An Assessment of the Legal Framework Pertaining to Sexual Harassment in the Workplace in Botswana

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ABSTRACT

This is a review of the law protecting employees against sexual harassment at the workplace in Botswana. It is noted that only public servants are assured of some protection under the Public Service Act of 1998. Employees in the private sector, not covered by this Act, are not directly protected under any other employment-related statutes. This notwithstanding, sexual harassment at a workplace could conceivably be an infringement of an employee's human rights, guaranteed under sections 3 and 15 and section 7 of the Botswana constitution. Sections 3 and 15 entitle every individual to protection against discrimination, and section 7 assures everyone of protection from inhuman and degrading treatment. If human rights under the Botswana Constitution, as under the South African Constitution, must be observed by both public and private entities, there would be considerable scope for protection of employees in the private sector against sexual harassment at the work place through constitutional litigation. It is contended, however, that there is a need to enhance protection of workers at all workplaces against sexual harassment through the inclusion of sexual harassment provisions in the Employment Act.

1. INTRODUCTION

Sexual harassment in the workplace is a widely discussed and internationally recognized phenomenon. Previous studies have indicated that it is a significant problem in the workplace,[1] and is actually more common than is acknowledged.[2] As a result, sexual harassment is generally an issue that is known to exist, but its existence is usually ignored or given negligible audience. This may arise from laws that do not proscribe sexual harassment outright, thus

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1 International Labour Organisation (ILO), *Equality at Work: The Continuing Challenge*, Report of the Director General, International labour Conference, 100th Session, 2011, Report I (B), Executive Summary, xi.

2 R. Husbands, 'Sexual Harassment in Employment: An International Perspective' (1992) 131 *International Labour Review* 537; P. Halfkenny, 'Legal and Workplace Solutions to Sexual Harassment in South Africa: The South African Experience' (1995) 16 *Industrial Law Journal* 6

leading to most sexual harassment incidents going unreported owing to victims' ignorance of their rights.

Sexual harassment in the workplace is mostly perpetrated by those in senior positions because their economic power *vis-à-vis* that of their juniors puts them in a position to do so.[3] In view of that, harassment may be perpetrated with the goal of influencing decisions taken in the workplace (such as the process of employment, training, promotion and dismissals) in exchange for sexual favours.[4] This has been classified as *quid pro quo* sexual harassment. Nevertheless, harassment of a sexual nature does not always involve the abuse of economic power, but may occur amongst work colleagues who are in similar positions, or even at times, may be directed at seniors.[5] This has been classified as hostile work environment harassment[6] since the harassing conduct creates an environment that is intimidating, offensive and oppressive, without necessarily influencing workplace decisions. Studies have also shown that men and women alike may fall victim to sexual harassment,[7] but that in most cases women are on the receiving end.[8]

Contrary to a narrow view that it affects employees only, sexual harassment has been found to be detrimental not only to its victims, but also to employers. It has three consequences to the employer. These include consequential absenteeism of the victims; award of damages to victims of the harassment, (where there are laws); and the loss of management time dedicated to the investigation and defence of claims of sexual harassment, as well as legal fees that arise from such cases.[9] This observation indicates that sexual harassment should not be viewed as a concern to employees only, but should also be of interest to employers.

Despite it being an issue of concern, the labour legislative framework in Botswana barely proscribes sexual harassment. The Employment Act, 29 of 1982, which regulates employment relationships in the private sector, is silent on sexual harassment. The Public Service Act, 13 of 1998 is the only labour legislation that specifically prohibits sexual

3 A. Basson, 'Harassment in the Workplace' in A. Basson, M. Christianson, O.C Dupper, C. Garbers, A. landman and E.M.L. Strydom (eds) *Essential Employment Discrimination Law* (Juta Cape Town., 2004) 228-257; C.A. Mackinnon *Sexual Harassment of Working Women* (Yale University Press New Haven and London 1979) 217-218; Halfkenny (n 2) at 4.

4 A. Basson ibid 228; ILO, International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Special Survey on Equality in Employment and Occupation in respect of Convention No.111*, Report III (Part 4B), 83rd Session, 1996, para 39, (hereafter ILO: CEACR Report III (Part 4B) 1996).

5 Basson (n 3) 228-257.

6 Ibid

7 P. Halfkenny (n 2) 4-5; ILO (n 1) paras. 106-107

8 P. Halfkenny (n2) 5; ILO (n 1) para 106

9 R. Husbands (n 2) 540

harassment, but its scope of application is limited only to public servants. Bearing in mind that employees in the private sector are barred from seeking remedy under the Public Service Act, the immediate question is what legal protection and remedies are available to these employees in Botswana when they fall victim to sexual harassment? This question is addressed later in this paper.[10]

2. INTERNATIONAL LAW PERSPECTIVES ON SEXUAL HARASSMENT

Equality of opportunity and treatment in the workplace is one of the ILO's quintessential subjects in the development of its policies and activities.[11] The continued need to achieve equality of opportunity and treatment in the workplace dates back as far as 1919 when the ILO Constitution of 1919[12] affirmed the need to preserve and promote opportunities for development and equitable economic treatment for all. The Declaration of Philadelphia adopted in 1944 also reiterates the aspiration of the ILO Constitution by stating that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."[13] This is also demonstrated by the fact that equality of opportunity is one of the fundamental rights and principles set as aside by the ILO's Governing Body as essential to every workplace.

The ILO Convention on Discrimination (Employment and Occupation)[14] came into force on 15 June 1960 after being adopted by the International Labour Conference at its 42nd session held in Geneva on 25 June 1958. According to the CEACR, the adoption of this Convention and its Recommendation[15] echoes the ILO's commitment to eliminating discrimination in employment, irrespective of the grounds on which it is based and/or the form it takes.[16]

It ought to be noted that the right not to be subjected to discrimination is a fundamental human right protected under article 7 of the Universal Declaration of Human Rights (UDHR)

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10 See part 3.1 below
11 ILO, 'International Labour Standards on Equality of Opportunity and treatment,' at http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/equality-of-opportunity-and-treatment/lang--en/index.htm, (accessed on …?)
12 See the Preamble of the ILO Constitution
13 ILO Declaration of Philadelphia, 1944 art II (a)
14 Hereafter Convention No. 111.
15 Discrimination (Employment and Occupation) Recommendation No. 111 of 1958
16 ILO, CEACR Report, para 7

as well as under other key human rights instruments.[17] Consequently, Convention No. 111 was formulated based on the fact that all human beings, regardless of their race, creed or sex, have the right to pursue both their material well-being and spiritual development and with the realisation that discrimination constitutes a violation of human rights as enunciated by the UDHR.[18] The UDHR provides that everyone has the right to work, the right to freedom of choice of employment and to just and favourable conditions of work,[19] thus recognising that the right to work cannot be fully enjoyed if it is not accompanied by just and favourable conditions of work.

The right not to be discriminated against in the workplace is also found in other prominent human rights instruments. In particular, articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights [20] obliges ratifying states to ensure the equal enjoyment of the rights set out in the Covenant without distinctions based on, amongst others, sex. Subsequent to that, the rights of men and women to work[21] and to just and favourable conditions of work are protected.[22] Article 7(c) specifically provides for the right to equality of opportunity as an integral part of the right to just and favourable conditions of work. Flowing from these sentiments, the right not to be discriminated against in so far as the workplace is concerned has arguably crystallised into a rule of customary international law.

Convention No. 111 and its Recommendation are the ILO's key instruments that focus on the elimination of all forms of discrimination in the workplace. In terms of article 1(1)(a) of the Convention, discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. The said distinction, exclusion or preference must have the effect of nullifying or impairing equality of opportunity. The CEACR has interpreted this definition as having three essential ingredients. Firstly, there must be some form of differential treatment which may take the form of a distinction, exclusion or preference which may arise not only due to an act, but also an omission. Secondly, the said differential treatment must arise out of any of the listed grounds. Finally, the differential treatment must have the effect of nullifying or impairing equality of opportunity or treatment.[23] It is also worth noting that the definition given in the Convention does not attempt to be exhaustive. By using the word "includes" the Convention gives expression to the

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17 See generally International Covenant on Civil and Political Rights, art 2 and 3
18 Art 2, 7 and 23
19 Art 23(1)
20 Hereafter referred to as the ICESCR
21 Art 6
22 Art 7
23 ILO: CEACR Report III (Part 4B) 1996, (n 4) para 23

fact that there may be other forms of differential treatment not listed by article 1. The CEACR has also defended the adoption of a broad definition by submitting that it covers all the situations that may affect equality of opportunity in the workplace.[24] Arguably, this submission readily supports the possibility of an argument that sexual harassment, whilst not listed, constitutes discriminatory conduct that nullifies equality of opportunity and treatment in the workplace. This is in view of the fact that the failure to respond to sexual advances may lead to the loss of a job opportunity or promotion, thus nullifying equality of opportunity and treatment in the workplace.

Whereas the definition of discrimination as enunciated by article 1(1)(a) is broad, article 1(2) permits differential treatment based on inherent requirements of the job. Article 1(3) defines the scope of "employment" and "occupation" within the Convention as referring to access to employment, vocational training and terms and conditions of employment.

It has already been indicated that Convention No. 111 was formulated with a view to eliminate discrimination in the workplace notwithstanding the form it takes or the grounds on which it is based. Whereas it was argued above that the adoption of a broad definition by the CEACR readily supports an argument for sexual harassment, it is not easily discernible how the Convention prohibits harassment. It will therefore be instructive to decipher how the ILO has crafted its arguments in defending the application of the Convention to sexual harassment.[25]

The CEACR has continuously submitted that sexual harassment can be addressed within the confines of Convention No. 111 as a form of discrimination on the basis of sex.[26] The CEACR has noted that distinctions based on sex are those which use biological characteristics and functions that differentiate women and men.[27] The Committee has stated that these distinctions may be explicit or implicit and directed at disadvantaging one sex or the other. Moreover, women continue to be predominantly affected by various acts of indirect discrimination.[28] Discrimination, according to the CEACR, should not be viewed as influenced by inferiority, but also as having its roots from other factors that are capable of limiting women's opportunities of obtaining and remaining in employment.[29]

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24 Ibid paras 19 and 23

25 The only ILO instrument that expressly prohibits sexual harassment is the Indigenous and Tribal People Convention No. 169 of 1989 which provides at article 20 (3) (d) that "The measures taken shall include measures to ensure that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment."

26 ILO: CEACR Report III (Part 4B) 1996, para 39.

27 Ibid para 35

28 Ibid

29 Ibid para 36

It can be seen here that the Committee moves for the broad interpretation of sex discrimination as including indirect sex discrimination. Indirect discrimination consists of practices that appear neutral, but result in unequal treatment of a class of persons with certain characteristics. Hence, certain acts of indirect sex discrimination are not so obvious to the naked eye and may appear neutral, but arise as a consequence of belonging to a certain gender. Flowing from this argument the Committee has listed distinctions based on pregnancy and confinement,[30] civil and marital status[31] and sexual harassment[32] as examples of indirect sex discrimination. In defining sexual harassment, the CEACR has given a non-exhaustive list of acts that may constitute sexual harassment:

> "Sexual harassment or unsolicited sexual attention includes any insult or inappropriate remark, joke, insinuation and comment on a person's dress, physique, age, family situation etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality and any unnecessary physical contact such as touching, caresses, pinching or assault."[33]

The first detail to be picked up from this definition is that sexual harassment has been characterised as constituting unsolicited sexual attention. Thus, the attention in this particular instance must not be welcome on the part of the victim. This unsolicited sexual attention may include *inter alia* inappropriate remarks, jokes or comments about a person's dress or physique. Furthermore, it may take the form of conduct that patronises another person with sexual implications, thus undermining their dignity. Unwelcome invitations or requests, whether made expressly or implied, accompanied by threats or not, lascivious looks or gestures and unnecessary physical contact, which includes pinching, caressing and touching all fall under the auspices of sexual harassment.

The latter part of the definition suggests that in order to successfully prove sexual harassment, sexual invitations and/or requests must be unwelcome on the part of the victim, and if this can be successfully proven, it is irrelevant whether the requests or invitations were accompanied by threats or not. Moreover, any unnecessary physical contact such as touching, caressing and pinching constitutes sexual harassment.

30 Ibid paras 37-38
31 Ibid
32 Ibid paras 39-40
33 Ibid para 39

In order for the above classes of conduct to constitute sexual harassment in the workplace, there must be proof that they were perpetrated with a motive to attain a particular result. The Committee has submitted that the conduct must be "justly perceived as a condition of employment or precondition for employment, or influence decisions taken in this field and or affect job performance."[34] As a result, the victim must allege that the harassment was a precondition to attain a job or to maintain it or that it affected her[35] job performance. That the alleged act of sexual harassment has to be accompanied by a motive or result draws back to the basis of classifying sexual harassment as a form of sex discrimination *viz* that it must limit an individual's opportunities of obtaining or remaining in employment. That is, the harassing conduct must actually put the victim's employment in jeopardy or inspire the belief that it does. This component also highlights that the ILO recognises *quid pro quo* and hostile environment sexual harassment as discussed above.[36]

3 BOTSWANA'S LEGISLATIVE AND POLICY FRAMEWORK ON SEXUAL HARASSMENT

Botswana became a member of the ILO in 1978. So far, it has ratified most of the ILO's fundamental conventions, Convention No. 111 included. The Government of Botswana has also made considerable effort to ensure that its labour legislation reflects its international obligations.[37] According to Dingake,[38] the Government overhauled the labour legislative framework in 2004 to incorporate the ILO Conventions it had ratified into national law. It also has to be noted that the incorporation of ILO Conventions into national legislation by the Government has not been a simple task. As Dingake[39] has observed, it took on average more than six years for legislation incorporating some of the ILO Conventions into national law to be formulated. In view of this, it can be concluded that the Government generally moves at a snail's pace to incorporate into national law the obligations arising from ratifying international

34 ILO, CEACR Report III (Part 4B) 1996 para 39

35 As alluded to above, sexual harassment affects both men and women. The use of the pronoun "her" throughout this contribution does not exclude the possibility that men also stand vulnerable to sexual harassment.

36 See part 1 (Introduction) above

37 For example, the fundamental concepts of freedom of association and collective bargaining are recognised and protected under the Constitution of the Republic of Botswana, 1966 and various labour legislation such as the EA, PSA, Trade Disputes Act 15 of 2004 and Trade Unions and Employers' Organisations Act 23 of 1983.

38 O.B.K. Dingake, *Collective Labour Law in Botswana*, (Gaborone Bay Publishing 2008) 25

39 Ibid 25

instruments. This part of the paper considers whether the approach to sexual harassment in the workplace has been similar.

3.1 The Employment Act

The Employment Act (EA), 1982 is the chief legislation regulating employment relationships in the private sector. It regulates almost all important elements that accrue to an employment relationship, such as remuneration, various types of leave and dismissals. However, unlike the Public Service Act (PSA), 1998, there are no express provisions in the EA outlawing sexual harassment; neither does it make provision for a procedure to deal with incidents that include such conduct. In contradistinction, section 38 of the PSA provides:

> "(1) … Sexual harassment of one employee by another, or by a person in authority over another in the public service, shall constitute misconduct.
>
> (2) For the purposes of this section, "sexual harassment" means any unwanted, unsolicited or repeated sexual advance, sexually derogatory statement or sexually discriminatory remark made by an employee to another, whether made in or outside the workplace, which is offensive, or objectionable to the recipient, which causes the recipient discomfort or humiliation, or which the recipient believes interferes with the performance of his or her job security or prospects, or creates a threatening or intimidating work environment."

This provision provides a comprehensive mechanism that seeks to address sexual harassment and takes it a step further by extending coverage to harassing conduct that may not necessarily take place in the workplace, so long as it occurs amongst work colleagues. The definition of sexual harassment mirrors that of the ILO.[40] It also recognises *quid pro quo* and hostile working environment harassment. Incorporation of the sentiments of the ILO notwithstanding, this level of protection is not available to private sector employees who cannot invoke the Act.

Section 23(d) of the EA only makes provision for a prohibition of termination of an employment contract based on discriminatory grounds such as gender and an employee's sexual

40 ILO: CEACR Report III (Part 4B) 1996 para 39

orientation. It is not clear as to whether one can rely on this provision in a sexual harassment claim. The most apparent claim that can be brought under section 23 would be that an employee was dismissed because she is a woman or because as a woman she was considered not fit to perform a certain task. However, in the case of *Moatswi and another v Fencing Centre (Pty) Ltd,*[41] the Industrial Court of Botswana acknowledged that discrimination should be seen as entailing acts of both direct and indirect discrimination. Also consider that the ILO has submitted that sex discrimination goes beyond the issue of inferiority, but is also fuelled by other considerations that limit women's opportunities to obtain or remain in employment.[42] Consequently, a far-reaching argument can be made under section 23 to the effect that an employee was dismissed because as a woman she stood susceptible to sexual harassment by her employer. Section 23(e) also makes a general provision which prohibits the termination of employment arising from "any other reason which does not affect the employee's ability to perform that employer's duties under the contract of employment." If an employee is dismissed due to her refusal to honour sexual advances from the employer, an argument may be made on the basis of this provision to the effect that the dismissal was based solely on such refusal and not because the dismissed employee had become unable to perform her obligations under the contract of employment.

The scope of section 23 is very narrow since it is limited to instances of discrimination related to termination of employment. Not all acts of sexual harassment lead to a termination of employment by the employer. Sometimes harassment is perpetrated not by the employer *per se*, but by those in authority[43] or by work colleagues. On that note, it is argued that an employee who is subjected to sexual harassment may resort to a claim of constructive dismissal provided for under section 26(2) of the EA. The EA does not define constructive dismissal save for listing the grounds on which it may be utilised. In order to give clarity to the scope and extent of section 26(2), the Industrial Court of Botswana in the case of *Motlhanka v BCL Limited*[44] relied on South African authorities. This a fact that merits discussion.

According to Grogan,[45] constructive dismissal was once not part of the common law of South Africa.[46] Constructive dismissal allows an employee to abandon her employment arising

41 [2002] 1 BLR 262 (IC) 265-267.
42 ILO: CEACR Report III (Part 4B) 1996 para 36.
43 For example, in instances of corporate companies where the employer is a juristic person and harassment occurs between a subordinate and a manager/supervisor.
44 [2010] 2 BLR 10 (IC) at 14-16 (hereafter the *Motlhanka*-case).
45 J. Grogan, *Dismissal*, (Cape Town, Juta 2010) 51.
46 Additionally, in *Jooste v Transnet t/a South African Airways* 1995 16 *ILJ* 629 (LAC) 636, the Labour Appeal Court highlighted that constructive dismissal was not part of the Labour Relations Act, nor any South African statute.

from a repudiation of the contract by the employer. Section 186 (1) (e) of the South African Labour Relations Act, 66 of 1995, gives employees the liberty to terminate their contracts of employment where the employer makes continued employment intolerable for them. In *Jooste v Transnet t/a South African Airways*,[47] the Labour Appeal Court (LAC) held that the onus rests with the employee to prove that she did not intend to terminate the employment relationship, but because of the intolerable conditions imposed by the employer, she had no option but to terminate her employment contract. In *Pretoria Society for the Retarded v Loots*,[48] the court held:

> "The enquiry then becomes whether the appellant (employer) without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

In view of the above, in order to succeed in proving a constructive dismissal, an employee must prove a relationship between her employer's conduct and the resignation. The conduct must be intolerable, unbearable or inhibit the employee from fulfilling her duties as an employee.

Similarly, constructive dismissal under the EA is treated as a remedy that entitles employees to terminate an employment contract without notice due to a breach of the contract by the employer. An employee thus has the right to terminate her employment contract if she is subjected to any of the grounds listed under section 26(2), one of which includes ill-treatment by her employer or her employer's representatives. Since the Act does not define or give an indication of what would constitute ill-treatment by an employer or the employer's representatives, it can be argued that an employee who has been subjected to sexual harassment either by the employer or other employees may resort to terminating her contract of employment and proving ill-treatment as a ground for such termination. In the *Motlhanka*-case,[49] the Court observed that the Act does not entitle employees to seek compensation where they have relied on section 26(2) to terminate a contract. For an employee to claim compensation for constructive dismissal, she has to prove that the dismissal was either

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47 1995 16 ILJ 629 (LAC) 630F
48 1997 18 ILJ 981 (LAC) 985 (hereafter the *Pretoria Society*-case).
49 2010 2 BLR 10 (IC) at p. 15

procedurally or substantively unfair.[50] Consequently, where an employee relies on constructive dismissal arising from being sexually harassed, she has to allege that due to the employer's sexual advances it was unbearable for her to continue being employed and as such, although the employer did not dismiss her directly, the unlawful conduct of such employer led her to resign. The guiding factor here would be that there is no obligation in terms of common law for an employee to comply with an unlawful or unreasonable instruction of an employer.[51] The provision may also assist where the harassment is perpetrated by a colleague as explained in the example below.

Be that as it may, where sexual harassment is concerned, reliance on constructive dismissal is of little assistance at least in two ways. First, in the *Pretoria Society*-case,[52] the Court noted that when an employee terminates a contract of employment based on a constructive dismissal, she does so because she believes that the employer has no reasonable prospects of ceasing the conduct or pattern that makes the work environment unbearable. The Court proceeded to note that if the employee is wrong in that assumption, then her resignation should be considered a voluntary resignation and therefore does not amount to a constructive dismissal. For example, where a sexual harassment complaint has been lodged by an employee against a colleague and the employer does not take reasonable steps to avert and discipline such conduct, it may be justifiable to claim that there was no indication that the employer would eliminate the conduct rendering the work environment unbearable, thus permitting a termination based on constructive dismissal. The employee has to prove that she did in fact bring the sexual harassment complaint to the attention of the employer, but that the employer failed to act accordingly.

The Industrial Court of Botswana in the *Motlhanka*-case[53] endorsed this position. An employee who had been continuously harassed by his employer's personnel terminated his employment contract and approached the Court alleging a constructive dismissal and sought compensation for the dismissal. The Court held that an employee who alleges harassment by an employer's representative must formally present that complaint to the employer so that it may be investigated in accordance with the employer's grievance procedures. According to the Court, it is not enough to allege a constructive dismissal where grievance procedures have not been followed preceding the resignation.[54] Although this case involved harassment of a non-

50 *Moremi v Westhynd Security (Pty) Ltd* [1998] BLR 287 (IC) at 293-295
51 Ibid
52 1997 18 ILJ 981 (LAC) 984 E-F
53 [2010] 2 BLR 10 (IC) at 17
54 Ibid

sexual nature, it follows that an employee should not be hasty to resort to constructive dismissal without exhausting the remedies made available by the employer. Complex situations may arise where the employer has no stipulated grievance mechanisms such as a sexual harassment policy that gives guidance on how to handle such a complaint and indicates its proper sanction. If the employer chooses to retain and rehabilitate an employee found guilty of sexual harassment as opposed to dismissing him, the victim of the harassment may resign and claim a constructive dismissal since she finds working in the same environment with the perpetrator as unbearable.

The second limitation of relying on constructive dismissal is that an employee must exercise this right within a reasonable period after the ground conferring the right materialises.[55] A failure to do so, in terms of the Act, is considered to be a waiver of the right. Nevertheless, the Act does not give a guideline as to what a reasonable period entails, nor does it give guidelines as to how this should be determined. Presumably, the employee must terminate the contract within a reasonable period after exhausting the employer's grievance's procedures where harassment is perpetrated by a colleague. Where the perpetrator is the employer, the termination should arguably be as soon as there is no indication that the employer will cease the offending conduct. The implication of this provision is basically that a failure to act upon the right to terminate the contract as soon as sexual harassment is identified results in a waiver of the right. Considering the sensitivity involved in sexual harassment matters, an employee who fails to act within "a reasonable time" because of fear of losing her job or victimisation may not find constructive dismissal very useful.

Despite an attempt to make an argument out of the provisions of sections 23 and 26 of the EA, these sections do not provide a comprehensive model that addresses the issue of sexual harassment in the workplace. It has to be kept in mind that the ILO views sexually harassing conduct in the workplace as having two facets. According to the ILO, sexual harassment can either be perpetrated as a condition for employment or a precondition of employment.[56] Moreover, in terms of article 1(3) of Convention No. 111, employment and occupation have been defined as including admittance to employment and relating to terms and conditions of employment. This reflects the fact that sexual harassment does not affect existing employees only. Job applicants may also find themselves at the receiving end of this conduct. Consequently, a policy adopted by a member state should not only address incidents of sexual harassment experienced by employees, but also those that are more likely to occur in the

55 Section 26 (3) of the EA
56 ILO: CEACR Report III (Part 4B) 1996 para 39

process of employment. It arises from the arguments made out of sections 23 and 26 (both dealing with dismissals) that only incidents of sexual harassment pertaining to employees may be addressed. This leaves job applicants with no readily available remedy under the EA. Even in the case of employees, the reliance on sections 23 and 26 does not guarantee ample protection and speak to the procedure for handling sexual harassment complaints and its appropriate sanctions. That is, the provisions are general and not specifically tailored to curb and address sexual harassment in the workplace.

On that note, the CEACR has expressed dissatisfaction with the general nature of section 23 of the EA, and observed:

> "While noting the general prohibition of discrimination added to the Employment Act, the Committee recalls that where legal provisions are adopted to give effect to the principle of the Convention, they should specify at least all the grounds of discrimination set out in *Article 1(1)(a)* of the Convention and cover all aspects of employment and occupation, including training, recruitment and selection and all terms and conditions of employment."[57]

The key observation is that section 23 is lacking in as far as it extends protection against discrimination to employees only, leaving out job applicants. According to the CEACR, if legislation intends to incorporate the Convention, it should do so in an unequivocal manner and cover all aspects that the Convention seeks to address.[58] The CEACR has also observed that the provisions of section 23(d) are general and should be amended to specifically enumerate the grounds of discrimination as set out in the Convention.[59] In its observation, the CEACR noted from a submission by the Government that the EA is being amended. Having noted the sexual harassment provisions reflected under the PSA, the CEACR has requested the Government to take the necessary steps to include provisions on sexual harassment as part of the EA.[60] The CEACR also expressed that it anticipates that the ongoing amendments to the EA will give the Government an opportunity to include more comprehensive provisions that prohibit direct and indirect discrimination, covering all aspects of employment, occupation and training.[61]

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57 ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular Countries*, International Labour Conference, 101st Session, 2012 at 430, (hereafter ILO, *CEACR Report III (Part 1A),* 2012).

58 Ibid.

59 Ibid .

60 ILO: *CEACR Report III (Part 1B)* 2012, 484.

61 Ibid

These remarks confirm the ILO's observation that notwithstanding overwhelming statistics on the ratification of Convention No. 111, its incorporation and implementation in national law has been occurring at a staggeringly slow pace.[62] Additionally, the ILO has observed that legislation of many ratifying states continues to fail to embody provisions that directly speak to sexual harassment.[63] The EA of Botswana still remains silent on sexual harassment in the workplace even after its amendment in 2008.

3.2 The Constitution of the Republic Botswana

Constitutions have continued to play a major role in the protection and development of labour rights and the labour discourse.[64] Modern constitutions specifically entrench labour rights and elevate them to the status of fundamental human rights.[65] Even in jurisdictions where labour rights are not constitutionally entrenched, the courts have played an important role in establishing the role that civil and political rights in the constitutions play in the protection of labour rights.[66] Hence, constitutions remain relevant in the protection and justiciability of labour rights and may be invoked to substantiate a claim in a court of law. That the EA has no specific provision addressing sexual harassment does not imply that harassed employees are completely left without a remedy should they choose not to resort to constructive dismissal under the EA. Constitutional provisions may be invoked in a sexual harassment suit to allege infringement of fundamental human rights.

The Constitution of the Republic of Botswana[67] was adopted in 1966 when Botswana gained independence. According to Dingake,[68] the time at which the Constitution was adopted had an influence on the absence of specific protection of labour rights. Be that as it may, this does not imply that labour rights are not protected and endorsed by the Constitution. Notwithstanding that it does not specifically make reference to labour rights, generic rights in the Constitution have been interpreted as guaranteeing constitutional protection of labour rights.[69] In view of the absence of specific sexual harassment provisions under the EA, an

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62 ILO, *Equality at Work: The Continuing Challenge*, International Labour Conference, Report 1(B), 100 Session, 201, para 227
63 Ibid para 62
64 See generally D. Beatty, 'Constitutional Labour Rights: Pros and Cons' 14 (1993) *Industrial Law Journal*, 1-2
65 O.B.K. Dingake, *Collective Labour Law in Botswana*, 14
66 Ibid
67 LN 83 of 1966
68 Dingake (n 65)
69 Ibid 26

employee may allege an infringement of one or more of the rights enshrined in the Constitution to augment her claim. In particular, a litigant in a sexual harassment suit may allege, amongst others, an infringement of the right to equality and the right not to be subjected to inhuman and degrading treatment.[70] Section 3(a) of the Constitution provides:

> ...every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex but subject to respect for the rights and freedoms of others and for the public interest... to life, liberty, security of the person and the protection of the law.'

In *Attorney General v Dow*,[71] the Court of Appeal elucidated the significance of this section to the protection of the rights enshrined in the Constitution. The Court indicated that section 3(a) is the umbrella provision in Chapter II under which all rights and freedoms protected under this part of the Constitution must be subsumed. Furthermore, the Court highlighted that while this section does not specifically speak to the prohibition of discrimination as the Constitution does in section 15, it cannot be said that section 3(a) does not have the effect of prohibiting discrimination.

Section 3(a) has also been repeatedly interpreted by the courts in Botswana as extending on everyone the right to equal protection of the law irrespective of their sex.[72] The right to equal protection of the law should be interpreted to go beyond protection proffered under written laws to mean that everyone is entitled to equal treatment and also access to and justice before the courts of law. Whereas the binding status of international law in Botswana depends on the specific incorporation of an international convention into national law,[73] sufficient basis exists for a litigant to utilise Convention No. 111 in support of her claim. As a source of international law, the Convention, guarantees protection against discrimination in the workplace, and of particular relevance to this discussion, sexual harassment. It must be highlighted that section 24 of the Interpretation Act[74] permits the use of international law as an aid to statutory interpretation. In this regard, the Court in *Attorney General v Dow*[75] held that the courts ought to interpret national law in a manner that does not conflict with Botswana's

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70 Section 7(1)

71 1992 BLR 119 (CA)

72 *Attorney General v Dow* 1992 BLR 119 (CA) at 142; *Mmusi and Others v Ramantele and Another* 2012 (2) BLR 590 (HC) at 617-620

73 *Good v Attorney General* 2005 (2) BLR 337 (CA); *Republic of Angola v Springbok Investments* (Pty) Ltd 2005 (2) BLR 159.

74 Cap 01:04

75 1992 BLR 119 (CA) at 154

obligations under international law. In the absence of express legislative provisions in the EA, the expectation is that provisions of the Constitution should be interpreted in line with the Convention to guard against sexual harassment in the workplace.

Further to the above, the Courts[76] have established that there is a relationship between the right conferred by section 3(a) of the Constitution and section 15, which entitles every individual to protection against discrimination. In terms of section 15(2), everyone is guaranteed the right to protection from discriminatory conduct by any person acting by virtue of any written law. Section 15(3) provides:

> 'In this section, the expression "discriminatory" means 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.'

Flowing from this provision, every employee is entitled not to be subjected to any form of discrimination, chief amongst these, discrimination on the basis of their sex. Since the ILO has classified sexual harassment as a form of sex discrimination,[77] section 15 gives room for a litigant to motivate her argument by making a submission that sexual harassment constitutes discriminatory conduct based on her sex, and that such harassing conduct infringes on her constitutional right not to be discriminated against.

In addition to the above arguments, section 7(1) of the Constitution entitles everyone to protection from being subjected to inhuman or degrading treatment. The expression 'inhuman and degrading'treatment has not been defined in the Constitution. However, the Court of Appeal in *Petrus and Another v The State*[78] has previously defined it to mean treatment that is devoid of human kindness. From an analysis of the sentiments of the Court, it appears that what constitutes 'inhuman and degrading treatment' depends on the circumstances brought before it, and this will require the Court to make a value judgement on whether the treatment complained of accords with the principle of human dignity.[79] In *Diau v Botswana Building Society*[80], the Court established the significance of the right in section 7(1) to the preservation

76 *Mmusi and Others v Ramantele and Another* 2012(2) BLR 590 (HC); *Attorney General v Dow* 1992 BLR 119 (CA)
77 ILO: *CEACR Report III (Part 4B)* 1996 at para 36
78 1984 BLR 14 (CA).
79 See also *Desai and Another v The State* 1987 BLR 55 (CA); *Mosetlhanyane and Others v Attorney General* Civil Appeal No. CACLB-074-10 9 (unreported) at para 19.
80 2003 2 BLR 409 (IC)

of human dignity. According to the Court, the right not to be subjected to inhuman and degrading treatment shields the right of individuals to their dignity.[81] Whereas the Constitution does not expressly protect the right to dignity, local jurisprudence indicates that it is a value that underlies all human rights contained therein.[82] This is not foreign as the UDHR and the International Charter of Human Rights both acknowledge dignity as a foundation of all human rights. This is also the case with the ICCPR and the ICESCR which outright highlight dignity as the cornerstone of the rights in the instruments respectively.[83] This notwithstanding, these international instruments do not define the essence of human dignity, hence national courts have been left to give meaning and content to this elusive concept. For purposes of this paper, the South African Constitutional Court's reflection on the essence of human dignity in *State v Makwanyan*e[84] may assist. The Court explained:

> 'Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.'

The Industrial Court of Botswana in the *Diau*-case took a similar view by holding that human dignity is what bestows on an individual their worth as a human being, and demands that they be treated with respect.[85] In light of the above sentiments, it must be submitted that a society that has the utmost respect for the fundamental human rights of its people will view sexual harassment as infringing on the right of an individual to not be subjected to inhumane and degrading treatment, and in the final analysis, as posing a threat to their dignity. A society that values human dignity as an intrinsic element of all human rights ought to view sexual harassment, no matter the form it takes, as a violation of the human rights of the victim.

3.2.1 Application of the Constitution to private entities

As instruments protecting human rights of people in respective jurisdictions, constitutions of countries are normally framed to govern the conduct of state actors. Consequently, the obligation to respect and uphold human rights generally extends to state actors only and not private entities. This position is not unique to the application of national constitutions as it has

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81 Ibid 433

82 See amongst others *Desai and Another v The State* 1987 BLR 55 (CA); *Diau v Botswana Building Society* 2003 2 BLR 409 (IC); *Mmusi and Others v Ramantele and Another* 2012 (2) BLR 590 (HC).

83 See in particular Preambles of these instruments.

84 1995 (3) SA 391, in particular para 328

85 2003 2 BLR 409 (IC) 433.

also been maintained in respect of international law.[86] Unlike the Constitution of the Republic of South Africa, 1996, which applies to both public and private bodies,[87] the Constitution of Botswana is silent on its application to private entities. While the position adopted in the South African Constitution *prima facie* seems desirable, there still is considerable debate and controversy on what horizontal application constitutional rights entails.[88] It is contended by some that horizontal application means direct application,[89] such that a court has to make a constitutional ruling and award a constitutional remedy to the applicant. Others advocate for indirect application, under which a court would merely be required to develop the common law in a manner consistent with the values contained in the Constitution.[90] Chirwa[91] highlights that the difference between a direct and indirect application lies in the fact that where a decision is based on the direct application of the obligation, the decision of the court is not a constitutional ruling, but a common law ruling made in light of constitutional values.

In the *Diau*-case,[92] the Industrial Court of Botswana had an opportunity to grapple with the question whether the conduct of private bodies can be brought under constitutional scrutiny. The Court noted that the Constitution had no clause limiting its application to organs of state and recalled that its language must at all material times be given a broad and purposeful interpretation so as to give effect to its spirit.[93] The Court proceeded to hold that in the absence of a clause limiting application of the Constitution to organs of state, there is no basis on which such a strict interpretation would rest. The Court further observed:

> 'In today's world there are private organisations that wield so much power, relative to the individuals under them, that to exclude those entities from the scope of Bill of Rights would in effect amount to a blanket license for them to abuse human rights. This is particularly so in an employment relationship which more often than not is characterised by unequal bargaining power between employer and employee.'[94]

Leaving private entities outside the scope of the Constitution would undoubtedly do more harm than good to the human rights of employees in the private sector. If the conduct of

86 D.M. Chirwa, 'The Horizontal Application of Constitutional Rights in a Comparative Perspective', *Law, Democracy and Development* (2006) 21-22
87 S 8 (2) makes the conduct of private bodies subject to constitutional scrutiny.
88 M. Dafel, 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights,'31, 1 (2005) *South African Journal of Human Rights* 56-85
89 Dafel Ibid and D.M. Chirwa 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' (2006) *Law, Democracy and Development*, 21-22.
90 Ibid
91 Chirwa (n 89)
92 2003 2 BLR 409, 427
93 Ibid
94 Ibid 427-428

private employers cannot be placed under constitutional scrutiny, room is given for violation of human rights of employees and the fact that employees would be barred from making a claim under the Constitution would exacerbate the situation. It also has to be taken into account that the private sector employs a relatively large portion of the population. Hence leaving it out of the scope of application of the Constitution, more particularly where fundamental rights are concerned, would leave multitudes of employees without resort when their rights are being infringed upon by their employers.

The Court thus concluded that private bodies are bound by the Constitution, but that the application of its provisions to these entities must be done with caution.[95] Whether or not a private body's conduct is subject to constitutional scrutiny has to depend on the nature of the conduct in question and the circumstances of each case.[96] Because one of the fundamental principles of the Constitution is to uphold respect for human dignity, and in view of the effect sexual harassment has on the dignity of the harassed, it is not comprehensible why a court would be reluctant to apply provisions of the Constitution to a private body where sexual harassment is concerned. Taking into account the sensitive nature of issues related to sexual harassment and the human rights violated by this conduct, one would think that the courts would be quick to jealously guard and protect victims in the private sector who rely on provisions of the Constitution in sexual harassment suits.

3.3 Codes of Good Practice

3.3.1 Code of Good Practice: Sexual Harassment in the Workplace

The Code of Good Practice: Sexual Harassment in the Workplace[97] was formulated under section 51(1) of the Trade Disputes Act,[98] which empowers the Minister of Labour and Home Affairs, in consultation with the Labour Advisory Board, to publish among other things, Codes of Good Practice that serve as guidance for employers, employees and their organisations. The Code is not contained within the Trade Disputes Act, but exists as a separate document kept by the Office of the Commissioner of Labour, which has the responsibility of ensuring its accessibility to employers.

95 Ibid 428
96 Ibid
97 Hereafter referred to as the Code of Good Practice on Sexual Harassment.
98 The Government is included as an employer within the provisions of the Trade Disputes Act. As a result, absent section 38(1) and (2) of the PSA, the Code of Good Practice would arguably be applicable to addressing sexual harassment in public service employment.

In terms of items 1.2 and 1.3, the object of the Code is to eliminate sexual harassment in the workplace and promote the development and implementation of policies and procedures with a view to achieve a workplace free of sexual harassment.[99] In order to do so, the Code requires every employer to devise a policy statement that incorporates and reflects the objects and provisions of the Code.[100] The employer is required to make available the policy to all employees, and display such policy in such a manner that non-employees who visit the workplace may peruse it.[101] The scope of application of the Code extends coverage to job applicants, contractors and clients.[102]

Item 3.1 of the Code defines sexual harassment thus:

> 'Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of the conduct distinguishes it from consensual behaviour.'

Sexual harassment has been classified as a breach of a contract of employment and a delictual wrong entitling the harassed employee to resign and claim compensation for constructive dismissal, or to sue for damages for breach of contract or an invasion of privacy.[103] According to item 2.3, sexual harassment should be treated as a serious misconduct warranting a dismissal without notice in terms of section 26(1) of the EA. Thus an employer may either lawfully discipline or dismiss an employee found guilty of sexual harassment.[104]

The Code also gives an employee who has been sexually harassed an option to either press criminal charges or bring a delictual claim against the perpetrator,[105] notwithstanding that the employer has commenced with the normal disciplinary procedures for the reported harassment.[106] Employers are encouraged to develop clear procedures for dealing with sexual harassment, which may be incorporated into existing grievance or disciplinary procedures.[107] Additionally, employers should create and maintain a working environment in which the dignity of each employee is respected. Victims of sexual harassment should not fear reprisals or that their grievances will be ignored or trivialised.[108]

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99 See generally item 1 of the Code.
100 Item 6.1
101 Item 6.2.
102 Item 2.
103 Item 1.4.
104 Item 1.4.2.
105 Item 7.8.1.
106 Item 7.8.2.
107 Item 7.
108 Item 5.

Whereas the Code presents an overarching mechanism that mirrors the international standard as set out by the ILO,[109] its weaknesses somewhat outweigh the significance it would have in combating sexual harassment. If the argument is that the Code is sufficient to address sexual harassment in the private sector, the following has to be noted: the Code gives employers the liberty to devise sexual harassment policies, but fails to provide enforcement mechanisms to ensure that every employer without distinction has a working sexual harassment policy. It appears that employers have to formulate and implement such policies as a matter of "good practice and ethics" and not because there is a pressing need to eliminate sexual harassment. As there is no indication of how employers' progress regarding the formulation and implementation of the policies will be monitored, there is the likelihood that most private employers will not be bothered to engage in that exercise. Moreover, even if the government attempts to monitor the formulation and implementation of sexual harassment policies in the private sector, it would be more of a cumbersome exercise, bearing in mind the diversity of private sector employment.[110] The Code also lacks binding force and cannot be enforced as giving rise to legal obligations. The Code merely gives guidelines and thus may be brought into play not as law, but as giving weight to a demand on an employer to comply.

It was stated earlier that whereas the Code was formulated under the Trade Disputes Act, it exists as a separate document accessible from the office of the Commissioner of Labour. It is not clear as to how the office ensures that the Code is made available to all employers and employees as reasonably practicable as possible. There is likely to be a class of employers that are ignorant of the existence of the Code. Even though it has been in operation for eleven years now, the Code has played a negligible role in addressing sexual harassment in the workplace. In the CEACR report of 2012, it was noted that Government had indicated that a majority of private institutions could be lagging behind in putting in place sexual harassment policies,[111] This was after Code had been in existence for more than a decade. Employees might be unaware of the existence of the Code, or they might be unwilling to formulate sexual harassment policies. On that note, the CEACR has previously requested Government to furnish it with information pertaining to measures employed to raise awareness of the Code amongst employers, employees and their organisations.[112]

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109 See para 2 above.

110 This submission is motivated by the fact that private sector employment comprises of many stakeholders amongst others, domestic employment, the farming sector, corporate firms, retail markets, temporary employment services.

111 ILO: CEACR Report III (Part 1B) 2012 484.

112 http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO:::.

The overall argument is that it would serve better if there were provisions on sexual harassment in the EA. This is because the EA will apply to all employers and employees in the private sector. Moreover, employees who fall victims to sexual harassment would readily recognize that a claim against sexual harassment is justiciable before the courts. The direct request by the CEACR that the government should include sexual harassment provisions in the EA[113] is not without a basis, because the government has not to date put forward any justifications as to why sexual harassment in the public service is outlawed by an Act of Parliament, whereas this is not the case for the private sector.

3.3.2 Code of Good Practice: Employment Discrimination

This Code of Good Practice is similar to the Code on Sexual Harassment in that they are both formulated under section 51(1) of the Trade Disputes Act. Similarly, it also serves as a guideline that requires employers to formulate policies prohibiting discrimination in the workplace. The object of the Code is to move for elimination of discrimination in the workplace while promoting equality of opportunity and treatment.[114] In terms of item 3.3, 'harassment of an employee whether of a sexual nature or otherwise constitutes a form of discrimination.' This constitutes a recognition that sexual harassment is a form of sex discrimination as viewed by the ILO. The Code also mirrors the international standard that aims to eliminate discrimination in the workplace notwithstanding the form it takes and advocates for the attainment of equality of opportunity and treatment in the workplace.

However, limitations identified under the Code on Sexual Harassment are equally applicable to this Code, chief amongst them being that it cannot be applied as binding law. The CEACR has also noted the provisions of this Code and its relevance to or addressing sexual harassment in the workplace, but it has nevertheless requested Government to incorporate sexual harassment provisions in the EA.[115]

4 CONCLUSION

In the sixteen years that Convention No. 111 has been in force for Botswana, considerable effort has been made to incorporate it in national legislation as far as sexual harassment is

113 http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO:::.
114 Item 1.1.
115 http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO:::.

concerned, but only in respect of public sector employees under the PSA. Employees in the private sector are not similarly protected under the EA. While provisions in the EA pertaining to constructive dismissal may be invoked to circumvent the absence of specific provisions proscribing sexual harassment, the remedies they provide are not alive to the effects of sexual harassment and do not embrace the wide spectrum of this conduct.

That notwithstanding, an employee can always plead an infringement of one or more of her fundamental human rights entrenched in the Constitution in a sexual harassment suit. Though the scope of application of the Constitution to private employers depends on the rights being claimed, the nature of the infringing conduct involved in sexual harassment will without a doubt bring a private employer's conduct under constitutional scrutiny.

The Code of Good Practice on Sexual Harassment and the Code on Employment Discrimination have also played a negligible role in addressing sexual harassment in the workplace. In its reports the CEACR has requested and implored Government of the need for legislative measures to address sexual harassment in the private sector. Government, further, can hardly justify the *status quo* under which sexual harassment is clearly and directly proscribed in public sector employment but not in private sector employment. Procrastination may arguably be due to the perceived difficulty of ensuring effective implementation of sexual harassment laws in the private sector. This notwithstanding, amendment of the EA to address sexual harassment of employees in the private sector are long overdue. Sexual harassment should be classified serious misconduct, and employers should be legally obliged to formulate on the matter. Such policies must set out the structures to which sexual harassment must be reported and the manner in which cases will be dealt with. The EA must also oblige employers to raise awareness amongst employees on sexual harassment in the workplace as well as ensure that employees are familiar with the policy.