The Role of the Judiciary in Enhancing Constitutional Democracy in Botswana

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ABSTRACT

This article highlights the important role that the judiciary has played in safeguarding Botswana's constitutional democracy. This role is primarily located in and can be discerned from the courts' decisions as well as the legal framework establishing the judiciary. When assessing the courts' role in enhancing constitutional democracy consideration must be given to judicial decisions on issues relating to the rule of law and separation of powers; respect for popular sovereignty; balancing majority and minority rights; treatment of principles of international law; limited government and the institutional and procedural limitation of power. The judiciary as a constant, has over the years played a central role in fostering constitutional democracy in Botswana. The adjudication of disputes by the Courts has not been without challenges as the Courts have been, in some instances, accused of failing to fulfil their mandate. In this work, decisions of the Higher Courts in Botswana will be used as a barometer for assessing the extent to which they have been instrumental in safeguarding constitutional democracy.

1. INTRODUCTION

This article assesses Botswana's adherence to constitutional democracy and points out that a lot of changes have taken place since independence. Most of the developments the country has gone through have had a massive and changing effect on Botswana's adherence to the rule of law, democratic principles and the respect for human rights. For the most part the judiciary has over the years played a central role in fostering constitutional democracy in Botswana and this has not been without challenges. The judiciary has at times been viewed with suspicion by members of the community, especially members of the opposition parties, the legal fraternity and the labour movement. There have been instances where the judiciary has been accused of failing to fulfil its

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mandate under the constitution on allegations that there is too much deference to the executive.

Following this introduction is a discussion of constitutional democracy in the second section. The third section of this article discusses the judiciary under the 1966 Republican Constitution. This is followed by a discussion of constitutional democracy and the judiciary in Botswana in the fourth section. It is in this section that that the following issues are considered: treatment of the principles of international law by the Courts; adjudication over human rights issues; adherence to the rule of law and separation of powers; adjudication and oversight over electoral processes; and general judicial review. The fifth section of the article discusses challenges and prospects of the involvement of the judiciary in a constitutional democracy. It then makes some recommendations.

2. UNDERSTANDING CONSTITUTIONAL DEMOCRACY

The classical Athenian democracy has been transformed into the largely representative democracy that obtains today resulting in many variants of democracy as developed by political theorists.[1] These include deliberative democracy, constitutional democracy, participatory democracy, multiparty democracy, parliamentary democracy, representative democracy, social democracy and liberal democracy. Many states and many societies are considered to be liberal societies because they aspire to respect the rights of persons and allow them to participate in the decision-making process. Above all, many states have placed elected representatives, who hold the power to make decisions on behalf of the majority, under constitutional limitations.[2] These constitutional limitations normally place emphasis on the protection of individual liberties, the rights of minorities and the separation of powers between the various arms of government.[3] These constitutional limitations have since come to be identified as forming the core of constitutional democracy.

It has been rightly pointed out that there are two chief features that distinguish a constitutional state from other types of political order.[4] The first feature, pointed out by Stein, is that "… political will in constitutional democracies is not completely sovereign; it is bound to several individual

1 J. Norman, "Human rights and democracy: conceptualization and application in Palestine" *(2005) available at http://www.phrmg.org/human_rights_and_democracy.htm (accessed 10 October 2017).*

2 D Beetham *Democracy and human rights*, Cambridge: Polity Press (1999), p. 35.

3 ibid.

4 T. Stein, "Does the Constitutional and Democratic System Work? The Ecological Crisis as a challenge to the Political Order of Constitutional Democracy," 4 (3) *Constellations* (1998), p. 420.

rights, sometimes to specific collective goals of the society, and to a set of procedural rules."[5] The second feature, according to him, is that the institutional arrangement in a constitutional democracy leads to decisions that are based on consent and are appropriate to the issues they resolve.[6] From this perspective, we are made aware that constitutional democracy is a representation of the societies' desire to have leaders who operate mainly within constitutional boundaries and/or limitations. Actions and decisions of the majority members of the society are therefore supposed to be limited by the legal and institutional mechanisms so as to ensure that the rights of individuals and minorities are protected.[7] Constitutional democracy is said to have been successful in countries such as South Africa and Botswana.[8] Further, constitutional democracy has been identified as providing a great possibility of success in achieving peace in countries where there is conflict.[9] Finally, Kis points out that "constitutional democracy usually refers to a set of political institutions."[10] He proceeds to argue that "the values and principles of liberal democracy present us with ideals and requirements that can furnish reasons for preferring constitutional democracy." [11] This is because, the argument continues, reference to liberal democracy speaks to the "normative ideas, aims to be pursued and restraints to be observed." [12]

The elements of constitutional democracy can therefore be easily identified as being popular participation and sovereignty; majority rule and protection of the minority rights; limited government; and the existence of institutional and procedural limitations on powers of government. The restraints that are placed on the elites, who have been given the mandate by the populace to govern, are to ensure the respect for the rights of others by those in power. When the government is acting outside constitutional boundaries it thus falls short of the dictates of constitutional democracy and decisions so taken are liable to be set aside by the courts. In the main, and going by Kis' understanding of constitutional democracy, the constitutional legal framework and the institutional legal framework are supposed to be arranged in such a manner that any limitations that have been imposed are effective.

As will become apparent in the later parts of this article, it is not always

5 ibid.
6 ibid.
7 W. Murphy, *Constitutional Democracy and Maintaining a Just Political Order*, Baltimore: John Hopkins University Press (2007), p. 68.
8 ibid. 78.
9 ibid. 79.
10 J. Kis, *Constitutional Democracy*, Budapest, New York : CEU Press, (2003), p.VIX.
11 ibid, p. X.
12 ibid, p. VIX.

the case that in constitutional democracies, institutions are arranged in such a way that they lead to decisions that are based on consent and are relevant to the societal disputes.[13] The United States is among the oldest constitutional democracies in the world and has provided a reference point for emerging constitutional democracies like Botswana. It has not, however, managed to escape being described as " …an urban society, whose great cities are filled with crime, pollution, congestion and decay" and as a "great republic" with "great wealth and extreme poverty…and antagonism of interests".'[14] This is evidence of the fact that the limitations placed on the governed do not always lead to a perfect society that may as well be utopian or egalitarian. Donnelly is therefore correct to point out that the substantive conceptions of democracy have inherent problems "ranging from naive overestimates of the goodness of real people to elitist paternalism that sees the people as needing to be directed by those with the virtue or insight needed to know their interests" .[15]

The following discussion on constitutional democracy and the judiciary in Botswana reflects an understanding of constitutional democracy as encompassing the arrangement of institutions in such a way that they lead to decisions that are based on consent and are appropriate to the issues they resolve.[16] The discussion does focus on the decisions of the Botswana courts and their approach to issues that are at the core of constitutional democracy. It does not, at the same time, ignore the fact that the makeup of the judiciary in Botswana is an important factor in ascertaining the role of the judiciary in enhancing constitutional democracy in Botswana. That is why there is a discussion of the architecture of the judiciary under Botswana's Constitution. That is, a judiciary that is subject to too much executive influence because of the manner that it operates and is established is likely to play a limited role in nurturing constitutional democracy.

3. THE JUDICIARY UNDER THE 1966 REPUBLIC CONSTITUTION

The provisions of the Botswana's Republican Constitution are a commitment to the ideals of separation of powers and the rule of law.[17] The Judiciary in

13 Stein (n 4) 420.

14 D. Mueller, *Constitutional Democracy*, New York: Oxford University: Oxford University Press, (1996).

15 J. Donnelly, "Human rights, democracy and development" 21 *Human Rights Quarterly* (1999), p. 618.

16 Stein (n 4) 420.

17 C.M. Fombad, "The separation of powers and constitutionalism in Africa: The case of Botswana" 25

Botswana is provided for under Chapter VI of the Constitution and in particular sections 95 through to 106. These provisions set out the functions, duties and responsibilities of the judiciary in the Republic of Botswana. Chapter VI of the Constitution establishes and sets out the composition of the High Court, Court of Appeal, the Judicial Service Commission (JSC) as well as the appointment of members to these entities. The Constitution also provides for the tenure of the judges of the higher courts, the jurisdiction of these courts, procedure of the JSC and the interpretation of the Constitution. The Constitution is supplemented by the Judicial Services Act which makes provision for the conditions of service, gratuities and salaries of judicial officers. To that end, the Constitution confirms that the judiciary is an organ of the state in Botswana.

It must be pointed out that the judiciary is now being identified as the Administration of Justice (AOJ), a department in the Ministry of Defence, Justice and Security. This means that the judiciary does not have a separate budget as an arm of government and has its finances controlled by the Minister as opposed to the Chief Justice. The AOJ, in practice, is made up of the High Court, the Court of Appeal and the Judicial Service. In addition to these institutions we have Magistrates Courts, the Small Claims Court and other specialised Courts such as the Juvenile Courts.

The High Court is established by the Constitution as the superior court of record with unlimited original jurisdiction.[18] The unlimited original jurisdiction of the High Court is now beyond doubt and has been cemented by the various decisions of both the High Court and the Court of Appeal.[19] The manner in which the High Court operates is regulated by the High Court Act[20] and the *Rules of the High Court*[21] the combined provisions of which explicitly and mainly sets out the administrative rules of the Court.

The Judiciary is led by the Chief Justice who is appointed by the President in accordance with section 96 of the Constitution. According to this section, the decision to appoint the Chief Justice is solely that of the President. There is no documented process that leads to the appointment of the Chief Justice through which, perhaps, the suitability of the person being appointed to the position of Chief Justice may be objectively ascertained. There is no known process that involves other stakeholders, such as civil society and members of

(1) *Boston College Third World Law Journal* (2007), pp. 301 – 342.

18 Constitution of Botswana, s 95.

19 *Mafokate v Mofokate* [2000] 2 BLR 430; *Botswana Railways' Organisation v Setsogo and Others* [1996] BLR 763 (CA).

20 Cap 04:02: 1976.

21 S.I.116: 2011.

the law society, in the appointment of the Chief Justice. This is in stark contrast to the processes in other countries such as South Africa.[22]

Judges of the High Court are appointed by the President, acting in accordance with the advice of the JSC.[23] In *The Law Society of Botswana & Another v The President of Botswana & Others*, [24] the Court of Appeal has held that the phraseology "in accordance with the advice of the Judicial Service Commission" means that the President is not at liberty to reject any names forwarded to him for appointment by the JSC. The Court further held that any act of the President to reject such names must be based on valid reasons as is subject to judicial review. The position taken by the President and the JSC in both the High Court and Court of Appeal cases was that the President is the appointing authority and therefore has the discretion to reject any person proposed for appointment by the JSC. They further argued that the President is not bound by the advice or the recommendations of the JSC. As a result, the President is allowed to reject any candidate that has been recommended for appointment by the JSC. The position of the Law Society of Botswana (LSB), which was rejected by the High Court,[25] was that the President should appoint judges in accordance with the advice of the JSC. That is, once the President is given a list of judges to be appointed by the JSC he must proceed to appoint them accordingly.[26] Suffice to point out that to the extent that the appointment of judges in Botswana remains the business of the JSC and the President, their appointment will continue to be considered as lacking the necessary legitimacy that may be conferred on their ascension to the bench by a transparent appointment process.

The judiciary should but does not include the Industrial Court which is a superior court and is of the same standing with the High Court.[27] The Industrial Court is a Court of record and its decisions are appealable to the Court of Appeal. Unlike the High Court, the judges of the Industrial Court are appointed by the President without the involvement of the JSC. Their appointment is not set out under the Constitution but rather under section 16 of the Trade Disputes Act. While the Industrial Court occupies an important space in the resolution of labour disputes, it is not clear why it is not considered

22 Constitution of South Africa, s 174(3).

23 Constitution of Botswana, s 96 (2).

24 Court of Appeal Civil Appeal No. CACGB-031-16.

25 *The Law Society of Botswana & Another v The President of Botswana & Others* MAHGB-000383-15 (Generally referred to as the *Motumise* case).

26 *Law Society of Botswana Position paper on the appointment of Judges (2011) available at http://www.lawsociety.org.bw/news/Position%20Paper%20on%20Appointment%20of%20Judges%20Final%2014%20june%202012%20'Final'.pdf (accessed 3 December 2014).*

27 Constitution of Botswana, s 127(1).

de jure and *de facto* as part of the judiciary in Botswana. The appointment of individuals, in a constitutional democracy set up, to any judicial office, should not be without proper checks and balances. Labour issues are important and at times at the centre of the economic situation of a country. It is certainly unacceptable for a superior Court to be created and not be subjected to any mechanism that monitors and ensures that it operates within internationally acceptable standards of oversight on judicial institutions and appointment of judicial officers.

Unfortunately, the constitutionality of the appointment of Judges of the Industrial Court was considered in *Botswana Railways Organisation* v *Setsogo & Others.*[28] The Court of Appeal in that case was called on to decide whether the appointment of Judges of the Industrial Court, by the President without the involvement of the JSC, was in compliance with section 104 (2)(c) of the Constitution. The Court was therefore called on to interpret this provision. The Court posited that there were two possible interpretations to this section. The first possible interpretation would result in a situation where the appointment of the Industrial Court President and judges of the Industrial Court is done by the President in accordance with the advice of the JSC.[29] The second possible interpretation put was that the President of the Industrial Court and the Judges of the Industrial Court would be appointed by the President in accordance with the advice of the JSC only in the event that the statute establishing the Court, in this case the Trade Disputes Act, so provides.[30] The Court favoured the latter interpretation. It held that the legislature could not have intended that the appointment of the President of the Industrial Court, judges and other members connected with the Court should be done with the involvement of the JSC. Therefore, section 104(2)(c) according to the *Setsogo* case cannot be said to be applicable to the appointment of Judges of the Industrial Court as the involvement of the JSC was not prescribed by the Trade Disputes Act.

In light of this Court of Appeal decision, two things should be highlighted. The first being that that the Court of Appeal ought to have adopted the first possible interpretation. It no doubts ensures that the appointment of judges to the Industrial Court is free from total control of the Executive. This will bring to the process necessary checks and balances ensuring adherence to principles of constitutional democracy and internationally acceptable standards relating to appointment of persons to judicial office. When this issue

28 *Setsogo* (n 19).
29 ibid, 805.
30 ibid, 803.

resurfaces before the Courts, the Court of Appeal should consider departing from its previous decision in the *Setsogo* case. The Trade Disputes Act may be amended to ensure that the appointment of judges of the Industrial Court is done with the involvement of the JSC.[31] While this is possible, it is not ideal as it leaves matters at the discretion of the Executive.

As aforementioned, the decisions of the High Court and the Industrial Court are appealable to the Court of Appeal. The Court of Appeal is established under the Constitution as part of the judiciary. Sections 99 to 102 of the Constitution provide for the composition and jurisdiction of the Court of Appeal. Section 99 of the Constitution can be summarised as essentially providing that the Court of Appeal shall be made up of the President of the Court and such number of Justices of Appeal as may be prescribed by the Parliament. At the moment the Court of Appeal is composed of nine justices with judges of the High Court being *ex-officio* members of the Court. As is the case with the appointment of the Chief Justice, the President of the Court of Appeal is appointed by the President without any advice or input from the JSC.[32] The justices of Appeal are on the other hand appointed by the President acting in accordance with the advice of the JSC.[33]

Section 103 of the Constitution makes provision for the composition and "procedure" of the JSC. The JSC is composed of the Chief Justice (who is the Chairman of the Commission), the President of the Court of Appeal, if not held ex officio by the Chief Justice, the Attorney General, the Chairman of the Public Service Commission, a member of the Law Society of Botswana (LSB) and a "person of integrity and experience not being a legal practitioner appointed by the President." The functions of the JSC, as provided under section 104 of the Constitution, are primarily to advise the President in the appointment of the justices of the Court of Appeal and judges of the High Court, magistrates as well as such other offices of President of the Court or member of any Court or connected with any Court as may be established by an Act of Parliament.

The above discussion immediately brings to the fore some obvious problems associated with the architecture of the judiciary under the Constitution. Firstly, the appointment of justices of the Court of Appeal and judges of the High Court is not in conformity with international standards as regards the appointment of judges. For example, the United Nations Basic Principles on

31 Report of the Presidential Commission on the Judiciary, (1997), p. 117.
32 Constitution of Botswana, s 100(1).
33 ibid.

the Independence of the Judiciary provide that an independent judiciary should be impartial and be politically independent.[34] The Principles further encourage states to ensure that there is no interference, direct or indirect, in the affairs of the judiciary as well as the improper influences.[35]

In the main, the appointment process in Botswana is largely entrusted to persons who are appointed, in the first place, by the President acting alone. A possible argument may be that the President appoints only one member of the JSC while the rest of the members hold their positions in the JSC *ex officio*. Such an argument loses sight of the appointment of members to their positions, all of whom are appointed by the President acting alone. The possibility of lack of independence from the executive cannot be ruled out and makes it difficult for one to argue against the perception that the judiciary is not politically independent. The composition of the JSC is in itself a mockery of the principles of constitutional democracy. It severely falls short of international standards relating to the independence, impartiality and integrity of the judiciary. This is in the sense that its composition does not qualify as a method of selection of judges that is able to effectively "… safeguard against judicial appointments for improper motives".[36] As rightly pointed out by the LSB, the JSC is largely dominated by Executive appointees as five out of its six members are appointed by a President.[37] The secrecy surrounding the appointment of judges, which is based on an argument that the JSC may regulate its own procedure as per section 103 of the Constitution, adds to the shortcomings of the appointment process. In a constitutional democracy, such secrecy is totally unnecessary and is counterproductive. The appointment of judges is a relevant factor to the performance and contribution of the judiciary to constitutional democracy. A flawed process of appointment of judicial officers may be conducive to possible political interference.

Secondly, the Constitution has created two centres of power within the Judiciary. This is so because the Constitution provides for the appointment of the Chief Justice and the Judge President of the Court of Appeal as two separate offices occupied by two different persons. The Chief Justice is supposed to be the head of the Judiciary. However, he/she is not a permanent member of the highest Court of the land as is the case in most jurisdictions. The Judge President is the head of the highest Court of the land, meaning that he/she is the one who provides judicial leadership in their position as the President of

34 United Nations (UN) Basic Principles on the Independence of the Judiciary (1985).
35 ibid, para 2.
36 ibid, para 2.
37 ibid.

the Court of Appeal. He/She can set aside decisions made by the Chief Justice and is able to influence the direction of the jurisprudence of the country with respect to important matters.

Perhaps it would suffice to end by highlighting that the current arrangement where the Industrial Court is not considered, *de facto,* part of the Judiciary falls short of the principles of constitutional democracy. This arrangement is perhaps justified, to people who have convinced themselves that the Industrial Court is not part of the judiciary, by the Court of Appeal's decision in the *Setsogo* case.

The following discussion highlights the role of the judiciary in enhancing constitutional democracy in Botswana by assessing the performance of the courts with respect to their application of international law, adjudication over human rights issues, judicial review, adherence to the rule of law and separation of powers and participation in the electoral process.

4. CONSTITUTIONAL DEMOCRACY AND THE JUDICIARY IN BOTSWANA

The previous discussion has highlighted that constitutional democracy is about popular sovereignty, balancing majority and minority rights, limited government and the institutional and procedural limitation of power. The totality of these elements translates into separation of powers, checks and balances amongst the three arms of government, due process as well as other by-products of a constitutional government. Ultimately, in a constitutional democracy the people are the ultimate source of authority. A closer inspection of the ideals of constitutional democracy will reveal that a sizeable amount of the work is assigned to the courts. This is largely because the disputes that arise between the citizens and any of the arms of the government or between the arms of government *inter se* are resolved by the courts. The courts are where differences between the majority and the minority are resolved and sometimes reconciled.

As aforementioned, the role of the judiciary in enhancing constitutional democracy is primarily located and can be discerned in the decisions of the courts. Regard must be had to decisions on issues relating to the rule of law and separation of powers, the application of international law in Botswana, popular sovereignty, balancing majority and minority rights, limited government and the institutional and procedural limitation of power. The next section focuses

on these issues so as to ascertain the extent to which the Courts in Botswana have contributed to the realisation of principles of constitutional democracy. The selected cases are used as examples of instances where the Courts were confronted and dealt with some of the issues touching on the core elements of constitutional democracy.

4.1 Treatment of Principles of International Law by the Judiciary

The treatment of international law by the Courts is crucial to the maintenance of constitutional democracy in a particular country. It must be recalled that international law is mostly made up of the accepted ideals by the international community to which Botswana largely aspires to adhere to. To that end, the manner and extent to which the courts apply principles of international law must be considered so as to establish whether it enhances or impedes the reception and adherence to principles of constitutional democracy in Botswana. For example, since World War II, protecting human rights has become more and more prominent to the world. In the period since World War II, a growing number of democracies have empowered the Courts to enforce constitutional norms that mirror international human rights standards.[38] Democracies have sought to create an environment within which they will effectively guarantee these rights. Democratization and the respect for human rights have come to be known as the two main goals that should be adhered to by democracies, constitutional democracies inclusive.[39]

The Botswana Courts have taken a clear and strict approach in their interpretation and application of principles of International Law.[40] It is clear that Botswana is a dualist state and that treaty provisions do not become part of the laws of the Botswana unless specifically incorporated into the laws of Botswana through an Act of parliament.[41] As such, treaties creating rights and obligations ratified by Botswana do not create rights and obligations enforceable by the Courts immediately upon ratification. However, section 24 of the Interpretation Act has been interpreted by the Courts as providing that treaties may only be used in the interpretation of the law where the wording of the statute is

38 S. Gardbaum, "The new commonwealth model of constitutionalism," 49 *American Journal of Comparative Law* (2001), pp. 707- 760.

39 A.J. Langlois, "Human rights without democracy? A critique of the separationist thesis," *25 Human Rights Quarterly* (2003), p. 990.

40 B. Maripe, "Giving effect to international human rights law in the domestic context of Botswana: Dissonance and incongruity in judicial interpretation," 14(2) *Oxford University Commonwealth Law Journal* (2014), pp. 251 – 282.

41 *Attorney General v Dow* [1992] BLR 119.

ambiguous. Customary international law is applicable in Botswana in so far as it is not inconsistent with any piece of domestic legislation.[42] Most of the cases that have been decided following the *Unity Dow* case have consistently held that international law principles, to the extent that they are not incorporated within the domestic legislation, can only be used as interpretative tools.[43] Thus, the Courts have consistently held that the law in Botswana should be interpreted in conformity with Botswana's obligations under international law whenever that is possible. Making reference to the treatment of international law in Botswana, Amissah JP in the *Unity Dow case* indicated:

> "[t]hat [reference to the African Charter] does not seem to me to be saying that the O.A.U. Convention, or by its proper name the African Charter of Human and Peoples' Rights [sic], is binding within Botswana as legislation passed by its Parliament. The learned judge said that we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations…I am in agreement that Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act."[44]

Little to no usage of principles of international law, especially international human rights law principles, by the Courts, is likely to deprive the citizens of the better protection that would otherwise be obtainable under international law. This is because international law enhances democracy at the domestic level in so far as it encourages the respect for human rights and the limits placed on government power.

Equally, the application of international law without due regard to the internal limitations on the use of such principles put in place by the country's legal and constitutional framework is likely to be detrimental to the rule of law and constitutionalism in the country. The wholesale use of international law principles in Botswana by the Courts might result in total disregard of

42 *Amadou Oury Bah v Lybian Embassy* [2006] 1 BLR 22 (IC) 25.

43 E.K. Quansah, "An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana," in M. Killander (ed.) *International law and domestic human rights litigation in Africa*, Pretoria: Pretoria University Law Press (2010), pp. 37 – 56.

44 Dow case (n 41) 154.

the dualist nature of our legal system and basic principles of separation of powers. That is, if the legislature has seen it as unnecessary to domesticate the provisions of the African Charter, for example, the Courts should not enforce such provisions of the Charter which are not domesticated or find no corresponding principles within the domestic laws.

It is here that the monist-dualist distinction in Botswana comes to the fore. The distinction is considered as paramount and is consistently enforced by the Courts. This distinction has provided the Courts with a guide on the extent to which the Courts should apply principles of international law. This is at times at the expense of the enjoyment of the rights by litigants who would have enjoyed better protection had the court applied international law principles. A case in point involves the deportation of Professor Kenneth Good in 2005.[45] Kenneth Good was declared a prohibited immigrant under the provisions of the Immigration Act (1991) which provided, *inter alia*, that once a person is declared a prohibited immigrant by the President they will not have recourse to the Courts. According to the provisions of the Act, any person declared to be a prohibited immigrant does not have the right to be heard before or after such a declaration.[46] Specifically, the Act provided that "…no Court shall question the adequacy of the grounds for any such declaration."[47] The total effect of these provisions was that Kenneth Good was denied the right to be heard. This was contrary to provisions of the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter) to which Botswana is party to. An application by Kenneth Good to have the declaration set aside as being unconstitutional failed. The Courts refused to interpret the provisions of the Immigration Act in accordance with provisions of the treaties that Botswana is party to. Both the High Court and the Court of Appeal held that the provisions of the Act were free from any ambiguity and as such it was not necessary for them to use international law principles as an aid for interpretation.[48]

The treatment of international law by the Courts is consistent with democratic principles and the dictates of separation of powers. The Botswana Courts are mindful of the fact that Courts are not supposed to domesticate international law. That way, the Courts have tried to stay clear of the pitfalls that have been noted, for example, with respect to the interpretation and application

45 *Kenneth Good v The Attorney General* [2005] 1 BLR 462.
46 Immigration Act, s 36(1).
47 ibid, s 11(6).
48 Maripe (n 40) pp. 251 – 282.

of international law in South Africa.[49] In his intervention, Phooko argues that the approach by the South African Supreme Court of Appeal (SCA) in *Government of the Republic of Zimbabwe v Fick and Others* [50] did not respect the "roles reserved for other branches of government".[51] He is of the view that the approach by the SCA was a violation "of the principle of separation of powers as the Court preferred common law over the Constitution".[52] The case concerned the recognition and enforcement of the SADC Tribunal decision by the South African Courts even though South Africa at the time had not domesticated both the SADC Treaty and the SADC Protocol on the Tribunal.[53] The Court in that case held that it had the power to recognize the decisions of the Tribunal as they were in compliance with the common law grounds for the enforcement of foreign judgments.[54]

The Botswana Courts have, however, made an attempt to fill implementation gaps especially where international law principles have not been domesticated. They have found means of ensuring that the interpretation of the Constitution is in line with Botswana's aspirations in so far as international law is concerned. A case on point relates to the provision of water to the *Basarwa* (The San) within the Central Kalahari Game Reserve (CKGR). In *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana*[55] the Courts interpreted the constitutional provisions relating to freedom from inhuman and degrading treatment as encompassing the right to water.[56] One may conclude that the Botswana Courts have done well in setting clear standards with respect to the application of international legal principles locally. This obviously was not without challenges. At times attempts by the High Court to interpret the Constitution in accordance with the international law principles has attracted immense criticism from the Court of Appeal and from the academia.[57]

49 M.R. Phooko, "Legal Status of International Law in South Africa's Municipal Law: Government of the Republic of Zimbabwe v Fick And Others (657/11) [2012] ZASCA 407," 22 (3) *African Journal of International and Comparative Law* (2014), pp. 399 – 419.

50 *Government of the Republic of Zimbabwe v Fick And Others (657/11) [2012] ZASCA 407*.

51 ibid, p. 406

52 ibid.

53 ibid, p. 400.

54 ibid, p. 403.

55 *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana (Unreported, CALB–074-10).*

56 B.R. Dinokopila, "The right to water in Botswana: a review of the Matsipane Mosetlhanyane case," 11 *African Human Rights Law Journal* (2011), pp. 572-581.

57 C.M. Fombad, "Gender equality in African customary law: has the male ultimogeniture rule any future in Botswana?' 52 *The Journal of Modern African Studies* (2014), pp. 475 - 494.

4.2 Adjudication Over Human Rights Issues

Connected to the above is performance of Botswana Courts in the adjudication over matters relating to human rights. Over the years the High Court and the Court of Appeal have passed laudable decisions that have dealt with issues of human rights. These include the *Unity Dow* case and the *Molepolole College of Education SRC* case[58], in which the Courts declared unconstitutional acts and provisions of the law which in effect sanctioned discrimination on the basis of sex, and *Clover Petrus & Another* v *The* State,[59] in which the Court declared unconstitutional provisions of the Criminal Procedure and Evidence Act sanctioning corporal punishment in installments.

In *Tidimalo Jokase*[60] Lesetedi J. (as he then was) came to the conclusion that a law that prohibited women from representing themselves before the courts, on account of their status as women, was contrary to the provisions of the Constitution. He pointed out that such a customary practice would be contrary to the principles of natural justice and therefore contrary to the dictates of the Constitution.[61] This ruling was cited with approval by Dingake J in *Edith Mmusi & Others v Molefi S. Ramantele & Another*.[62]

Other human rights cases include the High Court and Court of appeal decisions in the *Sesana & Others case*[63] and *Matsipane Mosetlhanyane.*[64] The two cases dealt with the rights of the Basarwa living in the Central Kalahari Game Reserve (CKGR) and the Government's plans to forcefully remove them from their ancestral land. While the decisions have brought limited succour to the litigants, the pronouncement made by the Courts in those cases was lacking in some respects. In both cases, and even though the issues touched on the justiciability of socio-economic rights in Botswana, the Courts failed to conclusively decide whether socio-economic rights in Botswana are justiciable or not.[65] The *Matsipane Mosetlhanyane* case is also criticised for failing to conclusively hold that the Government was under the obligation to provide *Basarwa* with water.

Other cases which are indicative of the Courts' shortcomings in the

58 *Molepolole College of Education SRC v Attorney General* [1995] BLR 758.
59 *Clover Petrus & Another v The State* [1984] BLR 14).
60 Tidimalo Jokase v Gaelebale Mpho Swakgosing (Unreported, MAHLB-000661-10)
61 ibid, para 8.
62 *Edith Mmusi & Others v Molefi S. Ramantele & Another* (Unreported, MAHLB- 000836-10).
63 *Sesana & Others v The Attorney General* [2002] 1 BLR 452.
64 *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana* (Unreported, CALB–074-10).
65 B.R. Dinokopila, "The Justiciability of socio-economic rights in Botswana," 57 (1) *Journal of African Law* (2013), pp. 108 – 125.

adjudication of human rights cases are the *Kenneth Good*[66] and *Gomolemo Motswaledi*[67]cases. In the *Kenneth Good* case both the High Court and the Court of Appeal held that the President's decision to declare someone a prohibited immigrant could not be challenged before the Courts. Both Courts held that once the President has decided that a person was declared a prohibited immigrant on account of national security concerns, the Courts could not attempt to second guess the President's decision.[68] In the *Motswaledi* case, again both the High Court and the Court of Appeal held that the President could not be sued, in his personal or private capacity, while in office. This was after Gomolemo Motswaledi, who was the Secretary General of the ruling Botswana Democratic Party, sought an order declaring his suspension from the party as unlawful. He had duly cited President Ian Khama who was then the party Chairman, as one of the defendants. The Court's decision was considered by some as indicating the Court's deference to the Executive. A closer reading of this decision will reveal that the Court, as already indicated above, may have been handicapped by a constitutional framework that not only bestows too much power on the Office of the President but grants the person occupying that office immunity from suit in his private capacity whilst holding office.

Perhaps the weakest decision, relating to human rights, ever made by the Courts of Botswana is that in *Kanane v. State*.[69] The Court of Appeal in that case was of the view that gay men and lesbian women do not represent a group or class which required protection. Refusing to decriminalise same sex relations, the Court held further that the time had not arrived for the adoption of progressive trends taking place elsewhere. It is not clear on what basis this conclusion was arrived at since there no was evidence provided to the Court to substantiate the argument.

Other progressive decisions of the Courts dealt away with discriminatory practices in the workplace in relation to HIV/AIDS;[70] affirmed rights of fathers of children born out of wedlock;[71] affirmed rights of sexual minorities;[72] and extend the right of inmates to life saving medication for HIV/AIDS to foreign inmates.[73] The performance of the courts in this regard

66 *Good v Attorney General 2005* (2) BLR 337 (CA).

67 *Gomolemo Motswaledi v Botswana Democratic Party* (Unreported, MAHLB-000486).

68 B.T. Balule, "Good v The Attorney-General (2): Some Reflections on the National Security Dilemma in Botswana," 7 *University of Botswana Law Journal* (2008), pp. 153–172.

69 *Kanane v State* [1995] BLR 94.

70 *Lemo v Northern Air Maintenance* (Pty) Ltd 2004 (2) BLR 317 (IC).

71 *Geofrey Khwarae v Bontle Onalenna Keakitse & Others*, Case No. MAHGB – 000291-14.

72 The Attorney General & Others v Thuto Rammoge & Others, Civil Appeal No. CACGB-128-14 (unreported judgement).

73 The Attorney General & Others v Dickson Tapela; The Attorney General & Others v Gift Brendan

may be deemed to be fair considering the archaic and limiting constitutional framework that they are operating under.

4.3 Adherence to the Rule of Law and Separation of Powers by the Judiciary

The application of international law by the courts, as evidenced by the above discussion, may be evidence of the extent to which the judiciary respects the boundaries set by the principles of separation of powers. However, this is not the only factor worth considering when one considers the judiciary's adherence to the rule of law and separation of powers in a constitutional democracy. Apart from the Courts' insistence on the proper application of international law, the Courts approach to mandatory minimum sentences deserves mention. Even though the Legislature has, in some instances, adopted mandatory minimum sentences, the Courts have found a way of ensuring that the promulgation of such laws does not interfere with judicial discretion.

The approach of the courts to issues of mandatory sentencing is indicative of the attempt by the courts to ensure that the separation of powers is respected. This is obviously in addition to the Court's demand that the legislature must respect constitutional rights in its law making process. Malila has rightly noted that legislation dealing with mandatory minimum sentences "has proved not to be popular with the judiciary because it represents further encroachment on their powers to deal satisfactorily and comprehensively with the permutations of cases coming before them."[74] He highlights that on several occasions the Courts have struck down enactments imposing minimum mandatory sentences that are likely to lead to excessive, inhuman and degrading prison sentences.[75] He considers such to be the restoration of the discretion of the Courts.[76]

The Court of Appeal in *Moatshe* v *The State; Motshwari & Another* v *The State*[77]conceded that the imposition of mandatory minimum sentences by the Legislature was generally acceptable in many jurisdictions and was a legitimate function of the legislature in modern democracies. The Court further indicated that the legislature was aware of the need to take the necessary steps

Mwale CACGB – 096- 14 [unreported]; CACGB – 076- 15 [consolidated & unreported judgment].

74 I.S. Malila, *"Emerging trends and the genera framework for the exercise of sentencing discretion in Botswana," 6 African Journal of Legal Studies* (2013), pp. 171 – 188.

75 ibid, p. 186.

76 ibid.

77 *Moatshe v The State; Motshwari & Another v The State* [2004] 1 BLR 1.

to prevent the structure of the society from being undermined by those who commit prevalent crimes. In that sense, by imposing minimum mandatory sentences the legislature was acting in the public interest as it was to curb the incidence of particular offences. The question in the *Moatshe* and *Motshwari* cases was whether mandatory minimum sentences prescribed under the Motor Vehicle Theft Act and section 292 of the Penal Code were in contravention of the Constitution. The Appellants were of the view that the sections in issue were contrary to the provisions of the Constitution which provided that no person shall be subject to inhuman and degrading punishment. The Court of Appeal proceeded to hold that minimum mandatory sentences were not *prima facie* contrary to the provisions of the Constitution. However, such a sentence would be considered to be unconstitutional and inhuman and degrading if they were disproportionate to the seriousness of the offence.

The decision of the High Court in *Attorney General of Botswana v Umbrella for Democratic Change & Others*[78] is also indicative of the commitment of the Courts the rule of law and separation of powers in Botswana. In his opening statement, Leburu J, delivering the unanimous decision of the High Court, firmly indicated that "Constitutional supremacy, within the realm of the doctrine of separation of powers, shall be the springboard from which this decision will be anchored and shaped." At the heart of this case was an attempt by the Attorney General, following a letter of demand from the ruling party, the Botswana Democratic Party (BDP), to invalidate the revised Standing Orders of the National Assembly of Botswana. The Attorney General's argument in this case was that the Constitution envisaged that the endorsement of the Vice-President by the National Assembly should be a simple majority reached by a show of hands. Accordingly, the argument went, the Standing Orders were, to the extent that they introduced the additional requirements of election by secret ballot and ballot papers, *ultra vires* the Constitution. It was further argued that by imposing the additional requirement of a secret ballot the Legislature acted contrary to section 89 of the Constitution relating to the amendment of its entrenched provisions. The Attorney General was of the view that the stringent requirements of amending entrenched provisions of the Constitution were not followed.

After an assessment of the provisions of the Constitution relating to the election and endorsement of the position of the Vice-President, Speaker and Deputy Speaker of the National Assembly, the Court came to the conclusion

78 *Attorney General of Botswana v Umbrella for Democratic Change & Others* (Unreported, UAHGB – 000184-14), (UDC case).

that the *modus operandi* for the election of the Speaker and the Deputy Speaker as well as their endorsement was not spelt out by the Constitution. It observed that the Constitution provided that the National Assembly may regulate its own procedure. Section 76 (1) of the Constitution provided that "Subject to the provisions of this Constitution, the National Assembly may regulate its own procedure." The Court thus cited with approval the High Court decision by Kirby J. (as he was then) in the *Mzwinila*[79] case, wherein he held that the law in Botswana recognised the privilege of Parliament to regulate its own procedure. To that end, and in the absence of any provision in the Constitution indicating that the voting and endorsement of the Vice-President, Speaker and Deputy Speaker of the National Assembly should be done by show of hands, Parliament was well within its mandate to make provision for voting by secret ballot. The Court also emphasised that even though the Parliament enjoyed an exclusive right to determine its internal processes such powers and privileges were subject to the Constitution. In support of this proposition, the Court cited with approval South African decisions, *Smith* v *Mutasa & Another*[80]and *Doctors for Life v The Speaker of the National Assembly and Others.*[81] The main conclusion by the Court was that participation in the voting process should be free from intimidation and coercion.[82] Further that the peoples' right to take part in the governance of their country through freely chosen representatives was a sacrosanct principle and an indispensable feature of Botswana's constitutional democracy.[83] To that end, no one was supposed to interfere with the processes aimed at achieving such principles. This decision does confirm the judiciary's commitment to the rule of law and fortifies one's argument that the Botswana Courts are indeed committed to the rule of law and separation of powers.

4.4 Judicial Involvement in Electoral Processes

Involvement of the Courts in the determination of electoral disputes is critical to constitutional democracy in many countries.[84] In Botswana, the Judiciary is involved in electoral processes in more ways than one. In addition to general consideration of petitions contesting election results, Magistrates are

79 *Mzwinila v The Attorney General* [2003] 1 BLR 557.
80 *Smith v Mutasa & Another NNO* [1990] (3) SA 756 (ZS).
81 *Doctors for Life v The Speaker of the National Assembly and Others* [2006] 6 SALR 416.
82 UDC case (n 78), para. 50.
83 *Attorney General of Botswana v Umbrella for Democratic Change & Others* (n 78), para. 50.
84 B. Otlhogile, "Judicial Intervention in the election process: Botswana's experience," 27(2) *Comparative & International Law Journal of South Africa* (1994), pp. 222-233.

specifically tasked with resolution of disputes relating to the registration of voters. The Chief Justice is also the returning officer for presidential elections.

It is perhaps in the consideration of petitions against election results that the Courts in Botswana have made the most significant contribution to constitutional democracy. The Courts have suggested that petitions are not to be lightly considered or entertained.[85] In the *Kono* case the Court of Appeal underscored that this approach is preferred because of the disruptive effect of successful petitions on the affairs of the State. Following this approach, the Courts have insisted on strict adherence to the provisions of the Electoral Act. It is now a well established position of the law in Botswana that all the mandatory provisions of the Electoral Act must be complied with when launching an election petition. With respect to such petitions, the Court of Appeal has indicated that it has no power to condone any irregularities or grant extension of the strict time limits as set out under the Electoral Act.[86] The strict approach is explained by the Court when it states that:

> "The power of the courts to consider the regularity of elections is not derived from any inherent jurisdiction nor does it arise from the common law but it is to be found within the corners of the electoral statute, i.e. in Botswana in the Electoral Act. In applying that Act the courts must be astute not to disturb an election which on the face of it appears fair and regular. Persons who allege that it was not, have, of course, a democratic right to challenge it but such challenge must not be frivolous, mischievous or ill-founded but be based on substantive grounds. In bringing an election petition, too, a petitioner must ensure that he complies meticulously with the relevant provisions of the Electoral Act." [87]

As aforementioned, the extent of the courts in involvement of the resolution of disputes is clearly set out and limited by the Electoral Act. In that context, the remedies which may be obtained before the courts by litigants in electoral matters are limited to the remedies which are set out in the Electoral Act. In the *Mbaakanyi case,*[88] the petition was dismissed due to the fact that the Petitioner had not paid the requisite security required by the Act. The Court indicated that all electoral deadlines must be strictly complied with, failing which the matter should be dismissed as the Court will not afford anyone any

85 *Kono and Others v Lekgari and Others; In re Lekgari and Others v Independent Electoral Commission and Others* [2001] 2 BLR 325.
86 ibid, 332.
87 ibid.
88 *Mbaakanyi v Independent Electoral Commission & Another* [2010] BLR 157.

indulgence. Also in the *Mbaakanyi* case, the Petitioner had sought an order for a recount of the ballot papers. A preliminary objection to the effect that the order sought was incompetent was upheld by the Court. In the main the Court pointed out that a petitioner in an electoral dispute is only entitled to three substantive orders as set out in the Electoral Act.[89] That is, a petitioner is only entitled to seek and obtain an order declaring that they were duly elected,[90] or the respondent was not duly elected and the petitioner was or is entitled to be declared elected[91] or that the respondent was not duly elected, and no other person was or is entitled to be declared elected.[92] The Court pointed out that the orders sought by the Petitioner were none of those authorised by the Electoral Act as were not determinative of the election.

The Courts in this instance have ensured that there are no floodgates of litigation with respect to electoral matters. The absence of the usually protracted electoral disputes in Botswana could be due to the fact that the outcomes of elections in Botswana are usually not contested. The absence of such disputes could also be due to the nature of the electoral system, in particular the absence of presidential elections. The fact that the Courts have been strict when it comes to dealing with electoral matters is important as it has ensured that the courts have not been used to disrupt the electoral process in Botswana. It is encouraging to note that the courts have not completely closed out any person who wants to challenge the outcome of the electoral process.

4.5 Judicial Review

Some scholars have questioned whether judicial review is appropriate and, in particular, whether it conforms to the dictates of democracy. They have argued against instances where the Courts review legislation and, in some instances, decision-making by the Executive.[93] Those who are opposed to judicial review argue that it is undemocratic because the Courts are constituted by unelected persons who, as a result of the fact that they are unelected officials, do not have the mandate to "override the work that the legislature has done."[94] Those who are in favour of judicial review argue that the Courts are entitled to declare a

89 Electoral Act, s 121.
90 ibid.
91 ibid.
92 ibid.
93 J. Waldron, "The Core of the Case against Judicial Review," 115 *Yale Law Journal* (2006), pp. 1346-406.
94 ibid, 1362.

statue unconstitutional and refuse to enforce it in the event that the Court finds that such a statute does not conform to the provisions of the Constitution.[95]

The debate as to the appropriateness of judicial review and its conformity to separation of powers is slowly losing favour with many commentators. Most have accepted the role of judicial review in the resolution of disputes and have accepted that by nature judicial review is not necessarily undemocratic. Judicial review has been associated with the preservation of civil liberties and prevention of illegal unjust laws as well as arbitrary laws relating to taxation.[96] Agresto, citing with approval Eugene Rostow, is correct when he points out that the Courts are the ultimate guardian of civil liberties.[97] The Courts are able to achieve this through, among other things, the use of judicial review. The Botswana courts have embraced the concept of judicial review and have over the years declared unconstitutional statutory provisions that contradict the Constitution. This is evidenced by the decisions of the Courts, discussed above, on some human rights issues.

Further to the above, the Courts have consistently reviewed acts of Government officials so as to ensure that they are not, for example, abusing governmental authority. This judicial review which finds its basis under common law is now entrenched in our legal system. To that end, the High Court Rules have a provision dedicated to the manner in which review applications are supposed to be brought before the Court (Court Order 61 of the Rules of the High Court).[98] Through their decisions on matters that have been brought before them for review, the Courts in Botswana have been instrumental in keeping the other arms of government in check.[99] Perhaps this is one of the notable contributions of the courts to Botswana's constitutional democracy since independence.

5. CONCLUSION

The judiciary has, over the years, immensely contributed to constitutional democracy in Botswana. This can be discernible from the above discussion on the courts' adjudication over human rights issues; to the treatment of

95 Emmanuel, 1994:8; *Marbury v Madison* 1 Cranch 137 (1803.

96 J. Agresto. *The Supreme Court and Constitutional Democracy*, Ithaca and London: Cornell University Press (1984).

97 ibid, 24.

98 Rules of the High Court, Statutory Instrument No. 116 (2011).

99 B. Maripe "Judicial review and the public/private body dichotomy: an appraisal of developing trends," 4 *University of Botswana Law Journal*, pp. 23 – 56.

principles of international law; adherence to the rule of law and separation of powers; participation in the electoral process; and judicial review. The strength of the judiciary lies in the fact that there is evidence of institutional growth and consistency of approach on the issues discussed above. This is not to say that the judiciary is perfect, but its contribution to constitutional democracy is now probably undisputable. It is perhaps the latest cases – *Attorney General of Botswana v Umbrella for Democratic Change & Others* and *The Law Society of Botswana & Another v The President of Botswana & Others* (The *Motumise* case) – which confirm the positive role and contribution of the judiciary to Botswana's constitutional democracy. It should be admitted that the judiciary is operating within the boundaries of a very limiting constitutional framework. Botswana's 1966 Constitution has had a negative impact on the extent to which the Courts can protect the rights of the citizens for example. The absence of provisions relating to socio-economic rights for example has affected the level of their protection and the extent to which the Courts may offer meaningful remedies to the marginalised members of the community.

A lot however needs to be done by the judiciary to ensure that there is proper adherence to principles of constitutional democracy in Botswana. The previous discussion indicates that there is need for reforms in the judiciary. Such reforms will definitely enhance the role of the Courts in furthering constitutional democracy in the coming fifty years. The first of such reforms should be geared towards ensuring and safeguarding the independence of the judiciary. In particular, the appointment of judges should be reviewed so as to ensure that the process is insulated from external influences and will lead to a more transparent appointment of judicial officers. That is, the composition of the JSC must be reviewed so as to ensure its compliance with international standards relating to the composition of such institutions. The independence of the judiciary might be enhanced by ensuring its financial autonomy which can be achieved by ensuring that the judiciary draws its funding from the country's consolidated fund. Once the judiciary is able to control its budget, it should be able to allocate its resources in a manner that is consistent with its vision and needs.

It appears that the Industrial Court is considered as a Court of law and equity – and a superior court at that - but does not, *de facto*, form part of the judiciary. Judges of the Industrial Court are appointed by the President without the involvement of the JSC. The *de facto* exclusion of the Industrial

Court from the judiciary is indeed puzzling. Notwithstanding the decision of the Court of Appeal in the *Setsogo* case, the manner of appointment of judges of this Court should be considered as unconstitutional. The Trade Disputes Act must therefore be amended to make provision for the involvement of the JSC in the appointment of judges of the Industrial Court. If the opportunity presents itself, the Court of Appeal should reverse its decision in the *Setsogo* case.

With respect to the adjudication of disputes, there have been instances where the consistency of the Courts is questionable. These are instances when the Courts have refused to adopt the same approach that was adopted by the Court of Appeal in the *Unity Dow* case in the application of international law. The *Kenneth Good* and the *Motswaledi* cases are examples of instances where the Courts may have faltered. It is worthy to note that in both cases what was being questioned were the actions of a sitting President. The Courts must ensure that their approach in the adjudication of all constitutional disputes is consistent. In that way, the Courts will play a pivotal role in nurturing Botswana's constitutional democracy and will ensure that Botswana in the next fifty years will continue to be an example of a working democracy in Africa.