswana. Perhaps consideration should have been given to amending section 20 (s) so that the Minister could also waive payment of the whole or any part of the P30 *per centum* payable by persons who are not citizens of Botswana.

According to section 21, remission of payment of transfer duty is also permissible where a contract of sale is cancelled and rescinded by mutual consent, before transfer, and without payment of any part of the purchase price or any valuable consideration being given for the cancellation. But where any part of the purchase price has been paid, or valuable consideration given for

⁴¹ See GR Lekgowe ‘The trajectory of citizen economic empowerment in Botswana after fifty years: an endless road of hapless policies’ (2016) *University of Botswana Law Journal* 138-171.

the cancellation, transfer duty must be collected in respect of the purchase price paid or valuable consideration given.⁴² Where a contract of sale is set aside, cancelled or rescinded by a judgment of a competent court, section 19, in a manner comparable to section 21, provides that transfer duty shall not be paid or collected. But if it has already been paid, it shall be returned. Section 20, paragraphs (n) and (o), provide for returns of transfer duty that trustees in insolvency must take particular note of. Where a contract of sale is set aside as a voidable disposition by a trustee administering the estate of the seller, transfer duty shall not be paid, but if it has already been paid, it shall be returned. Where the contract is set aside or abandoned by a trustee in the insolvency of the purchaser, transfer duty is, again, not payable. But if it has already been paid, it shall not be returned. To avoid an unnecessary loss to the estate, a trustee in the insolvency of the purchaser must therefore take care to set aside voidable dispositions before transfer duty is due and payable.

Before it was revised in 2019, section 20 had 22 paragraphs, offering exemptions from payment of transfer duty which could be grouped as relating to: administration of estates of deceased persons;⁴³ administration of estates of insolvents;⁴⁴ transfers consequent upon marriage in community of property, and upon the death of a spouse so married;⁴⁵ initial and final transfers to and from a trust;⁴⁶ partition transfers;⁴⁷ transfers involving those liable to pay value added tax (VAT);⁴⁸ and exemptions for the benefit of citizens.⁴⁹ The Transfer Duty (Amendment) Act of 2019 did not revise most of the paragraphs describing exemptions to be claimed in the administration of estates of deceased persons, or any of the paragraphs referring to exemptions relating to insolvency administration, transfers to or from trustees; partition transfers and payment of VAT. The 2019 Amendment substantially revised exemptions to be claimed by persons married in community of property and by citizens of Botswana.

At a time when a woman married in community of property was subject to the husband's marital power and could not therefore have immovable property registered in her name at the Deeds Registry, section 20 (g) of the Transfer

42 Section 22 of the Transfer Duty Act.

43 See paras (a) to (f), and (k) to (l) of section 20.

44 See paras (n), (o) and (p) of section 20.

45 Paras (g) and (d) of section 20.

46 Paras (h) and (i) of section 20.

47 Para (j).

48 Paras (u) and (v) of section 20.

49 Para (t) of section 20.

Duty Act provided that the husband of any woman who had property registered in her name before the marriage could have it removed from her name into his name without payment of transfer duty. This exemption was not removed when the Deeds Registry Act was amended in 1996 to provide for registration of immovable property under the name of a woman married in community of property,⁵⁰ or in 2004 when the concept of the husband's marital power was abolished in Botswana.⁵¹ The Transfer Duty (Amendment) Act of 2019 has substituted paragraph (g) of section 20 with one indicating that property standing in the name of a spouse at the Deeds Registry may be removed from the name of that spouse into the name of the other spouse without payment of transfer duty.⁵² Although cast in a gender neutral manner, the policy behind this is to encourage and facilitate transfer of properties from male to female spouses, especially widows.⁵³ In the same vein, the exemption in paragraph (d), under which the surviving spouse of a husband to whom she was married in community of property could inherit or take over immovable property from the joint estate without payment of transfer duty, has also been recast and expanded so that any surviving spouse, (regardless of the matrimonial property regime under which he or she was married), could inherit or take over from the estate of the deceased without payment of transfer duty.⁵⁴ A new paragraph (GA) has also been added to section 20, to permit any divorcee to have property standing in the name of his or her former spouse transferred into the divorcee's name without payment of duty.⁵⁵

The expansion of exemptions for the benefit of citizens of Botswana was also remarkable. First, paragraph (t) was substituted with one providing that a citizen of Botswana shall not be charged with duty upon the first P1 000 000 of the purchase price or value of the immovable property. The Transfer Duty (Amendment) Bill of 2018 proposed to increase the exemption from P200 000 to P500 000. As the Bill was being scrutinized in and out of the National Assembly, the Minister announced that the threshold for the exemption will be increased to P750 000.⁵⁶ Section 14 (e) of the Transfer Duty (Amendment) Act

50 Deeds Registry (Amendment) Act No 10 of 1996.

51 Abolition of Marital Power Act No 34 of 2004.

52 Section 14 (b) of the Transfer Duty (Amendment) Act 2019

53 See para 72 of the *Revised Botswana Land Policy* Government Paper No 1 of 2019.

54 Section 14 (a) of the Transfer Duty (Amendment) Act 2019.

55 Section 14 (e).

56 Bonnie Modiakgotla 'Transfer Duty amendment Bill could get another twist' *Sunday Standard Business* 21-27 July 2019 at 17.

of 2019 ultimately wrongly announced that the threshold was increasing from P500 000 to P1 000 000. The Minister appears to have buckled, and acceded to those demanding that more must be done under the Act to facilitate acquisition of immovable property by citizens of Botswana, if need be, at the expense of foreign investors likely to be scared by the exponential increase in the rate of duty for non-citizens to P30 *per centum*. The main concession to those making a case for investor friendly taxation being retention of the criteria in section 2 (6) of the Act for determining the citizenship of a company.

Four new paragraphs were also added to section 20, three of which added to the exemptions claimable only by citizens of Botswana, and the fourth provided an exemption that could be claimed by all tax payers, including citizens of Botswana. These are paras (w), (x), (y) and (z) of section 20.⁵⁷ Paragraph (w) provides that a citizen of Botswana who for the first time purchases or acquires a residential property or an undeveloped property shall be exempt from payment of transfer duty that would otherwise have been payable. Paragraph (x) exempts from payment of transfer duty an individual citizen of Botswana who transfers immovable from himself or herself to a company owned 100 *per centum* by that individual or jointly by that individual and his or her spouse. Paragraph (y) exempts from payment of transfer duty the transfer of immovable property from a company owned 100 *per centum* by an individual citizen of Botswana or jointly by that individual and his or her spouse to that individual and his or her spouse. Paragraph (z) lastly states that donations of immovable property to eligible beneficiaries as provided for under the Income Tax Act shall also be exempt from payment of transfer duty.

It has been noted that there is a possibility of transfer duty avoidance in the manner in which exemptions in paragraphs (w), (x) and (y) have been articulated. The exemption for first-time home owners or developers can be claimed by both individuals and citizen companies. There appears nothing to stop an individual who already has a residential property, and does not therefore qualify for the exemption, from acquiring another through a citizen company.⁵⁸ And if the company is wholly owned, or jointly owned by the individual and his or her spouse, it may subsequently transfer the property to the individual or

57 Section 14 (f) of the Transfer Duty (Amendment) Act of 2019. This means that with the new paragraph (GA), section 20 lists potential exemptions from payment of transfer duty that are slightly more than the letters of the alphabet. Exemptions have increased from 22 to 27.

58 This is an opinion attributed to Jonathan Hore, a tax specialist, in an article by Gowenius Toka 'Hope Beckons as Bill to Ease Property Ownership by Citizens Evolves' *Sunday Standard* 14-20 July 2019 at 5.

his or her spouse free of transfer duty. As most citizens of Botswana are only likely to access residential land, for the first time, from the Tribal land pool, the exemption in para (w) entails that notwithstanding the inclusion of tribal land grants and transfers among the duty attracting transactions in section 2 (1) of the Amended Act, most such grants and transfers are likely to be duty free. Even where those liable to pay duty are not first-time home owners, the exemption of the first P1 000 000 of the purchase price or value of the immovable property from payment of transfer duty would, as of now, push most undeveloped tribal land plots into the duty-free bracket. The Transfer Duty (Amendment) Act of 2019 has thus significantly eased the liability of citizens to pay transfer duty while exponentially increasing the rate at which non-citizens must pay. The burden of this tax now weighs heavily on non-citizens.

3. DISCRIMINATORY TAXATION AND THE BOTSWANA CONSTITUTION

The legality of nakedly discriminatory laws such as the Transfer Duty (Amendment) Act of 2019 must necessarily be assessed in reference to the well-known non-discrimination provisions of the Botswana Constitution. These are sections 3 and 15 in chapter II, the ‘Fundamental Rights and Freedoms’ chapter of the Constitution. Section 3 is the preambular, opening clause of the chapter, which attempts to summarize the fundamental rights and freedoms protected, and the overarching qualifications to the protection offered. Section 15 expounds on the nature and quality of protection offered in respect of discriminatory laws and actions. Section 3 is reproduced, and essential elements of section 15 either quoted or paraphrased.

Section 3 reads:

‘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 opinions, colour, creed or sex, but subject to the right and freedoms of others and for the public interest to each and all of the following, namely –

- (a) life, liberty, security of the person and the protection of the law;

- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection of the privacy of his or her home and other property and from deprivation of property without compensation,

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.’

It is conspicuous from this section that the fundamental rights and freedoms outlined are for every person in Botswana, regardless of his or her race or place of origin. Non-citizens are included among those protected. It is also notable that although non-discrimination is an essential part of the formulation of the fundamental rights and freedoms, it is not explicitly itemized in paragraphs (a) to (c) as one of the fundamental rights protected. Some may regard it as embraced in ‘the protection of the law’, which must be equal for both citizens and non-citizens, but the elaboration of ‘protection of the law’ in section 10 indicates that it is essentially about the right not to be mulcted for a criminal offence without due legal process. Protection from discrimination under the law is separately described in section 15. Section 3 also announces that the elaboration of each fundamental right or freedom in its respective provision is subject to the limitations indicated in the provision and, in addition, limitations must also pass muster in reference to ‘respect for the rights and freedoms of others and for the public interest’. There are thus two sets of limitations through which to measure the quality of protection of fundamental rights and freedoms offered in Chapter II of the Botswana Constitution, the more important being the limitations in section 3.

There are at least four essential elements of section 15 to highlight in this review. First, sub-section (1) states that ‘no law shall make any provision that is discriminatory either of itself or in its effect.’ Sub-section (2), secondly, in part 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 any

public functions or duties. Sub-section (3), thirdly, describes ‘discriminatory’ as referring to:

‘... 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 fourth essential element of section 15 is that as pre-announced by section 3, both limbs of protection from discrimination are riddled with limitations that severely compromise the quality of the protection offered. Non-discrimination as encapsulated in sub-section (1), which is more relevant to this analysis, is subject to the provisions of sub-sections (4), (5) and (7). Non-discrimination in sub-section (2) is subject to the provisions of sub-sections (6), (7) and (8). Sub-section (9) qualifies the protection offered in both sub-sections (1) and (2). For purposes of assessing the legality of the Transfer Duty (Amendment) Act of 2019 under both sections 3 and 15 (1), the more notable, eye-catching limitations are in sub-section (4). It states:

‘Subsection (1) of this section shall not apply to any law so far as that law makes provision –

- (a) ...
- (b) with respect to persons who are not citizens of Botswana;
- (c) ...
- (d) ... or
- (e) whereby persons of any such description

as is mentioned in sub-section (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 persons of any other such description, is reasonably justifiable in a democratic society.’

Paragraph (a) declares as legitimate under section 15 (1) any

discriminatory law providing for the appropriation of public revenues or other public funds. Paragraph (c) refers to laws relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. Paragraph (c) indicates that laws for the application of customary law to members of a particular race, tribe or community also pass constitutional muster under section 15 (1).

Paragraphs (b) and (e) could be cited as authorizing the passing of discriminatory legislation. Paragraph (e) appears to authorize what could be described as affirmative action legislation, for the benefit of previously disadvantaged persons. It probably would have provided constitutional cover for the Transfer Duty (Amendment) Act of 1976⁵⁹ if the issue had arisen. This is the law that introduced for the first time the rate of R30 *per centum* for transfer of only freehold agricultural land to non-citizens.⁶⁰ The mischief to be corrected was continuing ownership and transfers among settlers of European or Afrikaner descent of agricultural land in the freehold sector, ten years after independence in 1966. Giving priority to Batswana in the acquisition of agricultural land in this sector, located in parts of the country most congenial to arable agriculture, would probably have been regarded by any constitutional court in Southern Africa as necessary land reform, and reasonably justifiable in a democratic society.

In the absence of tangible information or statistics indicating that non-agricultural land in present-day Botswana is predominantly owned, held or controlled by non-citizens, it would be difficult to sustain the argument that high, almost punitive, taxation of only transfers of land to non-citizens, is reasonably justifiably in a democratic society.⁶¹ For this reason, Government is not likely to seek constitutional cover for the Transfer Duty (Amendment Act of 2019 under para (e) of sub-section (4), but under para (b), in respect of which this standard justification for the clawing-back of constitutional protection of fundamental rights is not demanded. Paragraph (b) is *ex facie* a horrible claw-back clause, appearing to authorize xenophobic treatment of foreigners under any law in Botswana, and for whatever reason. But we must recall and apply the analysis

59 No 10 of 1976.

60 As noted earlier, a uniform rate R4 *per centum* was previously payable by everyone for transfer of all types of land.

61 A survey of ownership of residential land in Gaborone was quietly abandoned around 2006/7 after coverage of only a few areas. We can only speculate as to why this was so. Perhaps the emerging statistics were uncomfortable for some prominent citizens and politicians.

by the Court of Appeal in Botswana of the relationship between section 3 of the Constitution and the specific clauses elaborating on the fundamental rights and freedoms protected in Chapter II.⁶² The Court of Appeal has reiterated more than once that even unrestrained claw-back clauses in Chapter II must be tested against the requirement in section 3 that the protection of fundamental rights and freedoms in the Constitution is ‘subject to respect for the rights and freedoms of others and for the public interest.’⁶³ It must at least be in the public interest to pass a law that discriminates against persons who are not citizens of Botswana. The proverbial jury must be regarded as still out on whether a constitutional court would regard a law which so severely discriminates against foreigners, in matters of taxation, is in the interest of the public.

4. CONCLUDING REMARKS

The enactment of the Transfer Duty (Amendment) Act of 2019 may be likened to the scoring of two own goals by the Government of Botswana in a soccer game. First, as Business Botswana and other interested stakeholders loudly protested while the Bill was under consideration, by exponentially raising the rate of transfer duty payable by non-citizens, Government was confounding its own quest for inflows of foreign direct investment, matching Botswana’s well-deserved reputation for political stability, democratic governance, through regular conduct of free and fair elections, and prudent management of its economy. In the language of the General Agreement on Trade in Services (GATS) 1994 of the World Trade Organization (WTO), the type of foreign direct investment most sought after by developing countries manifests itself in a service provider’s ‘commercial presence’ in the investment destination. This is readily associated with increasing employment and infrastructural investments in developing countries. Commercial presence goes hand in hand with access to land resources. By restricting or impeding access to land by non-citizens, the Transfer Duty (Amendment) Act of 2019 is signaling that foreign investors are not so welcome in Botswana.

Botswana is also an original Member of the WTO and, as such, a

⁶² See Amisshah P *Attorney General v Dow* [1992] BLR 119, 133-134.

⁶³ See Kirby JP in *Ramantele v Mmusi and Others* unreported Civil Appeal No CACGB-104-12 para 14; and *Attorney General and Others v Tapela and Another* unreported Civil Appeal No CACGB-096-14 and *Attorney General and Others v Mwale* unreported Civil Appeal No CACGB-076-15 para 57.

signatory to the General Agreement on Tariffs and Trade (GATT) 1994, GATS 1994 and other multilateral trade agreements, requiring Members to observe certain rules and disciplines in their conduct of international trade relations. The core rules and disciplines include non-discrimination among WTO Members in international trade tariff matters (MFN)⁶⁴; non-discrimination between imported and domestic products in matters of internal taxation, (National Treatment);⁶⁵ and non-discrimination between domestic and foreign services or service providers in the regulation of trade in services, (National Treatment).⁶⁶ By enacting a nakedly discriminatory Transfer Duty (Amendment) Act 2019, Botswana is, wittingly or unwittingly, signaling that it is not prepared to carry over into domestic taxation the national treatment principle it so readily observes in its conduct of international trade relations. One could argue that national treatment is a sound principle to observe in domestic taxation, especially where citizens and non-citizens are similarly circumstanced.

The second own goal relates to the potential justification for differential taxation of citizens and non-citizens under section 15 of the Botswana Constitution. The old school of politicians in Botswana used to argue that the country has been well-served by its old Constitution, with a Bill of Rights which has not been tampered with since the constitution was crafted for Botswana's independence in 1966.⁶⁷ In American colloquial language, 'if it isn't broke, why fix it?' If, indeed, it is in the public interest in Botswana to pass a land transfer tax Act that targets only non-citizens for excessively high transfer duties, the Bill of Rights in the Constitution is in dire need of modernization. Section 15 (4) (b) of the Constitution is in effect endorsing the type of xenophobic treatment of foreigners that would not pass muster as reasonably justifiable in a democratic country in several of the more modern Southern African constitutions. To its credit, the current Botswana Government has conceded that parts of the Constitution are indeed time-worn and in need of modernization. One hopes that this process will include erasure of time-worn claw-back clauses like section 15 (4) (b) that negate the core content of protection of every person in Botswana from discriminatory laws.

64 MFN is Most Favoured Nation Treatment, a rule encapsulated in Art I:1 of GATT 1994 in respect of trade in goods, and Art II of GATS 1994 in respect of trade in services.

65 Art III is the National Treatment provision in GATT 1994.

66 See Art XVII for the National Treatment principle in GATS 1994.

67 See C. Ng'ong'ola, 'Property Guarantees in the Constitution and Implications for Land Tenure Policy in Botswana' in E Quansah and W Binchy (eds) *The Judicial Protection of Human Rights in Botswana* (Clarus Press Dublin 2009) ch 16 at 301.