



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES  
UNDER ARTICLE 40 OF THE COVENANT**

**Initial report of States parties due in 2001**

**BOTSWANA\***

[23 November 2006]

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\* Annexes can be consulted in the files of the Secretariat.

**INITIAL REPORT OF BOTSWANA ON THE INTERNATIONAL COVENANT  
ON CIVIL AND POLITICAL RIGHTS SUBMITTED UNDER ARTICLE 40**

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## I. GENERAL

### A. History

1. The history of human settlement in Botswana dates back to the earliest evidence of mankind's existence. Today, archaeological evidence of early, middle and late Stone Age occupation can be found throughout Botswana.
2. By 20,000 BCE, Late Stone Age peoples in the region were producing sophisticated rock paintings while surviving by hunting and foraging. It is commonly believed that many modern "Khoisan"-language peoples (locally known as Basarwa) are direct descendents of these Late Stone Age occupants. From 200 BC there is evidence of the spread of pastoralism among the Late Stone Age communities of northern Botswana.
3. Iron Age settlement dates from the fourth century. Many scholars have speculated that the spread of Iron Age throughout southern Africa may be linked to an influx of "Bantu"-language farmers. But this view has been challenged, while the past assertion of a more modern chronology of "Bantu migrations" from eastern into southern Africa has been discredited by advances in archaeology and historical methodology.
4. A variety of Bantu languages and dialects are spoken in Botswana today. The largest subgrouping of these languages is Sotho-Tswana, which includes the national language Setswana and such other closely related, mutually intelligible dialects as Shekgalagari, Setswapong and Sebirwa. Other prominent Bantu languages spoken in Botswana include Chiyeyi, Chikuhane, Ikalanga and Otjiherero.
5. When European traders and missionaries began arriving in Botswana in the early nineteenth century they found the lives of most Botswana communities being disrupted by Bakololo and Amandebele invaders. As a result a number of more powerful rulers emerged such as Sebege of the Bangwaketse, Sechele of the Bakwena, Sekgoma of the Bangwato and Letsholathebe of the Batawana who built up their emerging states by acquiring both knowledge and guns from the European visitors. In return for guns they traded ivory and other game products, while inviting missionaries to establish schools in their territories. The Transvaal Boers invaded Botswana in 1852, but were driven away by a coalition of *merafe* (often translated as tribes) who temporarily united under the overall leadership of the Bakwena ruler Sechele.
6. In the late nineteenth century a new threat emerged in the form of the British imperial expansion. The discovery of diamonds at Kimberly resulted in the occupation of Botswana lands south of the Molopo River, which thereafter became part of South Africa.
7. In 1884 the Germans, imperial rivals to the British, began occupying Namibia. To prevent the Germans from expanding eastwards to link up with the Boers, in January 1885 the British proclaimed a protectorate over the southern half of Botswana. This action was reluctantly accepted by local rulers as preferable to direct rule by either the Germans or Boers. In 1890 the protectorate was extended over northern Botswana. Thereafter the territory was formally known as the Bechuanaland Protectorate.

8. A British settler, Cecil Rhodes, however, wanted to bring Botswana under the political and economic control of his British South Africa Company, which between 1890-93 had brutally occupied Zimbabwe. To stop this in 1895 three of the leading Batswana rulers - Bathoen I, Khama III and Sebele I went to Britain to lobby in favour of Botswana remaining a protectorate. After being told that the decision to transfer them to Rhodes' company had already been made, the three launched a nationwide campaign to bring their case before the British people. With the assistance of London Missionary Church, they drew so much public support that the British Government changed its mind and agreed to continue to administer the territory as a protectorate.

9. In 1891, Britain had begun to set up a structure for colonial administration of the protectorate. This provided for a Resident Commissioner responsible to a High Commissioner in the Cape. The country was thereafter divided into 12 districts, each having a resident magistrate whose duties were primarily judicial and involved only foreigners and non-residents.

10. In 1921, a Native (later African) Advisory Council was formed consisting of representatives from eight recognized Tribal Territories, namely the Bangwato, Bangwaketse, Bakwena, Barolong, Balete, Bakgatla, Batlokwa and Batawana.

11. From 1959 a number of competing nationalist political parties emerged, namely: the Bechuanaland Protectorate Federal Party, Bechuanaland People's Party (BPP), Bechuanaland Democratic Party (BDP) and the Botswana Independence Party (BIP). The first general elections were held in March 1965, and the Botswana Democratic Party (BDP) won overwhelmingly, with Seretse Khama becoming the Prime Minister and later the first President of the Republic of Botswana.

12. Sir Seretse Khama served as President until his death in 1980 after which the party continued to command substantial political support. He was succeeded by his Vice-President Quett Ketumile Joni Masire (later Sir Ketumile Masire), who retired in March 1998 and was, in turn, succeeded by his Vice-President, Festus Mogae. The Botswana Democratic Party won the 1999 general elections under the leadership of President Festus Mogae. It was re-elected for a further five years in 2004 giving President Mogae a further term of five years. The next general elections will be held in 2009.

## **B. Geography**

13. Botswana is a landlocked country situated in the heart of southern Africa. It shares borders with Namibia in the west and north, Zambia in the north, Zimbabwe in the north-east and South Africa in the east and south. It straddles the Tropic of Capricorn and has a land area of approximately 581,730 square kilometres, much of which is flat and covered with thick sand layers in the Kalahari Desert. It is 1,000 metres above sea level. In the north-west the Okavango River flows from Angola through Namibia into Botswana and soaks into the sand forming the Okavango Delta. In the north-east there are the salt deserts of the Makgadikgadi Pans.

14. Rainfall varies from 650 mm per year in the north-east to less than 250 mm in the south-west. Drought is a recurring problem although in early 2000 record rainfall brought serious flooding. Botswana experiences extremes of climate with winter temperatures below freezing being common in the Kalahari.

15. Botswana is rich in mineral deposits. Diamonds, coal, copper and nickel are mined in large quantities. Other minerals found in the country are gold, soda ash and salt.

16. The country has an arid landscape. Approximately 5 per cent of the land area is cultivated. Cattle ranching is the most significant agricultural enterprise. Farming is mainly at subsistence level and relies primarily on cattle, sheep, goats, maize, sorghum, beans, peanuts, cottonseed and other dry land crops.

### **C. Population**

17. The 2001 census yielded a population count of 1,680,863 (approximately 1.7 million) compared to 1,326,796 in 1991. This marked an increase of 354,067 over the 10-year period.

18. The population of Botswana grew at an average annual rate of 2.4 per cent during the inter-census period. The growth rate has been declining over the years. Annual growth rates between 1971 and 1981 as well as between 1981 and 1991 were 4.5 and 3.5 per cent, respectively. While the AIDS pandemic might have contributed somewhat to the decline in recent years, it must be noted that there was a decline during the pre-HIV/AIDS era. Indeed, factors such as declining fertility rates, increased women participation in economic activities, increased literacy rates, access to better health care, etc., may have a profound effect on population growth.

19. A summary of the demographic indicators that emerge from comparison of the 1971, 1981, 1991 and 2001 censuses is presented in table 1 (see annex 3). The main features of Botswana's population are declining fertility rate and life expectancy, and increasing mortality rate. Crude death rate rose between 1981 and 1991 mainly due to the HIV/AIDS pandemic. Life expectancy at birth also decreased from 65.3 years in 1991 to 55.7 years in 2001. Regarding the fertility rate, there has been a notable decline in all fertility indicators.

20. Overall, population density increased by one person per square kilometre between 1999 and 2001 from two to three persons per square kilometre. For Gaborone and Francistown, it rose to well over 1,000 persons per square kilometre between 1991 and 2001. Most district densities increased between the two censuses with the exception of sparsely inhabited districts.

21. Population trends point to increasing urbanization over the years. The growing concentration of the population around towns and cities reported during 1991 has somehow intensified. Some villages around Gaborone and Francistown have witnessed phenomenal growth over the period 1991 to 2001, with some recording annual rates of over 10 per cent.

22. Urbanization has been rapid with the number of people living in urban areas increasing from 9.5 per cent in 1971 to 15.9 per cent in 1981 and 45.7 per cent in 1991. In 1999 the Government estimated the urban population at 50 per cent and the United Nations Population Division reported a 28 per cent urbanization rate in 1997. This growth is due, in part, to substantial population growth in traditional urban areas like Gaborone and Francistown and the reclassification of many large villages to urban areas. Some 50 per cent of the total population lives within 100 km of the capital city, Gaborone.

23. Citizens of Botswana are known as Batswana. The Tswana-speaking population is made up of various ethnic groups including Bakgatla, Bakwena, Balete, Bangwato, Barolong, Batawana, Batlokwa and Bangwaketse. There are other ethnic groups such as Babirwa, Bakalaka, Bakgalagadi, Basarwa, Basubia, Batswapong, Bayeyi, Hambukushu, Ovabenderu and OvaHerero. In addition, there are significant minorities of people of European, Asian and people of mixed ancestry.

#### **D. Economy**

24. Prior to the emergence of the diamond industry the country's economy was dominated by agriculture, particularly cattle ranching. At industry level, mining was the major contributor to gross domestic product (GDP), 35 per cent, followed by trade, hotels and restaurants (10.9 per cent) and banks, insurance and business came third at 10.8 per cent. Within trade, hotels and restaurant industry, trade accounted for 8.7 per cent and hotels and restaurants accounted for 2.2 per cent. The lowest contributor to GDP was agriculture, and water and electricity, both at 2.4 per cent.

25. Between the late 1960s and the early 1990s, Botswana recorded the highest sustained real GDP growth rates in the world, averaging 6.1 per cent between 1966 and 1991. Following a recession in 1992/93 growth resumed and has continued since. Generally strong growth in diamond revenue has ensured large government reserves and budget surpluses. GDP in current prices increased from Botswana pula (BWP) 36.7 billion in 2002/03 to BWP 39.9 billion in 2003/04, an increase of 8.6 per cent compared to 15 per cent in the previous year.

26. GDP per capita grew from BWP 10,297 during 2002/03 to BWP 10,629 in 2003/04, an increase of 3.2 per cent in real terms. During 2003/04 most of the sectors except for manufacturing which contracted by 0.5 per cent recorded positive growth rates. The social and personal services registered 6.2 per cent growth rate, banks and insurance grew at 5 per cent, construction at 4.9 per cent, while general government increased by 4.6 per cent. On the other hand, water and electricity, trade, hotels and restaurants recorded lower than 4 per cent. The lowest contributor was agriculture with 1.1 per cent.

27. Total formal employment increased from 285,382 in September 2003 to 296,387 in September 2004 resulting in an additional 11,005 jobs. This was a growth rate of 4 per cent. Some of the major sectors which contributed to the employment growth include agriculture at 16 per cent, manufacturing at 8 per cent, while construction contracted by 15 per cent. According to the 2003/04 Household Income and Expenditure Survey (HIES), 462,367 people (76 per cent of the labour force of 606,827) were employed. Unemployment stood at 23.8 per cent in 2002/03.

28. Income inequality is high especially in comparison with other SADC countries in the region although since 1985/86 it has marginally declined. The poorest 20 per cent of the population has only 12 per cent of income share compared with the middle 40 per cent having 29 per cent and the wealthiest 20 per cent having 59 per cent of the national income. There is also disparity between the income levels of male- and female-headed households. This is more pronounced in urban areas where both mean and median incomes of female-headed households is less than half of their male counterparts. Similarly, disposable income (cash income plus income in kind) shows great disparities between urban and rural areas.

29. The median income was BWP 809 (approximately US\$ 175) in towns, compared to an average of BWP 1,710 (approximately \$350), whilst in rural areas the median was BWP 417 (approximately \$85) compared to an average of BWP 641 (approximately \$125). (Household Income and Expenditure Survey 1993/94.)

30. Most of the increase was realized in the fourth and first quarters (BWP 10.3 and 8.3, respectively); the second and third quarters experienced a slight decline of 0.2 and 1.0, respectively.

**Table 1**

**Public expenditure**

Public expenditure	2001/02	2002/03	2003/04
Public expenditure as percentage of GDP	42.8	42.8	40.8
Growth rate in public expenditure	18.5	14.8	3.7
Overall budget balance (Pm)	(961.96)	(1 391.78)	(78.32)
Health share of expenditure	5.9	7.0	9.8
Education share of expenditure	24.9	22.6	23.6
Defence share of expenditure	9.6	9.2	9.0
Ratio of defence to health/education expenditure	-	-	-

*Source:* Ministry of Finance and Development Planning.

31. Estimated Gross Domestic Product (GDP) in current prices went up to BWP 36,338 million from BWP 31,922 million in 2001/02. This is an increase of 13.8 per cent compared with 11.5 per cent in the previous year. Most of the increase was realized in the fourth and second quarters.

32. At sector level, mining remained the major contributor to GDP (34.8 per cent) followed by general government (16 per cent); trade, hotels and restaurants (11.5 per cent) and banks, insurance and business services at 11.3 per cent. Within the trade, hotels and restaurants industry, trade accounted for 8.9 per cent, hotels and restaurants accounted for 2.6 per cent. The lowest contributor to GDP was agriculture at 2.4 per cent followed by water and electricity at 2.6 per cent (table 0.1.1, annexes).

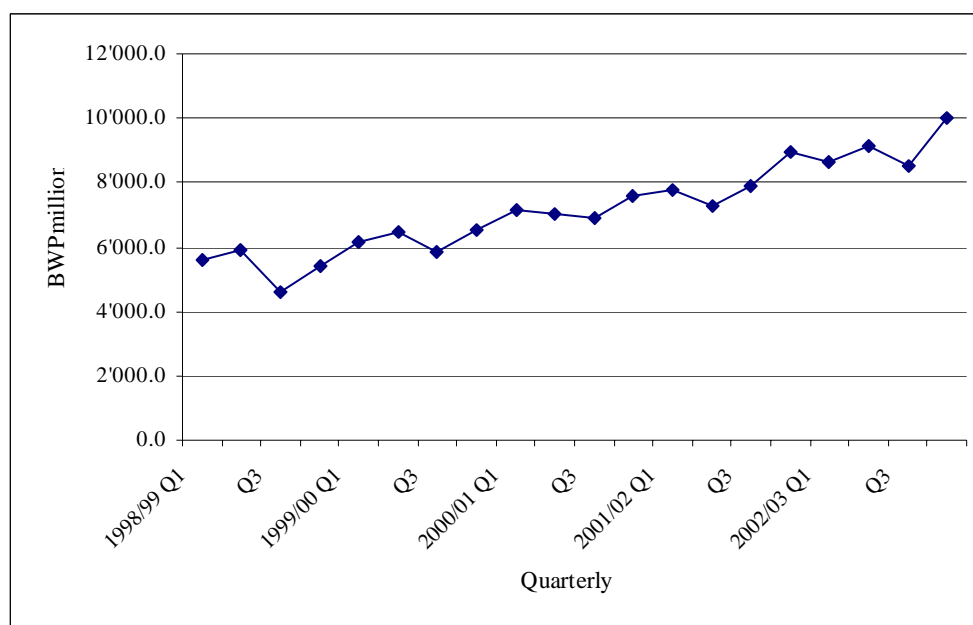
33. At constant 1993/94 prices, GDP was estimated at US\$ 18.04 billion, an increase of 6.7 per cent from the previous year. High annual change was recorded for water and electricity at 9.5 per cent and the rest were below 5 per cent, the lowest change observed on transport and communication (0.9 per cent) followed by construction at 0.6 per cent. GDP, excluding mining, increased by 4.8 per cent compared with 5.5 per cent in the previous year (table 0.1.2, annex).

34. Figure 1 shows the quarterly value added at current prices for all sectors from 1998/99 to 2002/03 in millions of pula.



**Figure 1**

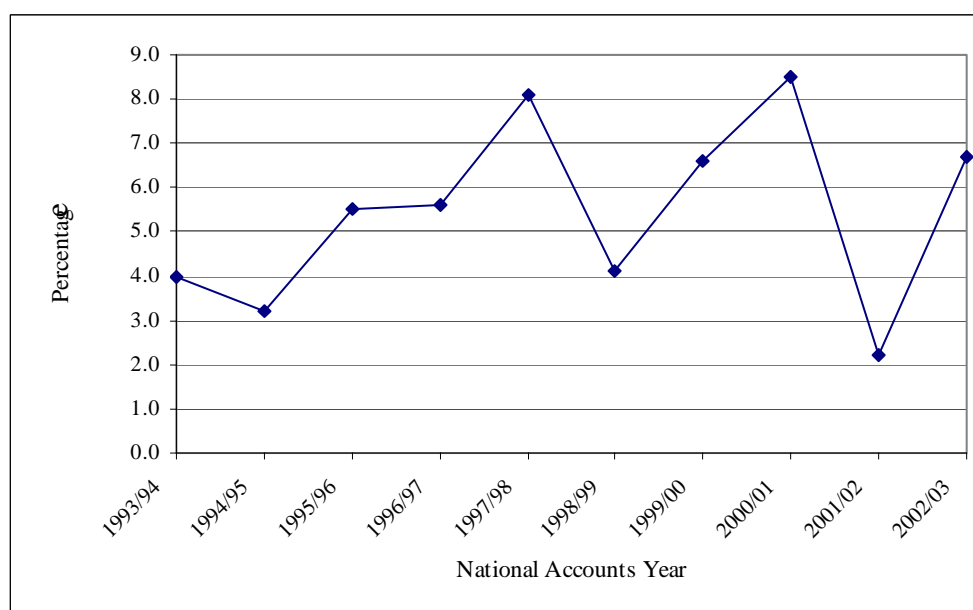
**Quarterly value added at current prices (1998/99-2002/03) (BWP million)**



35. Figure 2 below shows the trend of rate of increase/decrease in GDP in real terms since 1993/94. GDP per capita in real terms increased by 4.2 per cent in 2002/03 from a revised estimate of BWP 9,785 in 2001/02 to BWP 10,195 in 2002/03.

**Figure 2**

**Annual percentage change in real GDP (1993/94-2002/03)**



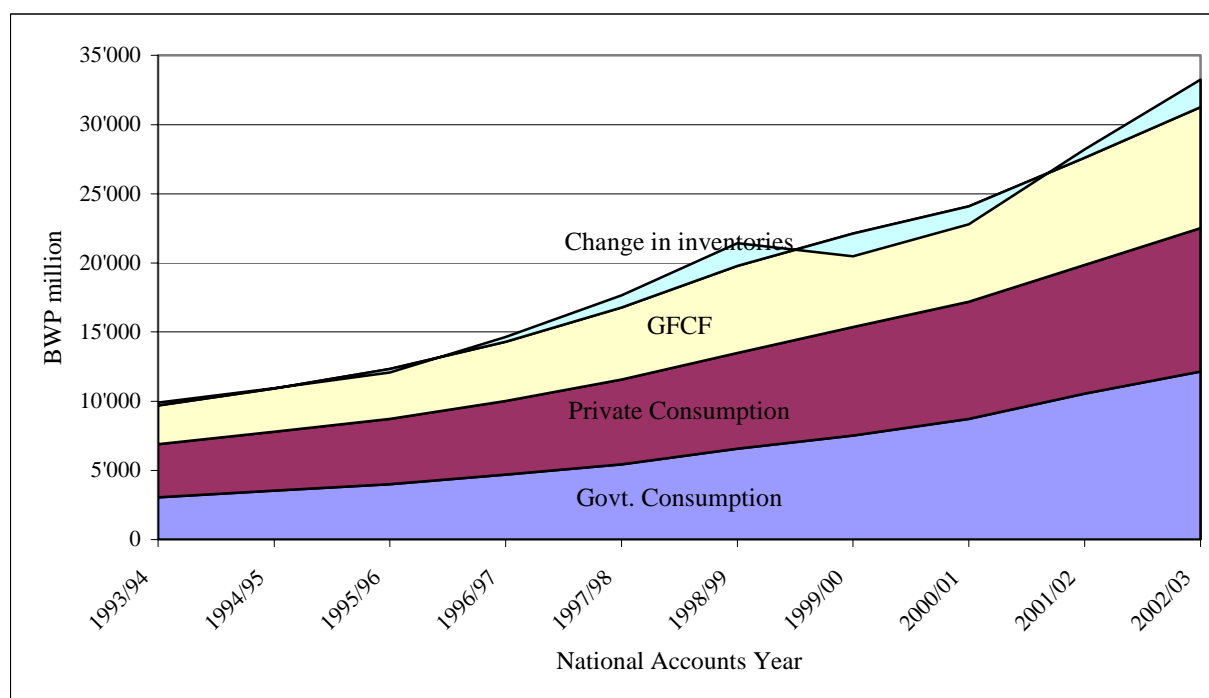
### Gross domestic product by type of expenditure

36. In nominal prices, GDP by total expenditure was mainly from government final consumption, followed by household final consumption with BWP 12,168 and BWP 10,336, respectively (table 0.2.1). In real terms, GDP by expenditure grew as follows: government final consumption, up 5.9 per cent; private final consumption, up 0.9 per cent; gross fixed capital formation, up 1.5 per cent; total exports and imports declined by 5.2 and 1.7 per cent, respectively.

37. Figure 3 shows GDP by type of expenditure. In 2002/03 gross domestic expenditure as a percentage of total GDP was 91.5 per cent, compared with 88.4 per cent in 2001/02. In real terms, GDP in 2002/03 increased by 8.9 per cent, compared with an increase of 15.3 per cent in 2001/02.

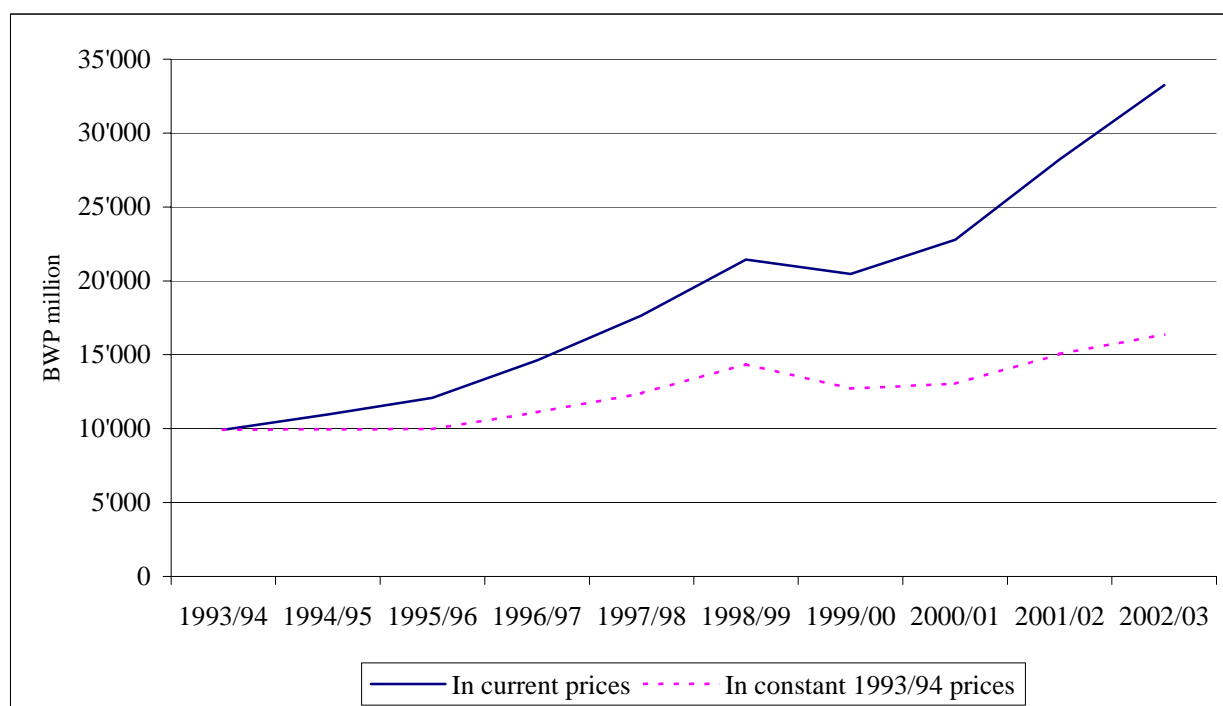
**Figure 3**

#### Gross domestic product by expenditure at current prices (1993/94-2002/03)



38. Figure 4 shows a trend of GDE at current prices since 1993/94. The trend shows that GDE has steadily been rising, except for the period 1998/99 and 1999/2000.

**Figure 4**  
**Gross domestic expenditure (1993/94-2002/03)**



### GDP by type of income

39. In aggregate terms, nominal factor cost/income increased from BWP 22,936 million in 1999/2000 to BWP 26,568 million (table 0.3.1, annex) in 2000/01. This growth was apparent in all the factor cost/income components. Compensation of employees increased from BWP 7,252 million in 1999/2000 to BWP 8,244 million in 2000/01. Nominal gross operating surplus increased from BWP 15,685 million in 1999/2000 to BWP 18,324 million in 2000/01.

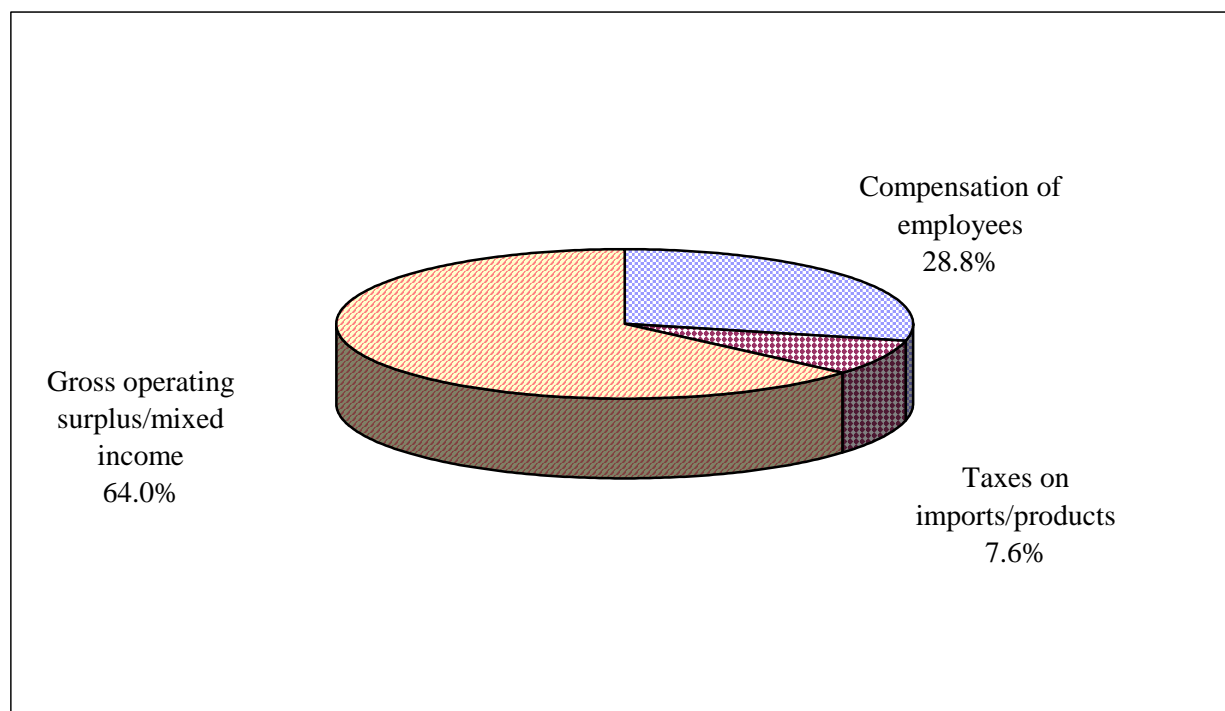
40. GDP by type of income (unadjusted for seasonal variations) on a quarterly basis is (as in tables 4.1 and 4.2, see annexes) expressed in millions of pula and percentages of total GDP, respectively.

41. Figure 5 shows the average composition of GDP by type of income. The chart indicates that approximately one quarter to two thirds of total GDP was realized through remuneration of employees and gross return to capital/remuneration of the owners of capital, respectively.

42. The rest was realized through payments of net import taxes and other taxes on products. (Table 0.7.1 shows the relations among product, income, savings and net lending/borrowing in nominal prices. The relations among product, terms of trade and gross national income in real terms is shown in table 0.7.2. See annexes.)

**Figure 5**

**Average composition of GDP by type of income 2000/01**



### **Employment**

43. Total formal employment increased from 279,700 in September 2002 to 285,400 in September 2003, resulting in an additional 5,700 jobs. This was a growth rate of 2 per cent. The majority of the jobs were concentrated in the private sector, which created 5,000 jobs, followed by central government with 1,100 jobs. Formal sector employment in central government increased by 1.3 per cent. The latest results of the 2002/03 Household Income and Expenditure Survey (HIES) indicate that there were 606,826 economically active persons, of which 462,366 persons were employed in both formal and informal sectors and 144,460 persons were unemployed. This gives an overall unemployment rate of 23.8 per cent as compared to 19.6 per cent obtained from the 2001 Population and Housing Census results.

### **Income disparities**

44. The 1993/94 and 2002/03 Household Income and Expenditure Surveys (HIES) show high incidences of income inequality that have been increasing between the two periods. The 2002/03 HIES indicate that the poorest 40 per cent of the population had only 5.8 per cent of the total income share, compared with 11.6 per cent in 1993/94. The income share of the middle 40 per cent of the population was 23.3 per cent in 2002/03, compared to 29.1 per cent in 1993/94, while the richest 20 per cent of the population got 70.9 per cent of total income, compared to 59.3 per cent in 1993/94.

45. At household level the income share has not changed much between the two surveys. In 1993/94 the poorest 40 per cent households had an income share of 9.4 per cent, compared with 9.2 per cent in 2002/03. The middle 40 per cent households get the income share of 29.9 per cent, compared to 29.4 per cent in 1993/94. The richest 20 per cent households get an income share of 60.9 per cent in 2002/03, compared to 61.1 per cent in 1993/94.

46. The 2002/03 HIES revealed disparity of disposable income between male- and female-headed households. In all the strata (cities/towns, urban villages and rural villages), male-headed households had higher incomes than female-headed households. Similarly, disposable income (cash income plus income in kind) shows great disparities between strata. The national monthly household median disposable income was BWP 1,344, compared to an average monthly household disposable income of BWP 2,424. In cities/towns, the monthly median disposable income was BWP 1,949, compared to an average of BWP 3,961. In urban villages, households had monthly median disposable income of BWP 1,334, compared to an average household income of BWP 2,445, whilst in rural areas the household monthly median disposable income was BWP 743, compared to an average of BWP 1,379.

### **E. Constitutional structure**

47. The Constitution of Botswana was adopted at independence. It provides for a republican form of government headed by the President with three main administrative organs: the executive, legislature and the judiciary. Each of these organs is independent from other organs.

48. The executive branch consists of the Cabinet headed by the President and is responsible for initiating and directing national policies. There are 14 ministries each headed by a Cabinet Minister which, together with the Attorney-General's Chambers, Auditor General's office and Independent Electoral Commission (IEC) constitute central Government. Each ministry is sub-divided into offices (generally "departments" or "divisions") with different areas of responsibility:

(a) The country is divided into nine administrative districts. In each of these districts, there are nine district councils. In urban areas there are two city councils and four town councils. These councils fall under the Ministry of Local Government and are responsible for primary education facilities, health facilities (clinics, health posts, etc.), construction and maintenance of some rural roads, social and community development, village water supply and public health;

(b) On the other hand, some central government ministries have decentralized some of their functions by creating offices of their ministries in the administrative districts, for example, water affairs, immigration and citizenship, agriculture, civil registration, labour and social security. In these administrative districts, there is an office of the District Commissioner whose main role is to coordinate all district development activities;

(c) The legislature is established under Section 57 of the Constitution and it consists of the President and the National Assembly. Section 58 of the Constitution provides that the National Assembly shall consist of 40 elected members who shall be elected in accordance with the provisions of this Constitution. There are four specially elected members, including the Attorney-General and the Speaker of the National Assembly. The National Assembly acts in

consultation with the 15-member House of Chiefs on tribal matters, and is the supreme law-making authority in the country. Elections take place on the basis of universal adult suffrage and the main Opposition Party is the Botswana National Front (BNF). In the 1994 elections, the Opposition got 30 per cent of parliamentary seats, but dropped to 16 per cent in the 1999 general elections. In 1999, 77.1 per cent of those registered to vote voted at the national elections. In the recent elections of 2004 there were 552,849 registered voters. Out of this number, 421,272 voted during the elections, representing 76.2 per cent;

(d) A notable development in the country's political landscape was made when Parliament took a major decision to increase the number of seats of elected members of the National Assembly by 17. The distribution of the seats was done subsequently by the Delimitation Commission which, in terms of the Constitution, is empowered to do so independently of the executive, the legislature and the judiciary. The Ninth Parliament has a total of 57 elected members against the current 40;

(e) The judiciary consists of the Court of Appeal, High Court and Magistrate Courts. In terms of Section 95 (2) of the Constitution, judges of the High Court shall consist of the Chief Justice and such number of other judges as may be prescribed by Parliament. According to Section 96 (1), the Chief Justice shall be appointed by the President and under Section 96 (2) other judges of the High Court are appointed by the President acting in accordance with the advice of the Judicial Service Commission.

49. According to Section 99 (2), judges of the Court of Appeal shall consist of the President of the Court of Appeal, and such number, if any, of Justices of Appeal as may be prescribed by Parliament and the Chief Justice and other judges of the High Court. In terms of Section 100 (1), the President appoints the President of the Court of Appeal and under Section 100 (2) other Judges of Appeal are appointed by the President with the advice of the Judicial Service Commission.

50. In terms of Section 104 of the Constitution, the power to appoint persons to the offices of magistrates shall vest in the President acting in accordance with the advice of the Judicial Service Commission.

51. The composition of the Judicial Service Commission is regulated by the Section 103 of the Constitution as amended by the Constitution (Amendment) Act No. 2 of 2001. The Commission consists of:

- (a) The Chief Justice who shall be the Chairman;
- (b) The President of the Court of Appeal;
- (c) The Attorney-General;
- (d) The Chairman of the Public Service Commission;
- (e) A member of the Law Society nominated by the Law Society; and
- (f) A person of integrity and experience not being a legal practitioner appointed by the President.

52. There is also the Industrial Court whose judges are appointed by the President in terms of the Trade Dispute Act. In appointing Industrial Court judges, the President shall designate one such judge to be the President of the Industrial Court, and any other judges shall rank according to their dates of appointment.

#### **F. Administrative structure**

53. In addition to the above constitutional structures, there are the Office of the Ombudsman and the Land Tribunal.

54. The Ombudsman is mandated in terms of the Ombudsman Act to investigate complaints of injustice or maladministration in the Public Service received from the public (including corporate bodies), and if such complaints are valid to make recommendations to the appropriate authority for compliance therewith. In the event of non-compliance the Ombudsman is obliged to make a special report to the National Assembly. The Ombudsman also has jurisdiction over human rights violations, as well as complaints from persons in both legal custody and those in hospitals.

55. The following matters are precluded from the Ombudsman's jurisdiction:

- Matters certified by the President or a Minister to affect relations or dealings between the Government of Botswana and any other Government or any international organization;
- Action taken for the purpose of protecting the security of the State or investigating crime, including action taken with respect to passports for either of those purposes;
- The commencement or conduct of civil or criminal proceedings in any court;
- Action taken in respect of appointments to offices or other employment in the service of the Government of Botswana or appointments made by or with the approval of the President or any Minister, and action taken in relation to any person as the holder or former holder of such office, employment or appointment;
- Action taken with respect to orders or directions to the Botswana Police Force or members thereof;
- The granting of honours, awards or privileges within the gift of the President;
- Action taken in matters relating to contractual or other commercial dealings with members of the public other than action by an authority mentioned in section 3 (6) of the Ombudsman Act; action taken in any country outside Botswana by or on behalf of any officer representing the Government of Botswana or any officer of that Government.

### G. Legal system

56. Botswana has a dual legal system, comprising customary law and what is usually termed received law (or common law). Customary law is the law of any particular tribe or tribal community insofar as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice. Customary law is not written and has variations among different communities. The received law consists of English law and Roman Dutch law as it was in force at the Cape on 10 June 1891 and as amended by statutes from time to time and interpreted by the Courts. The two systems coexist although there are differences in the law and its application.

57. The highest court in Botswana is the Court of Appeal. It is the superior court of record to which appeals can be made from the High Court. The High Court has original jurisdiction to hear and determine civil and criminal proceedings. It acts as an appellate body for the Magistrate Courts and the Customary Court of Appeal. The common law is made up of statute and precedents, which are cases upon which the High Court and Court of Appeal have ruled.

58. Since independence the Customary Courts have derived their authority from the Customary Courts Act No. 57 of 1968. The Customary Law Act of 1987 also lays down rules which are meant to guide the courts in deciding whether customary or common law applies. The Customary Courts have jurisdiction to deal with a wide variety of matters of civil<sup>1</sup> and criminal<sup>2</sup> law such as financial disputes, petty theft, marital disputes, divorce (where the couple is married under customary law), livestock theft, insults and defamation, among others. The jurisdiction of the Customary Court is limited by the potential penalties or fines to be imposed, or the particular types of crimes or disputes to be adjudicated. When dealing with criminal matters the courts follow the Customary Court Procedure Rules.

59. Lawyers are not permitted to give legal representation at the Customary Courts (Customary Courts Act, chapter 16:01, section 32). However, a person has the right to have a case transferred to another court (a common law court) where they have the right to legal representation if the permission to transfer is given by the Commissioner of Customary Courts.

60. Customary law is administered by the *Kgosi* (plural *dikgosi*, traditional leaders of a tribe), Headman or Court President who confers with the elders of the community who are conversant with customary law and practice. Cases are generally dealt with at the *kgotla* (a public meeting place - plural, *dikgotla*). *Dikgosi* will often become involved with dispute resolution outside the court system where there is room for discretion in the way they exercise their powers (legal or persuasive).

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<sup>1</sup> The civil jurisdiction of the Customary Court does not allow the courts to deal with matters such as the dissolution of civil marriages, testate succession or insolvency.

<sup>2</sup> The criminal jurisdiction of the Customary Court is limited and prevents the court from dealing with cases such as treason, bigamy, corruption, abuse of office, robbery, rape and other serious offences.



61. The application of the Acts regulating the jurisdiction and procedures of the Customary Courts is limited by the levels and training of *dikgosi*. The lack of awareness among the public at large and the fact that the Act is not translated into Setswana or other local languages also contributes to limited application of the Customary Courts Act.
62. Customary law is unwritten and practice can vary between different *dikgotla* (as customs vary according to different traditions). It is fluid and is a function of the patterns of behaviour within a particular community. This could make the integration of international conventions into the Customary Courts difficult.
63. Local police are officials of the Customary Courts and their work exists alongside the national police service. Both police services tend to prefer to use Customary Courts because they dispense swift and accessible justice.
64. The Customary Court of Appeal deals with appeals from the Customary Courts. Decisions of the Customary Court of Appeal may be appealed to the High Court. On issues which refer to land claims, appeals can also be made to the Land Tribunal.
65. The effectiveness of the two systems and the rules that guide them and the interplay of the system, both at the cultural and legal levels, have an impact on the way rights are protected and promoted in Botswana.
66. Local police are officials of the Customary Courts and their work exists alongside the national police service. Both police forces tend to prefer to use Customary Courts because they dispense swift and accessible justice. The Customary Court of Appeal deals with appeals from the Customary Courts (*dikgotla*), which administer customary law.
67. The effectiveness of the two systems and the rules that guide them and the interplay of the system, both at the cultural and legal levels, have an impact on the way rights are protected and promoted in Botswana. These issues will be discussed again in the relevant sections below.

## **Law enforcement**

### *Botswana Police Service*

68. The Botswana Police Service is responsible for the enforcement of law. The Service is regulated by the Police Act, Chapter 21:03, Laws of Botswana.
69. The Commissioner is the Commander of the Police Service and is appointed in terms of Section 112 of the Constitution.
70. Section 6 of the Police Act provides that the force shall be employed throughout Botswana, to protect life and property, prevent and detect crime, repress internal disturbances, maintain security and public tranquillity, apprehend offenders, bring offenders to justice, duly enforce all written laws with which it is directly charged and generally maintain peace.
71. Section 6 (2) thereof allows members of the force to carry arms for the performance of their duties although, in practice, they do not. The President may in times of war or other emergency deploy the police in the defence of the country.

72. The police must operate within the parameters of the Constitution at all times. If they exceed their powers, they can be held liable.

#### *Local Police Force*

73. The Local Police Force is another body tasked with law enforcement throughout the country. This is provided for under the Local Police Force Act. The force falls under the Ministry of Local Government. Section 6 provides that the chief of any area within which the local police officers are appointed shall administer the force, subject to the Minister's general or special directions.

#### *The Directorate on Corruption and Economic Crime*

74. The Directorate on Corruption and Economic Crime (DCEC) was established on 5 September 1994 in terms of the Corruption and Economic Crime Act (Cap 08:05). The main function of the DCEC is to receive and investigate any complaints alleging corruption in any body or by any persons. The Act prescribes the powers and duties of the Director. It states the procedures to be followed in handling a suspect and specifies the offences involving public officers, employees of public bodies, agents and those in the private sector.

75. The Directorate is under the Office of the President and the Director is formally and directly responsible to the President. However, the DCEC is autonomous in carrying out its functions although the decision to institute prosecutions is reserved for the Attorney-General. Where evidence of an offence is obtained this is referred to the Attorney-General in a prosecution report. If the Attorney-General decides upon a prosecution, the matter is usually referred back to the Directorate to undertake the processes of court registration and mention before the courts. Actual prosecution is the responsibility of the Attorney-General's Chambers, but directorate officers, in their capacity as Public Prosecutors, assist the Attorney-General in a considerable number of cases. Since its establishment the DCEC has prosecuted a number of economic crimes.

## **II. INFORMATION CONCERNING THE APPLICATION OF ARTICLES 1 TO 27 OF THE COVENANT**

### **Article 1**

76. According to Section 1 of the Constitution, Botswana is a Sovereign Republic.

77. Botswana maintains a democratic form of government through a system of free elections held every five years. Section 67 (b) of the Constitution provides that the voting age is 18 years. The voting age used to be 21 and was changed through Constitution (Amendment) Act No. 18 of 1997.

78. Section 61 of the Constitution provides that a person shall be qualified to be elected as a member of the National Assembly if he:

- (a) Is a citizen of Botswana;
- (b) Has attained the age of 18 years;

(c) Is qualified for registration as a voter for the purposes of the election of the Elected Members of the National Assembly and is so registered; and

(d) Is able to speak and, unless incapacitated by blindness or other physical cause, to read English well enough to take an active part in the proceedings of the Assembly.

79. The language requirement for election to the National Assembly exists because English is the official language of the country. In reality, both English and Setswana are accepted and spoken interchangeably in the Parliament as one is the official language and the other is the national language.

80. According to Section 62 (1) of the Constitution, a person shall be disqualified to be elected as a member of the National Assembly if he has been certified insane or of unsound mind, has a death sentence imposed on him, or has been declared insolvent in any part of the Commonwealth, or being under a sentence of imprisonment exceeding six months.

81. In terms of Section 58 (2) (b), provision is made for four specially elected members of the National Assembly. They are nominated by the President and elected by the National Assembly. There has been no established pattern in the election of specially elected members. In the past the election of special elected Members of Parliament has been used to introduce special skills to the National Assembly.

82. The Government's commitment to the right of self-determination is also reflected in the willingness of the Government to involve the populace in determining issues affecting them especially through Commission of Inquiries and Referenda.

83. For instance, there was the Balopi Commission, which was set up in 2000 by the President in response to a motion passed by a Member of Parliament in 1995 calling for an amendment of Sections 77, 78 and 79 of the Constitution to make it tribally neutral. The Commission undertook an extensive tour of the country in order to consult with a broad spectrum of Botswana society. Wide coverage was given to the Commission through the media. Submissions, both written and oral, were received from people of varying backgrounds such as House of Chiefs, traditional leaders, elderly statesmen and politicians, academics, youth and cultural groups. The report was submitted to the President in November 2000. Its finding was that Sections 77, 78 and 79 of the Constitution should be amended to accommodate other tribes. Cabinet has produced a draft white paper, which is to be presented before Parliament for review.

84. The Government of Botswana has, through consultation with the general public and all stakeholders, produced a national manifesto for the people of Botswana. It is commonly referred to as Vision 2016. This is a statement of long-term goals and a set of strategies that will meet these goals. Vision 2016 proposes a vision for Botswana. It is worth noting that one of these goals is that by 2016 Botswana will be an "Open, Democratic and Accountable Nation". "Botswana will be a community-oriented democracy, with strong decentralized institutions." This is an important indication of the Government's commitment to the right of self-determination.<sup>3</sup>

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<sup>3</sup> Vision 2016: Towards Prosperity for All, p. 11.

85. Botswana maintains a free market economy where any person with the right to property or resources is entitled to disposition thereof. At the same time, Botswana retains its prerogative to regulate the export of natural resources and to impose duties thereon.

## Article 2

86. It should be noted that international conventions do not have automatic application in the national or municipal law of Botswana until they have been specifically made a part of it by legislation. They require legislation in order to operate in national law.

87. Chapter II of the Constitution entrenches a Bill of Rights. The Bill protects the fundamental rights and freedoms of the individual.

88. Section 3 of the Constitution provides that 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 to life, liberty, security of the person and the protection of the law; freedom of conscience, of expression and assembly and association; and protection for the privacy of his home and other property and from deprivation of property without compensation.

89. The right to life is recognized under Section 4 of the Constitution.

90. The right to personal liberty is recognized under Section 5.

91. Section 6 of the Constitution guarantees freedom from slavery and forced labour.

92. Section 7 of the Constitution guarantees freedom from inhuman treatment or degrading punishment or other treatment.

93. It should be noted that upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Botswana entered reservations under article 7, paragraph 3. (See article 7 section of this report.)

94. The right to protection from deprivation of property is guaranteed in Section 8 of the Constitution. The Section further provides specific protection from being deprived of private property. However, the Constitution permits the acquisition of property, by Government, of any description. In furtherance of this right (the right to protection from deprivation of property), Parliament enacted the Acquisition of Property Act (Cap 32:01). The Act limits such acquisition to immovable property only. This right was in fact discussed and recognized in the case of the *President of the Republic of Botswana and Others v. Bruwer and Another*.<sup>4</sup> In this case, Bruwer and another were negotiating with the Commonwealth Development Corporation to purchase their farm. On the day the sale was to be finalized, Government published a notice in terms of the Acquisition of Property Act to acquire “compulsorily a piece of land being the Farm called Molopo Ranch together with improvements thereon including livestock”. The respondents

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<sup>4</sup> 1998 BLR 86.

challenged the acquisition by way of application to the High Court especially the validity of the notice and sought that it be set aside. They contended that the Acquisition of Property Act gave power to acquire immovable property only. Since the notice covered both immovable and moveable property it was *ultra vires* or void. On appeal it was held that the Acquisition of Property Act empowered the Government to acquire immovable property only. Government was incompetent to acquire moveable property.

95. The right to freedom of privacy of home and other property is guaranteed in Section 9 of the Constitution.
96. Section 10 guarantees the right to a fair trial within a reasonable time by an independent and impartial court.
97. Section 11 of the Constitution guarantees the right to freedom of conscience.
98. Section 12 of the Constitution guarantees the right to freedom of expression.
99. Section 13 of the Constitution recognizes the right to freedom of assembly and association.
100. Freedom of movement is provided for in Section 14 of the Constitution. Botswana has entered a reservation under article 12 of the Covenant.
101. Section 15 of the Constitution provides for freedom from discrimination.
102. There are certain circumstances under which the rights guaranteed in the Covenant may be derogated from or limited. This is where it is necessary to protect national security, public order, public health or morals or the rights and freedoms of others or where the restrictions are consistent with the other rights recognized under the Covenant. Also, restrictions that are provided by the law or which are reasonably necessary in a democratic society are permitted. These limitations are also recognized in the national legal arena of Botswana. Most of the rights in the Bill of Rights of Botswana may be limited in the public interest, public health and safety, and where it is reasonably necessary in a democratic society.
103. Any person whose rights and freedoms as recognized in the Constitution are violated has an effective and speedy remedy by way of petition to the High Court of Botswana. This is provided for in Section 18. The effect of Section 18 of the Constitution is that it gives remedy to people who think their rights have been infringed by any unconstitutional law, administrative action or steps taken against them which go against their rights as provided for in the Constitution.
104. The *Unity Dow v. Attorney-General* case<sup>5</sup> is an example of an application for relief to the High Court under Section 18 of the Constitution. In this case, Unity Dow was a female Motswana married to an alien. In terms of the law their children were not Botswana citizens and therefore aliens in the land of their birth. By reason of her being female under the

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<sup>5</sup> 1992 BLR 112.

Citizenship Act, she was unable to pass citizenship to her two children. Ms. Dow challenged the Citizenship Act as prejudicing her and being against the Constitution. The High Court agreed with her and granted her application declaring sections 4 and 5 of the Citizenship Act unconstitutional.<sup>6</sup>

105. Botswana recognizes that her obligations under this article are not limited to legislative enactments. Effective mechanisms exist for the enforcement and assertion of such rights.

106. It should also be noted that whereas previously human rights law was taught as part of a constitutional law course at the University of Botswana, human rights law has now been introduced to the bachelor of law degree programme as a separate course. It is also taught at diploma level in law. The Botswana Police College has also introduced a human rights programme. Further, the Government has set up the Women's Affairs Department which is an institution tasked with dealing with women's issues and development (refer to discussion under article 3 below).

107. Moreover, an inter-ministerial committee was established in 2002 at the initiative of the Ministry of Foreign Affairs and International Cooperation, with the support of the other ministries. The Attorney-General's Chambers played a very active role in the establishment of the committee. It is intended through this committee to ensure implementation of treaties, including reporting obligations.

108. In 1997, the Constitution (Amendment) Act No. 18 of 1997 established the Independent Electoral Commission. The Commission is made up of a chairperson, deputy chairperson and five other members. Day-to-day operations are carried out by the secretariat headed by the secretary, who is appointed by the President. The mandate of the Commission is to manage the electoral process and disseminate voter awareness information; they are also responsible for ensuring that voters are informed about the electoral process, mobilizing the public to register and vote.

109. As discussed earlier, an Office of the Ombudsman was established in 1995 through the Ombudsman Act. The office is another measure for the domestic enforcement of rights.

### **Article 3**

110. The Constitution prohibits any discrimination whatsoever. Section 3 provides that any person, whatever his race, place of origin, political opinions, colour, creed or sex, is entitled to fundamental rights and freedoms of the individual. These rights are subject to whatever limitations are stated by law. The rights may also be limited in matters of public interest and the protection of the rights and freedoms of others.

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<sup>6</sup> The Attorney-General appealed to the Court of Appeal, but was unsuccessful. The Citizenship Act was subsequently amended in 1995.

111. The Government recognizes that Botswana women do not experience and enjoy equality with men and that they do not fully participate in all aspects of national economic, social and cultural development. It has made an attempt to enhance the status of women and is still in the process of enhancing that status (for more detail refer to article 2 above).

112. The Government has set up a Women's Affairs Department within the Ministry of Labour and Home Affairs. The role of the Department is to deal with women's issues and to promote their development and integration into economic, social, cultural and political activities. Its work is complemented by non-governmental organizations such as Emang Basadi, which focus on women's issues.

113. In 1996, Botswana acceded to the Convention for the Elimination of All Forms of Discrimination against Women, and the Convention was translated into the national language, Setswana. Botswana is also in the process of ratifying the Optional Protocol to the Convention.

114. The Government has adopted a National Policy on Women in Development. The goal in adopting the policy is to achieve effective integration and empowerment of women in order to improve their status, enhance participation in decision-making and their role in the development process.

115. Specific measures included:

- (a) The elimination of all economic, social and legal practices discriminating against women;
- (b) Improving women's health;
- (c) Promoting education and skills training; and
- (d) Mainstreaming gender in development planning.

116. In 1997, the National Gender Programme Framework accompanied by an advocacy and mobilization strategy was launched. The National Gender Programme Framework outlines six critical areas of concern. For each of the areas the framework specifies strategies, objectives and specific actions to be taken to achieve social change; they are more fully described in a document entitled the Plan of Action for the National Gender Programme 1999-2003. The Plan of Action is a comprehensive set of strategies and activities designed to mainstream gender equity in each of the critical areas (see annex 4). In 1998, the Women's Affairs Department commissioned a review of all legislation affecting the status of women in Botswana. This resulted in the amendment of some of the laws affecting the rights of women.

117. As indicated above, in 1995 the Citizenship Act was amended to implement the court decision in the *Unity Dow v. Attorney-General* case. This had the effect of removing gender discrimination in citizenship laws.

118. The Deeds Registry (Amendment) Act of 1996 amended the Deeds Registry Act to enable women, whether married in or out of community of property and whether or not marital power had been excluded, to execute deeds and other documents without their husband's assistance. A

husband cannot deal with immovable property registered in his name, which is not excluded from community of property without his wife's consent, and conversely, a woman cannot deal with property that belongs to the community without her husband's consent.

119. There was a major development in December 2004 when Parliament passed a bill abolishing this structure of marital power under common law. The Marital Power Act, as amended, provides for equality between men and women in marriage in community of property. It specifically excludes customary and religious marriages.

120. The Marital Power Act, section 5, states:

“The effect of the abolition of marital power is to remove the restrictions which the marital power places on the legal capacity of a wife and abolishes the common law position of the husband as head of the family.”

121. In 1996, the Employment Act was amended to allow women to work in underground mines and to be employed in any industry or agricultural undertaking during the night.

122. The Criminal Procedure and Evidence Act was amended to provide for the mandatory hearing of rape in related offences out of the public eye. Before the amendment, it was left to the discretion of the tribunal to decide whether to try such cases in camera.

123. Sections 141 and 142 of the Penal Code were amended to bring about major developments: introduction of gender neutrality in relation to rape; moving it away from being phallus-specific. Rape is now defined in section 141 of the Penal Code to include penetration of a sexual organ or instrument into another person to derive sexual gratification. In a nutshell, women too can rape.

124. The Affiliations Proceedings Act was amended to make it possible:

(a) To increase the number and actions of courts before which an action may be brought; and

(b) To increase the monthly payment which the parent should make towards the maintenance of the child, while making provisions for situations in which a parent is unable to meet the prescribed minimum payment to pula 100 (\$20).

125. The Public Service Act was amended to recognize sexual harassment as misconduct. The General Order governing the public service has also been amended to include the following:

(a) Female local officers are entitled to 84 calendar days maternity leave on full pay for each confinement;

(b) Following from their return from maternity leave, officers are entitled to a one-hour recess per working day for a period of one year for the purpose of nursing the child.

126. The Electoral Act allows women to vote in general elections and by-elections, and to stand for parliamentary elections. At the last parliamentary elections, more than half of Batswana who registered to vote in the 1999 general elections were female (54.7 per cent) while 44.3 per cent were male. The number of women in Parliament has steadily increased over the years.



Although the number of women in Parliament has steadily increased over the years, in the last elections (October 2004), a setback was experienced when the number dropped from eight to six compared to the 1999 elections. See table below:

**Table 2**  
**Number of women in Parliament**

Year of elections	Number of women in Parliament
1965-1969	0
1969-1974	0
1974-1979	2
1979-1984	2
1983-1989	2
1989-1994	2
1994-1999	4
1999-2004	8
2004-2009	6

Of the six women in Parliament, five have been appointed to Cabinet and the sixth is a deputy speaker.

127. Other measures undertaken by the Government include:

(a) Gender mainstreaming in structures such as political parties, civil society and tertiary institutions; and

(b) Gender sensitization and training programmes have also been initiated as part of a broad strategy of capacity-building advocacy.

In order to ensure that gender mainstreaming was implemented effectively, the Women's Affairs Department commissioned a study on "The Gender Disaggregated Data on Positions of Power and Decision Making Within Public and Private Sectors" (see annex 5).

128. Despite the fact that the Constitution prohibits discriminatory treatment, or rather discrimination, under customary law, women lack independent legal capacity in that, irrespective of their age, they are subjected to the guardianship of their fathers, brothers, uncles where they are unmarried and to their husbands where they are married. Although over the years socio-economic changes have taken place regarding the position of women, the customary laws of some tribes recognize adult women as having legal capacity. Because customary law is unwritten there is some ambiguity in the legal status of women.

129. As already mentioned in this report, the Citizenship Act was amended in 1995 to implement the court decision in *Unity Dow v. Attorney-General*. The Act now allows citizenship to be acquired from either parent.

130. The Ministry of Education has also contributed to the attainment of equality between men and women. Its contribution has been through the following:

- (a) In an attempt to achieve the goals of “Education for All”, education and training in Botswana aims at achieving equal access to education for both men and women. The Government of Botswana considers education a fundamental human right;
- (b) The Ministry of Education has also developed an equal opportunities policy that is to ensure the promotion of equal opportunity for all the learner students, staff and community in aspects of institutional or professional life, and to ensure that no one is discriminated against or disadvantaged on the grounds of race, ethnic origin, religion, sex, disability, age, etc. The policy aims at increasing access to education for both females and males;
- (c) Deliberate efforts have been made to encourage girls into the fields of science, technology and vocational education and training through career fairs and career guidance videos where female role models are used as resource persons. This has been instrumental in dispelling the myth that science and technology is a field for males;
- (d) Sensitization workshops and training are run for teachers, instructors and lecturers to deliberately combat gender-based discrimination. This has resulted in an increased female representation in the intake for technical colleges;
- (e) In the development of educational material and schools curricula, a selection criterion ensures that the pictures and language in the teaching/learning materials are gender neutral. Gender issues are also infused and integrated strictly across the curricula to sensitize and create an awareness of gender issues;
- (f) Currently regulations are being reviewed with the intention of coming up with a policy that will facilitate an increase in the retention rate for girls in order to address the issue of girls being kept out of school by pregnancy. The idea is to assist them to improve their quality of life by allowing them to improve their education. The review is even looking at ways of supporting the girls such that their academic performance is not negatively affected;
- (g) A guidance and counselling programme is part of the curriculum for primary education to secondary education level. The programme aims to break stereotypes prevalent in career decision-making for boys and girls.

#### **Article 4**

131. Section 17 (1) of the Constitution provides for the declaration of a state of public emergency by proclamation published in the *Gazette*.

132. The declaration so made, if not sooner revoked, shall cease to have effect if made when Parliament is sitting or has been summoned to meet within 7 days, at the expiration of a period of 7 days beginning with the date of publication of the declaration, or if made under any other circumstances at the expiration of a period of 21 days beginning with the date of publication of the declaration, unless before the expiration of that period, it is approved by a resolution passed by the National Assembly, supported by the votes of a majority of all the voting members of the Assembly.

133. Where the declaration is approved by a resolution of the National Assembly it shall remain in force until the expiration of a period of six months beginning with the date of its being so

approved or until such earlier date as may be specified in the resolution. The declaration so made can be extended by a resolution of the National Assembly by a majority vote for periods not exceeding six months. The National Assembly can revoke the declaration made by resolution at any time.

134. In 1999, a state of emergency was declared in order to remedy electoral anomalies. A writ was issued for the general elections. However, it was discovered that more than 67,000 people stood to be disenfranchised as their names appeared on supplementary rolls that had not been certified (and, were therefore, not in operation), and whose certification after the issue of the writ was prohibited by section 28 of the Electoral Act and only Parliament could remedy the situation. But as Parliament had already been dissolved (and not simply prorogued), only after the declaration of a state of emergency could it be summoned to meet in order to remedy that anomaly. After the emergency was declared, Parliament was summoned and the Electoral Act was amended to allow for certification of the rolls. None of the rights protected under the Covenant were violated and the life of the nation was not threatened. The state of emergency lasted for less than a day.

135. Section 16 of the Constitution suspends the application of Sections 5 [Personal Liberty] and 15 [Discrimination] in certain cases. These derogations can only be taken under circumstances that are reasonably justifiable for the purpose of dealing with the situation that exists during any period when Botswana is at war or a state of emergency has been declared under Section 17 of the Constitution. It is important to note that the laws of Botswana do not provide for derogation from the rights under article 4, paragraph 2, of the Covenant. The Constitution provides that where a person is detained or is deprived of his personal liberty, his case shall be heard by an independent and impartial tribunal established by law. Furthermore, such person shall be allowed to have legal representation and be afforded reasonable facilities to consult and instruct at his own expense his legal representative who will be permitted to make written and oral representations to the tribunal. Though there is provision for the right to legal representation, accessibility is limited due to resources and the State is not obliged to provide resources to those who do not have them.

136. It is however important to note that Botswana has never declared a public state of emergency as envisaged by article 4 of the Covenant where the life of the nation was threatened. The Emergency Powers Act empowers the President as the head of the executive branch of Government to make emergency regulations whenever an emergency proclamation is in force; to specify matters which may be provided for in emergency regulations; to provide for the duration of emergency regulation and to provide for matters incidental thereto or connected therewith.

137. Section 4 of the Emergency Powers Act provides that emergency regulations and any order or rules made in pursuance of the state of public emergency shall have effect notwithstanding anything inconsistent therewith contained in any enactment. The operation of any other enactment that is inconsistent with the regulations shall be suspended until the state of emergency is revoked. It therefore follows that the regulations will cease to have effect upon revocation of the declaration of the public state of emergency.

138. The role of the military during a period of emergency has not been defined specifically either in Section 17 or Section 48 of the Constitution. However, the President being the Commander-in-Chief is empowered by Section 48 of the Constitution to determine the

operational use of the armed forces, subject to parliamentary control. Therefore, Parliament can control, restrict and moderate the use and deployment of the armed forces in any situation including an emergency declared under Section 17 of the Constitution.

139. According to section 4 of the Botswana Defence Force Act, the force is charged with the defence of the country and the President may determine such other duties from time to time. The force has a set of orders intended to guide its members to follow on how and when to open fire in different circumstances.

140. Section 7 of the Police Act provides that in time of war or other emergency, the President may employ the police force or part thereof, in defence of Botswana.

### **Article 5**

141. Generally, Botswana honours its treaty obligations. To this end, it has endeavoured to interpret the various articles contained in the Covenant in good faith as required by the Vienna Convention on the Law of Treaties of 1969 with a view to realizing the objectives of the Covenant. However, it is important to note that there are certain rights enshrined in the Covenant that can be derogated from in the event of a state of emergency. These rights are outlined in the Constitution of Botswana and they are Section 16 (the right to protection of personal liberty), Section 5 (the right to protection from discrimination on the grounds of race, etc.). Furthermore, the Constitution and the Penal Code Act of 1964 also provide for limitation of the right to life. This derogation can only be carried out under certain circumstances discussed under article 6 of this report. There are no provisions in any of the laws of Botswana that allow for unjustifiable limitations of human rights.

### **Article 6**

142. Section 4 of the Constitution confers the right to life on all individuals. This clause also outlines circumstances considered reasonably justifiable where there can be deprivation of life.

143. In 1997 the Parliamentary Law Reform Committee produced a report on public opinion on the death penalty, which was tabled before Parliament. The findings of the report show that the public was in favour of retaining the death penalty.

144. Section 25 of the Penal Code states that death may be inflicted as punishment by a court of law. The Act further states under section 26 that the death sentence shall not be pronounced against any person who is under the age of 18 or pregnant women under any circumstances. The Criminal Procedure and Evidence Act at section 298 addresses the issue of the death penalty with regards to pregnant women. Where a woman is facing a death sentence and she alleges that she is pregnant, proof to the court should be shown that she is indeed pregnant. Where the court does find that she is pregnant then the sentence will be reduced to life imprisonment.

145. Under the Penal Code offences that attract the death penalty are treason as per section 34 and murder as per section 203. The death sentence is mandatory though a lesser sentence may be imposed where there are extenuating circumstances. Currently there are no initiatives or plans by the Government to totally abolish capital punishment.

146. There are safeguards in place to protect those accused of offences that carry the death penalty. Section 10 of the Constitution provides that where a person is accused of a criminal offence carrying the death penalty, the accused shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This has the effect of preventing arbitrary deprivation of life where one is charged with an offence that carries the death penalty.

147. The Constitution guarantees the right to legal representation in criminal cases at the accused's own expense (Section 10 (2) (d)). Government assistance to criminal defendants who do not have the means is limited to those charged with capital offences. In such cases, *pro deo* counsel is provided. However, the amount paid by Government is not attractive compared to private sector fees. The Registrar of the High Court has tried to address the problem by decreeing that every law firm should take up one such case a year but this has not resolved the problem of the quality of representation for the needy. The University of Botswana runs a poorly resourced legal clinic staffed by law students and supervised by a law lecturer in an attempt to fill the void. In addition, a number of NGOs have some legal aid programmes for the needy. However, it is acknowledged that some of them have financial constraints.

148. There are also regulations concerning the treatment of persons on death row. The regulations have the effect of protecting the prisoners from any arbitrary treatment. These are provided for under the Prisons Act. Section 115 of the Act provides that:

“Every prisoner sentenced to death shall be confined in some safe place within a prison, kept apart from other prisoners and placed under constant supervision by a prison officer both by day and night.”

149. Section 59 (1) provides for visiting and medical examination of prisoners under sentence of death. It states that:

“The medical officer shall, on every day on which he visits the prison, visit every prisoner under sentence of death or charged with a capital offence or in solitary confinement and shall ensure that every such prisoner is medically examined at least once every week.”

150. Section 116 (1) provides that:

“No person other than the Minister, a prison officer, the medical officer or other medical practitioner in his place, a minister of religion or other person authorized by the Commissioner shall have access to a prisoner under sentence of death ...”

“Provided that such prisoner may, subject to any reasonable conditions the Commissioner may impose, be visited by his legal advisors and such of his relatives and friends as he may express a wish to see.”

151. From September 1966 to date, 40 executions were carried out. Of these 39, 3 were women; only 6 executions were carried out after 2000, the most recent being in 2003. All the executions that have ever been carried out in Botswana have all been for the offence of murder. There are currently three condemned prisoners on death row.

152. The death penalty is imposed by the High Court. The convicted person then has the right to appeal to a higher court, that is, the Court of Appeal. Furthermore, the convicted person can appeal to the President to commute the death sentence to a lesser sentence by exercising the prerogative of mercy with the advice of the Advisory Committee on the Prerogative of Mercy. This is provided for under Sections 53 and 54 of the Constitution. An example on this point is the case of *Letlhohonolo Bernard Kobedi v. The State Court of Appeal Criminal Appeal No. 25 of 2001 (High Court Criminal Trial No. F.29 of 1997)* in which the appellant was convicted of the murder of a member of the Botswana police who was investigating a robbery that the appellant had committed. The Appeal Court dismissed his appeal and reaffirmed the death sentence that had been passed on him by the High Court. In their judgement, the justices ordered that the execution of the sentence of death be stayed pending the appellant's full exercise of his rights to petition the State President for clemency. The State President, however, turned down the petition and the prisoner was executed.

153. In 1975, one death sentence was commuted to life imprisonment.

154. In order to promote the right to life, the Government adopted the Primary Health Care strategy in the mid-1970s. The strategy has resulted in significant gains in the improvement of the health of the people in Botswana. The main emphasis of this strategy being health promotion, disease prevention and control while the secondary processes include curative services and rehabilitation.

155. In order to increase life expectancy and promote the right to life the following measures have been put in place to address emerging health needs and problems:

(a) Monitoring the quality of water supply in towns and rural areas thereby reducing the risk of diseases such as cholera, typhoid, etc. These diseases continue to claim lives in the region today, while in Botswana the country has not had outbreaks in recent years as a result of safe water supply;

(b) Immunization against major infectious diseases: the country is running a good immunization programme. Childhood immunizable diseases are no longer major causes of infant mortality. However, the country is facing a major resurgence in tuberculosis as a result of the HIV/AIDS epidemic. In addressing this problem Isoniazid Tuberculosis Preventive Therapy (IPT) has been initiated for the HIV positive patients who are eligible to prevent them from developing active tuberculosis which is the major cause of mortality;

(c) Growth monitoring: weights of children under 5 years of age are monitored monthly and appropriate measures are taken in instances where the child is malnourished;

(d) Maternal and Child Health Care including Family Planning: currently there is the safe motherhood initiative intended to promote healthy motherhood and reduce maternal death. Other programmes that were introduced recently include Prevention of Mother to Child Transmission (PMTCT), and the Infant Feeding Programme as a result of the HIV/AIDS epidemic;

(e) Prevention and Control of Local Endemic Diseases: there is a well-established malaria control and other vector borne diseases programme;

(f) Prevention and Control of Non-communicable Diseases and Injuries: Botswana as a developing country has also been experiencing a steady increase of non-communicable diseases, namely: hypertension, cancers and diabetes (health statistics reports). Hypertension, which is a risk factor for cardiovascular disease, is the commonest cause of morbidity and mortality. Currently, the Ministry of Health in collaboration with the World Health Organization is undertaking a study on hypertension, diabetes and stroke among those aged 50 years and above. The results of this study will be useful in developing health policies regarding care of the elderly in respect of these diseases;

(g) Communicable Disease Surveillance: an integrated disease surveillance and disease programme has been started in the unit as a major regional initiative to strengthen disease surveillance and epidemic response.

### Article 7

156. Botswana has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) but subject to a reservation on article 1 “to the extent that ‘torture’ means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana”. A similar reservation was entered upon ratification of the Covenant “to the extent that ‘torture, cruel, inhuman or degrading treatment’ means torture, inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana”.

157. The Constitution provides for protection against torture and inhuman punishment. Section 7 (1) thereof states, “No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.” However, the Constitution proceeds to make an exception in Section 7 (2) by stating that “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.”

158. In Botswana, torture per se is not an offence, but the offences are elements leading to it such as assault, attempted murder, manslaughter. Hence the courts rely on case law.

159. There are a number of cases in which torture has been discussed. For instance, in *Clover Petrus and Another v. State* 1984 BLR 14, the two accused persons were convicted by a magistrate of housebreaking and theft. Each was sentenced to three years imprisonment and to corporal punishment, as provided for by section 301 (3) of the Criminal Procedure and Evidence (Amendment) Act No. 21 of 1982. Under this provision, corporal punishment was to be meted out in four strokes each quarter in the first and last years of the term of imprisonment. On appeal to both the High Court and Court of Appeal, counsel for the accused raised the issue of whether corporal punishment was unconstitutional as being in conflict with Section 7 of the Constitution, which guarantees protection from torture or inhuman or degrading punishment or treatment. It was held that the repeated and delayed infliction of corporal punishment was inhuman and degrading and therefore in conflict with Section 7 (1) of the Constitution. The Court ordered the deletion of strokes from the sentence.

160. Although torture is not defined in the laws of Botswana, courts outlaw torture of any kind. Apart from the Constitution, section 23 (1) (ii), of the Police Act provides as follows:

“an offence against discipline is committed by any police officer who is guilty of unlawful or unnecessary exercise of authority, that is to say, if any police officer uses any unnecessary violence to or intimidates any prisoner or other person with whom he may be brought into contact in the execution of duty”.

If a police officer is found guilty of such conduct, he may, depending on the degree of violence or intimidation, be dismissed from the police service in terms of sections 28 and 29 of the Act. Where a person alleges that the police have subjected him to torture, and the matter is brought to court, evidence will be adduced to show exactly what it is that the offender is alleged to have done. The court will then decide on the basis of the evidence before it, whether that amounts to torture. As such, the court's hands are not tied and restricted to a particular definition of torture.

161. In *State v. Thebe and Others* 1993 BLR 484, the five accused persons were police officers who had participated in the interrogation of the deceased, a suspect in their custody. The deceased had been manacled on the orders of the first accused. The purpose of placing the manacles on the deceased was to get a confession out of him. The accused was assaulted and the force used was brutal and excessive. There had been no legal justification for the use of such excessive force on the deceased. Although it was not possible to ascertain who, of the police officers, had caused the actual death of the deceased, it was clear that the death resulted from injuries that had been unlawfully caused. Accordingly, the accused were all held criminally responsible for the death and convicted of manslaughter. They were also dismissed from the Police Service.

162. This clearly demonstrates that the courts are the fact that torture exists. The courts are prepared to convict police officers, who engage in activities which border on torture, of offences such as manslaughter which carry maximum sentences of life imprisonment.

163. The Penal Code does not have specific sanctions on the commission of torture. However, sanctions will vary from one conduct to another.

164. A victim may sue the Government for damages where torture is alleged and such cases are tried like any other civil case. The victim has the burden to prove that he was tortured.

165. In other instances, there is administrative discipline of the perpetrators as can be seen in the case cited above.

166. The law voids any declaration or confession obtained through torture. Section 228 of the Criminal Procedure and Evidence Act provides:

“(i) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person;



“Provided that:

“(a) Such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.”

167. A case illustrating that where confession was obtained by applying undue pressure on the accused person is inadmissible is *Twala v. The State* 1986 BLR 371. In this case, the appellant and four others were charged with unlawful possession of a substantial quantity of methaqualone (mandrax tablets) in contravention of the Habit-Forming Drugs Act. In passing judgement the trial Chief Magistrate found that it was not clear at all how or when the appellant came into possession of the tablets. He, however, stated that if the appellant threw the tablets into the river either alone, or in company with, or with the assistance of others, then, at that moment he must be said to have been in possession of them. He therefore convicted the appellant. On appeal to the High Court, counsel for the State conceded that he could not support the conviction because of the Trial Magistrate’s admission of a confessional evidence of pointing out by the appellant. It was held that the confessional evidence relied on by the State was wrongly admitted by the Trial Magistrate as he had found as a fact that the police applied undue pressure to the appellant to make him confess. The appeal against conviction was therefore allowed.

168. Section 231 (4) of the Criminal Procedure and Evidence Act lays down the law on admissibility of confessions. A statement recorded in accordance with this section shall not be admissible in evidence against the maker thereof unless it had been freely and voluntarily made by him in his sound and sober senses and without having been unduly influenced thereto.

169. The treatment of detainees is governed by the Prisons Act, particularly sections 64-82. These clauses provide, inter alia, that:

(a) A female prison officer shall be in charge of any prison in which female prisoner’s alone are detained;

(b) Male and female prisoners shall be detained in separate prisons or in different parts of the same prison;

(c) In the case of illness of a prisoner the officer in charge may order his removal to a hospital on the advice of a medical officer or at his own discretion in case of emergencies;

(d) A prisoner may be confined by means of mechanical restraints e.g. handcuffs, if the prisoner has to be removed from one place to another and the officer in charge considers it necessary, for the safe removal of such prisoner.

170. In order to ensure that prison officers understand provisions relating to the treatment of prisoners, all newly recruited officers are sent for a six-month training programme at the Prisons Staff College where the treatment of prisoners is one of the core courses for such officers.

171. Section 111 of the Prisons Act states that:

- “(i) No prisoner shall suffer solitary confinement or a reduced diet unless the medical officer has after examination certified his opinion that the prisoner is physically and mentally fit to undergo solitary confinement or to receive a reduced diet for the period awarded.” (Under regulation 23 of the Prisons Regulations, the cell must also be certified fit for the purpose by a medical doctor);
- “(ii) No prisoner shall continue to suffer solitary confinement or a reduced diet where the medical officer has after examination certified his opinion that the prisoner is physically or mentally unfit to continue to undergo solitary confinement or to receive a reduced diet”;
- “(iii) Where a prisoner is punished with solitary confinement together with a reduced diet the period of the reduced diet awarded shall in no case exceed the period of solitary confinement awarded”;
- “(iv) No prisoner punished with solitary confinement or a reduced diet shall be put to any form of manual labour during the period of solitary confinement or reduced diet.”

172. Section 116 of the said Act provides that:

“Every prisoner sentenced to death shall be confined in some safe place within a prison, kept apart from other prisoners and placed under constant supervision by a prison officer both by day and night.”

173. Section 60 provides for visiting and medical examination of prisoners under sentence of death. It states that:

“The medical officer shall, on every day on which he visits the prison, visit every prisoner under sentence of death or charged with a capital offence or in solitary confinement and shall ensure that every such prisoner is medically examined at least once every week.”

174. Section 117 provides that:

“No person other than the Minister, a prison officer, the medical officer or other medical practitioner in his place, a minister of religion or other person authorized by the Commissioner shall have access to a prisoner under sentence of death ...”

“... provided that such prisoner may, subject to any reasonable conditions the Commissioner may impose, be visited by his legal advisors and such of his relatives and friends as he may express a wish to see.”

175. Prisoners sentenced to death are not employed on any prison labour. They do not even clean their cells. Their cells are cleaned by selected prisoners serving determinate terms. Although prisoners under death sentence do not take part in rehabilitation programmes such as education classes, learning trade skills, etc., they are offered counselling by prison social workers and chaplains.

176. Under section 131 of the same Act, the judges, all magistrates and such other persons as the Minister may, by notice published in the *Gazette*, appoint for that purpose shall be official visitors to all prisons. These may also include civilian committees (appointed by the Minister) and members of the International Committee of the Red Cross.

177. Under section 79 of the Act provision is made for prisoners to maintain contacts with the outside world. Thus the Commissioner may order that any prisoner be temporarily released from prison, for such period as he shall specify, in order to: (a) visit a dying relative; or (b) attend the funeral of a “relative”. In subsection (1) “relative” means the father, mother, husband, wife, son, daughter, brother, sister or guardian of the prisoner or a person who would, in ordinary circumstances, be the immediate dependant of the prisoner.

178. Under the law, arrested persons are normally interviewed to get information relating to abuse or torture by the police investigating team. If it is found that detainees have been abused or subjected to ill-treatment, the perpetrators are prosecuted.

179. Officials who visit prisons regularly to inspect prison conditions also hear any complaints that the prisoners might have. This serves as a counter-check measure to ensure that any abuses or ill-treatment are identified and reported.

180. The Prisons Act permits the use of reasonable force by prison officers on prisoners. Section 33 (1) provides that:

“Any prison officer may use such force against a prisoner as is reasonably necessary in order to make him obey lawful orders which he refuses to obey or in order to maintain discipline in a prison.

The minimal force is allowed in preventing escapes, prison breaking, riots and in saving lives.”

181. Further, the law recognizes that sometimes the police need to use reasonable force in the execution of their duties. Section 47 of the Criminal Procedure and Evidence Act provides as follows:

(1) “Where a peace officer or other person authorized to arrest a person endeavours to make such arrest, and the offender forcibly resists the endeavours to arrest him, or attempts to evade the arrest, such peace officer or other person may use all means necessary to effect the arrest.”

(2) “Nothing contained in this section shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.”

182. In *Makwati v. State* 1996 BLR 682, the appellant was a member of the Special Support Group (SSG) of the Botswana Police Service. Some police officers had been assaulted during the night, and the following day, the appellant and others went to look for persons who had assaulted their colleagues and the deceased was one of the suspects. The appellant was in possession of an AK-47, and when he sought to arrest the deceased, the latter brushed aside the appellant’s

firearm and ran away, and the appellant fired three shots from his AK-47 in automatic mode from behind the deceased, all of which struck him. There were no warning shots fired, and it was during daylight and there were many police officers surrounding the deceased's yard. The court held that the appellant had gone far beyond the limited protection afforded by section 47 of the Criminal Procedure and Evidence Act in shooting the deceased with an AK-47 on automatic mode. The appellant was convicted of manslaughter.

183. There are a total of seven complaints by prisoners that were recorded during the reporting period. In one case the officers involved were subjected to administrative disciplinary proceedings and ended up with one third of their salaries being cut. The other two were tried under criminal law. In one case, the officers involved were prosecuted. However, they were all discharged and acquitted by the court.

184. In both *Thebe* and *Makwati* cases cited above, investigations were carried out by police officers. The accused persons were police officers. They were investigated by other police officers and in both cases the accused persons were convicted.

185. Under the law, when a prisoner awaiting trial or a suspect complains that he was tortured or ill-treated by the police while in their custody, the normal procedure is that a case is opened and investigations are thoroughly carried out. If at the end of the investigations it is revealed that indeed the allegations are true, the implicated officer is subjected to criminal proceedings or administrative disciplinary proceedings depending on the gravity of the offence.

186. Corporal punishment in schools is allowed by the Education Act. It should be noted, however, that corporal punishment should be instituted as a last resort. Further, there are regulations in the Education Act that govern its administration. These include persons who may administer corporal punishment, the manner of administering it and record keeping. According to the Act, only the head of school has authority to administer corporal punishment. A teacher, boarding-school master, matron or parent can only administer it after being authorized by the head of school or the permanent secretary. It should also be administered in the presence of another member of the staff of the school at which the pupil is enrolled. According to the regulations, corporal punishment must be moderate and reasonable in nature and shall be administered on the palm of the hands or across the buttocks with a light cane, not more than one metre long and not more than one centimetre in diameter and no punishment shall exceed five strokes. No male teacher except the head of school shall inflict corporal punishment on female learners. In addition, all schools should keep a register of corporal punishment in which the following details should be recorded: (a) name of the student; (b) date of the punishment; (c) ground for the punishment; (d) name of the person who administered the punishment.

187. The register should then be signed by the person who administered the punishment and the observer. This register should be made available to school inspectors on request. However, in reality these rules are not strictly adhered to.

188. The conditions and procedures for providing psychiatric care are outlined in the Mental Disorder Act (Cap 63:02 in section 5), which states that: "in order for a patient to be admitted in a mental hospital an application must be made to the District Commissioner by the wife or husband or other relative of the patient, or any other person who has attained the age of 21 years".

189. Patients detained at a mental institution fall into two categories:

- (a) Those who are detained under the Mental Disorders Act for civil patients; and
- (b) Those detained under the Criminal Procedure and Evidence Act for mentally abnormal offenders.

190. Health workers detain patients under the Mental Disorders Act if they:

- (a) Are suicidal, homicidal or in any way dangerous to self or others;
- (b) Have committed or attempted to commit a crime of serious nature;
- (c) Are unable to guard self against common physical dangers or look after self;
- (d) Require skilled medical attention or need care.

No person is detained in the institution or elsewhere simply on the grounds of being mentally disordered or defective except by virtue of the provisions of these Acts.

191. A Mental Health Board constituted under the direction of the President exists as an external measure to prevent abuse of patients. The Board visits each institution every six months and on each visit, members give personal observation to every patient and inspect every ward, kitchen and the places where patients are ordinarily occupied which in this case is the Occupational Therapy Department. The Board reports the results of its visits and inspections to the Director of Health Services. The Board may be called upon by the Minister to make suggestions and observations as well as recommendations to the Director regarding the welfare of the patients.

192. It is also required by law that the Medical Superintendent of the institution must report annually to the Director of Health Services about the mental and physical condition of the detained patients.

193. The Board investigates any complaint raised by patients. In this regard, the Lobatse Mental Hospital recorded 10 formal complaints in the last 10 years and those were resolved at hospital management level and the Ministry of Health level. One proceeded to the Office of the Ombudsman and was resolved at that level. It should be noted that the Botswana Centre for Human Rights (Ditshwanelo) also advocates for the patients.

194. Patients have the services of a *curator bonis*. This is a mechanism used for the protection of a patient's property. The District Commissioner upon the issuance of a reception order, appoints a *curator bonis* to safeguard the property of the patient and prevent alienation of the patient's property.

195. There is also the question of clinical trials. The trials are dealt with briefly under regulation 18 of the Drugs and Related Substances Act, No. 18 of 1992. This regulation defines clinical trials of drugs as studies in human beings or animals in order to systematically generate new or verify existing information about their efficacy and their side effects, and also studies relating to their absorption in, metabolism and excretion from the human or animal body.

196. Regulation 18 (2) provides that any person wishing to conduct a clinical trial of a drug shall submit to the Director of Health Services an application signed by the applicant, and if the Director approves he shall issue a written authorization permitting the applicant to conduct such trial, with or without such conditions or directions as he may specify.

197. Sub-regulation 3 specifically discusses the issue of protection of human subjects by specifying that “to ensure protection of the general public against any risk or adverse effects from the clinical trial of any drug, the Director shall monitor the trial from the beginning to the end so as to satisfy himself that all specific and general conditions or directions subject to which the trial was authorized are being strictly observed by the person conducting the trial, and that to all intents and purposes the trial will achieve its aims and objectives”.

198. There is also provision for termination or suspension of the trials by the Director. This is specifically pointed out under regulation 18 (4) which states that “If at any stage during the clinical trial of any drug, the Director is satisfied that, having due regard to the initial risks, discomforts or other adverse effects caused to persons taking part in the trial, it is in the public interest immediately to stop or suspend the trial, he may, in writing so notify the person conducting the trial, who shall immediately comply with such notice.”

199. Regulation 18 (5) provides that where a clinical trial is to be conducted in a hospital or other medical institution, the application therefor shall be countersigned by the medical superintendent, or by a senior medical officer of comparable rank of such hospital or medical institution. There is a fairly limited discussion of clinical trials in the Act as at the time it was enacted there was very little in the way of clinical trials-related health research taking place in the country. With the prevalence of HIV/AIDS and the presence of a number of research institutions in the country, the amount of operational and clinical research being conducted has increased considerably in both quality and complexity.

200. The Ministry of Health has instituted a Health Research and Development Committee that performs the function of sanctioning research and also being an ethical review board. The Health Research and Development Committee subscribes to the “Belmont Principles” or basic research principles of respect for persons, beneficence and justice. Detailed research protocols are to be submitted prior to the granting of permission to conduct research, particularly research involving drugs and human subjects. Particular attention is paid to respect the autonomy of the participant and their freedom of choice to participate or not at any time in the conduct of research. Written informed consent is required for participation in clinical trials.

201. It is recognized, however, that there is a need for much better and more extensive documentation of policies and regulations governing research, regulation of research, as well as enactment of more comprehensive legislation to cover this important and growing area. Often research organizations that operate in the country involve external partners involved in collaborative research with researchers or institutions from Botswana. As far as possible international norms on collaborative research are adhered to, e.g. ethical review boards in the home country of the collaborating researchers or institutions must also authorize the research. Further, the research must ensure that patients are not exposed to standards lower than the standard of care in the country seeking to answer a particular research question.

## Article 8

202. The Constitution specifically provides for protection from slavery and forced labour. Section 6 thereof provides as follows: no person shall be held in slavery or servitude; no person shall be required to perform forced labour. For the purposes of this section, the expression “forced labour” does not include:

(a) Any labour required in consequence of the sentence or order of a court;

(b) Labour required of any person while he is lawfully detained that, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place in which he is detained;

(c) Any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;

(d) Any labour required during any period of public emergency or in the event of any other emergency or calamity that threatens the life and well-being of the community, to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation; or

(e) Any labour reasonably required as part of reasonable and normal communal or other civic obligations.

203. Further, section 256 of the Penal Code provides that: “Any person who kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, is guilty of an offence and is liable to imprisonment for a term not exceeding 10 years.”

204. Section 260 of the said Code states that: “Any person who detains any person as a slave against his will is guilty of an offence and is liable to imprisonment for a term not exceeding five years.”

205. Furthermore, section 261 provides that: “Any person who buys, sells, or disposes of any person as a slave, or who traffics or deals in slaves, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.”

206. Section 262 states that:

“Any person who unlawfully compels any person to labour against the will of that person is guilty of an offence.”

“However, the provisions relating to slavery and forced labour are cast in general terms and not specific to children e.g. issues of child labour.”

207. Botswana does not have any laws that permit compulsory military service. Even in practice there are no such cases. Moreover, the legislation does not address issues of drug trafficking.

208. It is clear that the law, particularly Section 6 (2) of the Constitution, prohibits forced labour. However, there are exceptions under the Prisons Act as reflected in section 91 (1) of the Prisons Act, which provides that:

“Prison labour shall not be afflictive.”

- (i) “Sufficient work of a useful nature shall be provided to keep every prisoner who is required to work actively employed for a normal working day”;
- (ii) “So far as is reasonably practicable, the work provided shall be such as will maintain or increase the ability of the prisoner to earn an honest living after his release from prison”;
- (iii) “Within the normal limits of discipline, the wishes of the prisoner shall be taken into account in deciding the type of work to which he is allocated”;
- (iv) “In order to prepare a prisoner for the conditions of normal occupational employment, the organization and methods of work shall resemble, as nearly as is reasonable, those of similar work outside prison.”

“Every convicted prisoner shall be given, within or without the precincts of the prison, such employment as the commissioner may direct. Provided that the medical officer may, after the examination of a prisoner, order on medical grounds that the prisoner shall be exempt from such employment for such period of time as the medical officer shall specify.”

209. Section 94 (1) of the Prisons Act provides for the employment of prisoners outside prison other than by public authorities. Subsection 3 goes further to say that “a prisoner employed under this section shall be paid for his work in accordance with any prescribed earnings scheme instituted in the prison by the Commissioner”. The legislation does not impose hard labour as a form of punishment.

210. Section 96 of the Act states that:

“Notwithstanding the other provisions of this Act or any other law, an offender who has been sentenced by any court to a term of imprisonment not exceeding six months (whether that term consists of a single punishment or punishments running concurrently or consecutively) or who has been committed by any court for non-payment of a fine not exceeding BWP 400 (\$80.00), may, by order of the court and with the consent of the offender, be employed under the immediate control and supervision of a public authority on public work or service carried on outside a prison.”

211. In terms of section 97 of the Act, the order can also be given by the Commissioner of Prisons or an official visitor, still with the consent of the offender.



212. The conditions of extramural labour are set out under section 99, which provides that:

(1) The public authority under the immediate control and supervision of which an offender is employed under this part shall:

- (a) Determine the number of hours the offender shall work each day;
- (b) Provided that no offender shall be required to work more than eight hours a day;
- (c) The interpretation clause of the Employment Act defines forced labour as:

“any labour exacted from a person under the threat of a penalty and which has not been voluntarily given”.

213. Forced labour is also specifically prohibited under the Employment Act. Section 71 thereof provides that:

“Any person who exacts or imposes forced labour or causes or permits forced labour to be exacted or imposed for his benefit or for the benefit of any other person shall be guilty of an offence and liable to a fine not exceeding BWP 2,000 (\$400.00) or to imprisonment for a term not exceeding 18 months or to both.”

214. Section 72 further provides that:

“Any public officer who puts any constraint upon the population under his charge or upon any individual member of that population to work for private individual, company or association shall be guilty of an offence and liable to a fine not exceeding BWP 2,000 (\$400.00) or to imprisonment for a term not exceeding 18 months or to both.”

215. The courts do not make any orders relating to work or service for persons under detention. The only work or service that persons under detention carry out is the normal day-to-day work that is carried out by prisoners and this includes sewing, carpentry, upholstery, etc. It is usually the kind of work that equips the prisoners with skill. Furthermore there is no work or service imposed on persons under conditional release.

216. Section 149 of the Penal Code, together with its 1998 amendment, prohibit the procurement of any person for purposes of prostitution either in Botswana or elsewhere. Sections 155 and 156 of the Penal Code also provide that any person who knowingly lives wholly or in part on earnings of prostitution or any woman who aids, abets or compels prostitution of another woman for gain is guilty of an offence.

### **Article 9**

217. The Constitution provides under Section 5 (1) that no person shall be deprived of his personal liberty, that is to say, he shall not be arrested or detained save as may be authorized by law in any of the following cases:

- (a) In execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he has been convicted;
- (b) In execution of the order of a court of record punishing him for contempt of that or another court;
- (c) In execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
- (d) For the purpose of bringing him before a court in execution of the order of a court;
- (e) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana;
- (f) Under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years;
- (g) For the purpose of preventing the spread of an infectious or contagious disease;
- (h) In the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
- (i) For the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another;
- (j) To such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Botswana in which, in consequence of any such order, his presence would otherwise be unlawful; or
- (k) For the purpose of ensuring the safety of aircraft in flight.

218. The subsequent subsection provides:

- (i) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention;

- (ii) Any person who is arrested or detained:
- (1) For the purpose of bringing him before a court in execution of the order of a court; or
  - (2) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial;
  - (3) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person.

219. Any victim of unlawful arrest or detention has an enforceable right to compensation, which can be realized through legal action, i.e. the victim going to court to sue the Government. The court then decides on the unlawfulness of the arrest or detention or if it is proved, the court orders compensation.

220. Section 10 of the Constitution provides that:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.”

221. However, in practice this has not been the case, particularly because of the serious backlog of cases. But courts are also strict on the notion of “a trial within reasonable time”, with some cases having been dismissed on the grounds that reasonable time has lapsed.

222. A case that illustrates the above point is *The State v. Merriweather Seboni* 1968-1970 BLR 158 (HC). The accused was arrested on 31 December 1967. Thereafter, due to various factors including administrative inefficiency on the part of organs of the State, his recommittal for trial took place only in February 1969. In recommitting him for trial, the Magistrate purporting to act in terms of Section 18 (3) of the Botswana Constitution, referred the question of delay in bringing the accused to trial to the High Court for determination. It was held that there was undue delay in bringing the accused to trial and the administrative deficiencies which resulted in the delay could have been avoided. It was further held that the detention of the accused and the delay in the proceedings were in contravention of Section 10 of the Constitution.

223. The law makes provision for persons deprived of their liberty by arrest/detention to have the right to go to court so that the court decides without delay on the lawfulness of his detention and orders his release if the detention is unlawful.

224. When a person is charged with a criminal offence before a Magistrate Court, and he is detained, section 111 (1) of the Criminal Procedure and Evidence Act provides that he can only be detained for 15 days; thereafter, the court may *mero motu* admit him to bail, or extend his remand depending on the circumstances of that particular case. So in Botswana there are no laws which provide for prolonged detention without trial.

225. Section 36 of the Criminal Procedure and Evidence Act states that:

- (i) “No person arrested without warrant shall be detained in custody for a longer period than in all the circumstances of the case is reasonable; and such period shall not (subject to the provisions of subsection (2)) unless a warrant has been obtained for the further detention upon a charge of an offence, exceed 48 hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court having jurisdiction in the matter.”
- (ii) Unless such person is released by reason that no charge is to be brought against him, he shall, as soon as possible, be brought before a Magistrate’s Court having jurisdiction upon a charge of an offence.

Section 36 (4) provides for the right of a person to be informed at time of arrest of reasons for his arrest by stating that where: “a person effects an arrest without warrant, he shall forthwith inform the arrested person of the cause of the arrest.”

226. Persons awaiting trial have a right to be granted bail; however, this provision has exceptions as can be seen in section 104 that states that:

“Every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of the Magistrate:

Provided that:

The refusal by the magistrate who has committed any person for trial, to grant such person bail shall be without prejudice to such person’s rights under section 113 (which provides for appeal to High Court against refusal of bail); and

The Magistrate may admit to bail a person under the age of 18 committed for trial on a charge of murder.”

227. Section 16 of the Constitution provides for a person deprived of his liberty to contact a lawyer. It states, inter alia, in subsection 2 that:

When a person is detained by virtue of such an authorization [i.e. on measures to limit personal liberty when the country is at war] as is referred to in subsection (1) of this section the following provisions shall apply:

[...]

(d) He shall be afforded reasonable facilities to consult and instruct, at his own expense, a legal representative and he and any such legal representative shall be permitted to make written or oral representations or both to the tribunal appointed for the review of his case.

228. Furthermore, Section 102 (1) provides that: “The friends and legal advisers of an accused person shall have access to him, subject to the provisions of any law or regulations relating to the management of the gaol.”

229. In such cases, proceedings before the courts are usually regulated by common law and the Criminal Procedure and Evidence Act.

230. In criminal matters, the Criminal Procedure and Evidence Act is used to govern how arrests, searches, application for bail are conducted. It also deals with indictments and summary trials.

231. In civil cases, rules of court for both the High Court and Magistrate Court generally regulate the proceedings.

#### **Article 10**

232. The Botswana Prisons Regulations have been drawn up to ensure that the protection from inhuman and degrading treatment is extended to people who have been deprived of their liberty.

233. Formal structures are in place to ensure compliance with international standards on the treatment of prisoners. These include official visitors and visiting committees. Prisoners can lodge complaints to these bodies in respect of their treatment, prison conditions and other related matters. They may also lodge complaints with the Commissioner of Prisons and the Minister. They are also allowed to make representations to the Ombudsman, and letters to the Ombudsman are not to be censored by officers as required by law.

234. One convicted prisoner has recently sought to enforce the right to access an official visitor and obtained a High Court order to that effect (see *Kemokgatla v. Attorney-General*).

235. Section 7 (1) of the Constitution provides that, “No person shall be subjected to torture or inhuman or degrading punishment or any other treatment.”

236. Regulation 3 (c) of the Prisons Regulations specifically stipulates that one of the principles guiding prison officers is that, at all times, the treatment of convicted prisoners shall be as such to encourage their self-respect and sense of personal responsibility, so as to rebuild their morale, to inculcate in them the habit of good citizenship and hard work, to encourage them to lead a good and useful life on discharge and to fit them to do so.

237. Section 46 of the Prisons Act outlines offences for which prison officers may be held liable. For instance, section 46 (1) and (L) makes it an offence for an officer to use unwarranted violence against any person in custody. Also, section 46 (I) (m) makes it an offence for an officer to use any weapon on a prisoner unless authorized by law to do so.

238. Punishments for offences under section 46 are discretionary and they range from reprimand, loss of salary, withholding or deferment of any increment of salary, reduction in rank to dismissal from service. The punishments are prescribed in sections 47 and 48 of the Prisons Act.

239. For example, one case in which prison officers had assaulted prisoners was dealt with under the internal disciplinary procedure. The officers involved were found guilty and were each fined one third of their salary for a month.

240. The other two cases were dealt with in the Magistrate Courts. However, officers involved were not found guilty, and were thus acquitted and discharged.

241. Generally, all prisoners are given equal treatment in line with the constitutional principle of equality before the law.

242. The separation of accused persons from convicted persons is provided for in regulations 4 and 5 of the Prisons Regulations. A remand prisoner may be provided with employment should he elect to perform it and shall be paid in accordance with a scale to be fixed by the Commissioner of Prisons. A remand prisoner is allowed to see a registered medical practitioner of his/her own choice on any weekday during working hours in the prison (see regulation 69), wear their own clothing and do hairstyles of their liking. Remand prisoners are not required to engage in prison labour. Visits to remand prisoners are unlimited.

243. However, there are different conditions for unconvicted prisoners charged with capital offence. These prisoners are kept under special observations at all times; all their letters are examined by the officer in charge.

244. A new facility has recently been established for illegal immigrants or persons arrested for being in the country unlawfully. It is the only centre in the country, and it has the holding capacity of 504 inmates. Immigrants at the centre are entitled to unlimited visits by friends and relatives. They also receive visits from diplomats representing their countries. Before the centre was built, immigrants or persons arrested for unlawfully being in the country were held in prisons as immigration detainees and were entitled to essentially the same rights as now.

245. As far as the separation of juvenile persons is concerned, the country is guided by the Children's Act of 1981 and Prisons Regulations. All prisoners under the age of 18 are treated as juveniles. They are held separately from adult prisoners.

246. Presently, there is only one boys' prison in the country and its holding capacity is 120 inmates. As the number of young offenders is on the increase, a second facility is under construction and was to be completed in the last quarter of 2003. It would accommodate juvenile offenders who hitherto, were accommodated in an overcrowded facility. Admittedly, there is no prison for young female offenders and that is solely because there is no problem of crime by young female citizens.

247. Young offenders are rarely committed to prisons to await trial. But, where they are admitted, prison social workers take it upon themselves to ensure relatives of such prisoners are informed of their detention.

248. Young offenders are given literacy classes or even secondary education depending on their circumstances. They are given instructions in basic agriculture and trade skills. As indicated in the Botswana country report to the Committee on the Rights of the Child (CRC/C/51/Add.9), a school of industry is under construction. The first phase of the school will cater to male offenders only and female offenders will be catered to in the second phase of the programme. Like adult prisoners, juveniles are given counselling by social workers and chaplains.

249. Over the past three years young offenders have been assisted to seek placement at schools, and have been placed in various institutions, colleges and other training institutions on release from prison. But much depends on how far a prisoner has gone with programmes offered in prison. During training in prison, juveniles are exposed to citizen empowerment schemes and how they may benefit under the schemes.

250. Juveniles are assisted to locate their relatives by prison social workers immediately after admission into prison so that by the time they are released, there is already contact with their relatives. Where possible, no prisoner should lose ties with his or her family and community.

251. Section 89 of the Prisons Act provides for the training and rehabilitation of prisoners. This section requires that the training and rehabilitation of convicted persons should be aimed at assisting them to lead good and useful lives. In this regard, educational and vocational facilities are provided, special attention is given to illiterate prisoners and every prisoner is encouraged and assisted to maintain such relations with persons and agencies outside prison as may in the opinion of the officer in charge best promote the interest of the prisoner's family and his own social rehabilitation.

252. As of the 16 July 2003, prisoners were trained and examined as shown in table 3 below.

**Table 3**

**Training for prisoners**

Trade	Number of prisoners trained
Carpentry	221
Upholstery/leather	204
Welding	46
Tailoring	59
Pottery	16
Blacksmithing	6
Building	200
Bible studies	300
Bible study groups	400
Literacy classes	700
Primary-leaving classes	100

253. Within the above period, some of those released have become successful and are contributing to the economy of the country. Three ex-prisoners are leading churches, seven are running their own workshops in carpentry and upholstery, three are running their own welding workshops and two are running their own construction companies.

254. Regulation 57 of the Prisons Regulations stipulates that every convicted prisoner shall be engaged in useful work depending on their sex and physical fitness. No prison work is done, except for keeping the prison clean and preparing food on Sundays and public holidays.

However, an officer in charge is permitted in regulation 62 (2) to make special arrangements for the observation by any class of prisoners of religious and national festivals peculiar to such class of prisoners.

255. Conjugal visits are not allowed. However, convicted prisoners are allowed visits by friends and relatives for 20 minutes each month. They may also write and receive one letter a month. They may also be granted special visits (see regulations 38 and 45 of the Prisons Regulations). Visits of priests and lawyers are almost unregulated. In fact, representatives of different churches are allowed to visit and to preach to prisoners, and prisoners are not forced to attend sessions conducted by such churches. They are allowed to practise religions of their choice.

256. Diplomats residing in Botswana and those accredited to the country are allowed to visit prisoners from their countries. Members of the International Committee of the Red Cross (ICRC) are allowed to visit prisoners and their last visit was in September 2002.

257. Recreational facilities are provided for prisoners at public expense. Some of the facilities given to prisoners are cards, balls, chess, draughts, Monopoly, etc. Regulation 37 of the Prisons Act allows all prisoners to engage in physical exercises.

258. All prisoners are allowed unfettered access to free medical care (see section 56 of the Prisons Act and regulation 11 of the Prisons Regulations).

259. Despite the fact that HIV/AIDS is rampant in Botswana, condoms are not allowed in prisons. Segregation of prisoners means that there is no way in which males and females can interact intimately. Distribution of condoms in prison would therefore contradict the law against homosexuality.

260. In 2000, the Prisons Act was amended to allow prisoners who are seriously indisposed, especially those suffering from terminal illnesses, to be released from prison to the care of relatives at home. Between 2000 and April 2003, 85 prisoners were released under this provision.

261. Regulations 31, 32 and 33 of the Prisons Regulations stipulate that all prisoners should be provided with quality clothing and bedding. In fact, all unconvicted prisoners are allowed to use their own clothes.

262. All prisoners are provided with food of sufficient quality and quantity (see regulation 34 of the Prisons Regulations). Unconvicted prisoners are allowed to have food items from outside prison from relatives and friends.

263. The following are offences for which a prisoner may be disciplined: mutiny; escaping; assaulting a prison officer; taking hostage; and possession of a weapon or assault. These are considered major prison offences. Minor offences include disobeying orders, being idle, using



abusive or threatening language, damaging prison property or possession of prohibited articles (see Prisons Act, sections 104-105). Every prisoner charged with an offence is entitled to defend himself against the charge.

264. The punishment meted on prisoners depends on the gravity of the offence and they can include solitary confinement, reduced diet, forfeiture of privileges or corporal punishment in extreme cases (see Prisons Act, sections 108-109).

265. As provided for in section 110 (3) and regulation 52 of the Prisons Regulations, a prisoner may undergo solitary confinement. Visits to a prisoner under solitary confinement are restricted to prison officers.

266. A condemned prisoner is kept apart from other prisoners. Only the Minister, a prison officer, a medical officer, a minister of religion or other person authorized by the Commissioner of Prisons can visit. A visit by any person other than a minister of religion should take place in the sight and hearing of at least two prison officers.

267. Prisoners under this category are at liberty to appeal to the Minister should they feel aggrieved by any decision or conditions imposed on them (Prisons Act, 115 and 116).

268. Female prisoners are detained in separate facilities from male prisoners in such a manner as to ensure that there is absolutely no communication. They are placed under the charge of a female prison officer.

269. The number of women prisoners who are mothers of young children is very negligible. Therefore, where this happens, children are allowed to stay with their mothers until they are 2 years old. The women's prisons in Botswana do not generally have maternity facilities as the numbers are often too small to justify their provision.

270. As a matter of policy, nursing mothers do not engage in hard labour. The Government buys the baby's milk and other necessities. Family welfare educators and social welfare officers assist in the upkeep and welfare of the child.

### **Article 11**

271. The laws of Botswana do provide for civil imprisonment. Order 53 of the High Court Rules makes provision for imprisonment for debt. But section 23 of the High Court Act states that, "no writ of civil imprisonment for non-payment or non-satisfaction of any judgment can be granted or issued", if the person sought to be imprisoned proves to the satisfaction of the Court that he "has no property or means sufficient to satisfy in whole or in part the said judgment or decree".

272. In the case of *Noor and Others v. Botswana Corporate Bank* (1999) 1 BLR 443, the Botswana Corporate Bank (BCB) obtained judgement against the defendant for a substantial amount of money. Subsequently, BCB issued a summons for civil imprisonment against the defendant. In argument before the court, one of the issues that were raised was whether the Constitution allowed for civil imprisonment, i.e. whether civil imprisonment was contrary to sections 3 (a) and 5 (1) (c) of the Constitution. On this issue, the court found that the individual's

liberty could be curtailed in execution of a court order to secure the fulfilment of an obligation imposed on him by law. The court found that Section 5 emphasized the liberty of persons and at the same time spelt out the circumstances under which that liberty may be curtailed, and that such curtailment should either be to protect the public interest or rights and freedoms.

273. Since independence, 124 persons have been admitted in prisons as judgement debtors. Judgement debtors are committed to prisons at the instance of their creditors. They are treated more like remands than convicts and are kept in the same cells as remand prisoners. As with unconvicted prisoners, they are not required to engage in any form of prison labour. They are also entitled to unlimited visits by relatives and friends.

### **Article 12**

274. The Constitution provides in Section 14 (1) that every person shall be entitled to freedom of movement, and for purposes of this Section, the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana. Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this Section.

275. Upon ratification of the Covenant the Government made reservations to paragraph 3 of article 12: "to the extent that the provisions are compatible with Section 14 of the Constitution of the Government of Botswana relating to the imposition of restriction reasonably required in certain exceptional instances".

### **Relocation of residents of the Central Kalahari Game Reserve (CKGR)**

276. Recently, the Government has relocated some people from the Central Kalahari Game Reserve (CKGR), most of whom are of Basarwa origin.<sup>7</sup>

277. The CKGR was established as a game reserve in 1961 through the High Commissioner's Notice which was superseded by the current Wildlife Conservation and National Parks Act of 1992. At the time there were about 3,000 people, the majority of them being Basarwa, who lived in the area. Their settlements comprised of small multilingual and multi-ethnic communities. Residents of the game reserve, who subsisted mainly on hunting and gathering, were at the time allowed to settle in the game reserve. Their hunting and way of life were at the time consistent with the preservation of wildlife resources inside the game reserve.

278. The CKGR was established with the view to protect wildlife resources and provide sufficient land for traditional use by the hunter-gatherer communities.

279. Over time, the settlers of the CKGR were abandoning their traditional hunter-gatherer lifestyle in favour of permanent or semi-permanent settlement around or near water sources

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<sup>7</sup> The Basarwa are also sometimes referred to as the Bushmen or the San, however "Bushman" is widely considered to be a derogatory or demeaning term.

provided by the Government to mitigate the effects of recurring droughts. Thus, in 1985 the Government appointed a fact finding mission to investigate the situation in the CKGR with a view to providing information that would facilitate decision-making on environmental protection and wildlife conservation on the one hand and the socio-economic development of the communities on the other. The outcomes were as follows:

280. Locations in the CKGR were rapidly evolving into permanent, settled agricultural communities.

281. The residents of the CKGR had largely abandoned their traditional way of hunting on foot with bow and arrow in favour of guns, horses and four-wheel drive vehicles.

282. The residents were also grazing increasing numbers of livestock inside the game reserve.

283. As a result the Government took a decision in 1986 that:

(a) The boundaries and the status of the CKGR should be maintained as they were at the time of the decision;

(b) The social and economic development of Old Xade and other settlements in the reserve should be frozen as they had no prospect of becoming economically viable;

(c) Viable sites for economic and social development should be identified outside the reserve and the residents of the reserve should be encouraged, but not forced, to relocate to those sites; and

(d) That the Ministry of Local Government and Lands should advise the Government on the incentives required to encourage residents in the reserve to relocate.

284. The relocation was necessitated mainly by the following reasons:

(a) Botswana's National Settlement Policy spells out guidelines through which settlements, both large and small, in the country are developed and provision of services to settlements are determined;

(b) The primary purpose of the parks and game reserves is to conserve the wildlife heritage, but it had become clear that residents of the CKGR were engaging in hunting, arable, pastoral agriculture and other commercial activities which was inconsistent with the aimed purpose (i.e. wildlife preservation); and

(c) Given the fact that the communities were sparsely populated, it was not economically sustainable for the Government to continue to provide essential services in the areas inside the CKGR.

285. Prior to each relocation, extensive consultations, which began as early as 1985, were carried out with all stakeholders including the inhabitants of all settlements in the game reserve, NGOs and other interested parties, leading to a large number of the inhabitants agreeing to relocate. Due compensation has been paid to families that moved out and the Government assisted them in moving their properties.

286. The relocation began in 1997 when 1,739 people relocated to the new settlements of New Xade and Kaudwane. A total of 1,239 people relocated to New Xade and 500 to Kaudwane. Following further consultations, another group agreed to relocate in 2001. According to the Population and Housing Census, there were 689 people who remained in the CKGR; 348 people relocated to G'Kgoisanekeni and 179 to Kaudwane in the Gantsi and Kweneng districts respectively between February and June 2002. Officially, 17 had remained after the relocation exercise which ended in June 2002.

287. The relocation has ushered in discomfort in and outside the country and complainants maintain that the policy guiding the integration of Basarwa in the development plans of the country falls short of considering cultural dynamics of Basarwa. This has often caused criticism against the Government.

288. The Basarwa have their own views about the relocation exercise. First, Basarwa reject the argument that they are causing depletion of the wildlife populations. They maintain that they have lived for thousands of years with the animals without any problems. They see it possible that they can effectively and responsibly co-exist with the animals and manage the present wildlife areas. Secondly, they argue that their movement out of the CKGR was out of fear due to intimidation practices of the authorities. Thirdly, they argue that they have not been consulted as to their relocation. Lastly, they argue that any intended development by the Government could follow them in their ancestral land (CKGR).

289. Some Basarwa of the CKGR have since taken the Government of Botswana to court challenging the decision to relocate them as well as the termination of essential services in the game reserve. The case is ongoing.

290. Human rights groups such as Ditshwanelo hold the view that the Government was ill-informed in relocating residents of the CKGR. In their view, the Government has always maintained that one of the reasons for the removal of the residents of the game reserve is to allow them access to development.

291. In laying out their position on the CKGR issue, Ditshwanelo has said that the termination of services at the CKGR by the Government on 31 January 2002 was unlawful. The centre expressed its view in the following words:

“Ditshwanelo believes that the decision of the Government to terminate basic and essential services to the residents inside the Game Reserve is wrongful and unlawful. We believe that it was a deliberate attempt by the Government to force the residents out of the Reserve. It occurred at a time when the Negotiating Team and the Government of Botswana were engaged in discussions, in good faith, concerning sustainable environmental use of the CKGR by communities in the Game Reserve.”

292. The negotiating team was formed by the residents and the following NGOs: First People of the Kalahari (FPK), the Working Group for Indigenous Minorities in Southern Africa (WIMSA), the Botswana Council of Churches (BCC), and Ditshwanelo.

293. Ditshwanelo continues to call upon the Government to actively engage in a constructive process of negotiations with the negotiating team. Ditshwanelo has called for a return to negotiations, in May 2002 in its statement to the thirty-first session of the African Commission on Human and Peoples Rights (ACHPR); in August 2002 in its alternative report to the Committee on CERD; in December 2003 in its statement to the thirty-fourth session of the ACHPR; in March 2004 during the BOCONGO-sponsored on Basarwa; in May 2004 during its presentation at the CIVICUS World Assembly and in all press statements. This is because Ditshwanelo believes that for development to be effective, it must be people-centred. This entails locating people at the centre of processes which recognize civil, political, economic, social and cultural aspects of their lives. This is an alternative to the current development approach used by the Government. Development should be more than the provision of roads, clinics and schools.

294. Despite this criticism, the relocation of the Basarwa has resulted in expanded services to their communities. It should be noted that the Government of Botswana has provided basic social services such as education, health facilities, shelter and clean water, which were not previously available. The Basarwa also continue to enjoy special hunting rights and are encouraged to observe their unique cultural practices such as painting, traditional medicine, tracking, music and dance.

295. Some Basarwa have made an application to court in which they are seeking to return to re-inhabit the CKGR; they challenge the Government's decision to relocate them. The case is ongoing.

### **Article 13**

296. The Botswana Constitution guarantees all individuals, irrespective of origin, residing in the country the rights recognized in the Covenant (see article 2 of this report). There, however, are provisions for expulsion of aliens for various reasons such as conviction of an offence punishable by imprisonment or where the security of the nation is at stake. Expulsion of an alien out of the country is effected in accordance with Immigration Act, section 25.

297. The power to expel the aliens from Botswana is vested upon immigration officials. However, there is room for appeal to the nearest Magistrate Court. Expelled aliens may also, if they so wish, apply for clemency to the Minister or the President.

298. Failure by an alien to leave the territory within the stipulated time shall lead to removal by an immigration officer or a police officer.

299. Section 25 (1) of the Immigration Act provides that the President may make a deportation order if the alien is convicted of an offence punishable with imprisonment and the court recommends that the deportation order be made or if the President deems it conducive to the public good.

300. Section 25 (4) provides that a deportation order may be made under the hand of the President and the President shall cause the order to be served upon the person to whom it relates and shall state in the order the period that it is to elapse after such service before the order takes effect.

301. Section 25 (5) provides that if the specified period expires before the alien has left, he shall be removed from Botswana by an immigration officer.

302. Illegal immigrants are usually rounded up by the police and other law-enforcement agents. Upon arrest illegal immigrants are put in safe custody before being transferred to the recently constructed Centre for Illegal Immigrants. This is the only facility of this nature in the country and it is located in the northern part of the country. The illegal immigrants are registered at the Centre, and their countries of origin are notified before the deportation is carried out.

#### **Article 14**

303. Section 3 (a) of the Constitution accords every person in Botswana protection of the law. This protection has been interpreted in the *Unity Dow v. Attorney-General* case as meaning equality before the law.

304. Section 10 (1) guarantees any person who is charged with a criminal offence, that, unless the charge is withdrawn, his/her case will be given fair hearing within a reasonable time, by an independent and impartial court of law.

305. In protecting the right to fair hearing, the courts adhere to the principle that “justice must not only be done, it must be seen to be done”. This principle seeks to ensure that there is no likelihood of bias on the part of the judges.

306. In the case of *Ali Khan v. The State* 1968-70 BLR 4, the appellant was convicted of unauthorized entry into the Central Kalahari Game Reserve, contrary to section 2 of the Central Kalahari Game Reserve (Control of Entry) Regulations of 1968. The District Commissioner was the person charged with the administrative responsibilities for the enforcement of the Fauna Proclamation. He was also the judicial officer who convicted the appellant. The appellant’s ground of appeal was that the Magistrate was the District Commissioner in Ghanzi, who was charged with administration of the Act the appellant was alleged to have contravened. On appeal, it was held that the test was not whether there was actual proof of bias, but whether on the facts there might appear to be a likelihood of bias.

307. In practice, however, the hearing of cases has been hampered by problems such as shortage of prosecutors.

308. Section 95 of the Constitution provides that there shall be a High Court with unlimited original jurisdiction. Judges of the High Court are appointed by the President upon the advice of the Judicial Service Commission. The Commission is composed of independent individuals who are not members of the executive except for the Attorney-General. Members of the Commission are the Judge President of the Court of Appeal, the Chief Justice, a nominee of the Law Society, a member of the community and the Attorney-General.

309. The retirement age of judges is provided for in Section 97 (1) of the Constitution. Section 97 (2) provides that a judge of the High Court can only be removed from office for serious misconduct and inability to perform duties of the court.

310. Section 97 (3) provides that if the President considers that the question of removing a judge of the High Court under this Section ought to be investigated then he shall appoint a tribunal consisting of at least three people to inquire into the matter, report on the facts thereof and advise the President whether the judge ought to be removed.

311. Section 99 of the Constitution establishes a Court of Appeal which is a superior court of record. It is composed of the President of the Court of Appeal, a number of Judges of Appeal, the Chief Justice and other judges of the High Court.

312. Appointment of judges of the Court of Appeal is similar to that of the High Court and so is the tenure of the office for the judges.

313. There exist Magistrate Courts, which are subordinate to the High Court and are presided over by Magistrates. The jurisdiction of these courts includes civil claims on amount which depends on the seniority of the presiding Magistrate (see part IV of the Magistrate Court Act).

314. The appointment of Magistrates and qualifications for appointment grades is done by the President on the advice of the Judicial Commission.

315. Each tribal area is serviced by a Customary Court. Such courts derive their authority from the Customary Court Act 57 of 1968. The Common Law and Customary Law Act lays down rules which guide the courts in deciding whether customary or common law applies. The courts deal with a wide variety of civil and criminal law.

316. Their criminal jurisdiction is limited and prevents them from dealing with cases such as treason, bigamy, corruption, abuse of office, rape, robbery and other serious offences. Further, they do not deal with matters such as dissolution of civil marriage, testate succession or insolvency. Legal representation at the Customary Court is not permitted. However, a person has the right to have a case transferred to another court where they do have the right to legal representation.

317. Customary Court is administered by the chief, headman or court president with the assistance of elders in the community. Cases are generally dealt with at the *Kgotla* (a traditional public meeting place).

318. Regrettably, application of the Act regulating the jurisdiction and procedures of the Customary Courts is limited by levels of training of presiding officers, and lack of dissemination, training and awareness-raising amongst the public at large. The Minister may dismiss or suspend, for any period he may deem fit, any member of a Customary Court who appears to abuse his power, to be unworthy or incapable of exercising the same justly, or, for other sufficient reason (section 9, Customary Court Act). The case of *Chief Seepapitso Gaseitsewe v. The Attorney-General and Leema Gaseitsewe*, Civil Appeal No. 5 of 1995, is an example of a situation where a minister has powers to suspend a chief. In this case, the Minister of Local Government and Lands suspended Chief Seepapitso from being Chief of the Bangwaketse on the ground of his unsatisfactory behaviour. The Chief's son, Gaseitsewe, was appointed Acting Chief during the period of his father's suspension. The Chief challenged his suspension and the matter went to the Court of Appeal. The Court of Appeal upheld the suspension.

319. The Constitution provides in Section 10 (2) (a) that every person who is charged with a criminal offence shall be presumed innocent until proven or has pleaded guilty to the charges. It is for this reason the courts are willing to grant bail in most bailable offences (see section 113 of the Criminal Procedure and Evidence Act).

320. The foundation of the principles governing bail application was laid down in the case of *The State v. Gopolang McKenzie* 1968-70 BLR 308. In this case, the court held that in deciding a bail application, the following considerations should be taken into account:

- (a) The nature of the accusation against the applicant and the severity of the punishment which may be imposed;
- (b) The nature of evidence in support of the charge;
- (c) The independence of sureties if bail were to be granted;
- (d) The prejudice to the accused if he is not admitted to bail;
- (e) The prejudice to the State if bail is granted.

The accused, Gopolang McKenzie, was a headman and an influential member of his village, facing a charge of murder. After taking into account the criteria referred to above, the bail application was refused.

321. The courts take the presumption of innocence and the provisions of Section 10 (2) (a) of the Constitution very seriously. "They do not like to deprive a man of his freedom while awaiting trial as he may be innocent" (see *Daniel Baiketsi and Another v. State H.Ct. Misc Application No. 4 of 1992*, per Mokama, then Chief Justice). In this case, the seven accused were arrested in February 1992 on a holding charge of being in possession of arms of war. The Public Prosecutor applied for their remand in custody, as investigations were ongoing. The accused applied for bail, and the Magistrate rejected their application. Their next mention date was March 1992. On that date the Public Prosecutor applied for their remand once again. They kept being remanded back into custody until November 1992 with the Public Prosecutor always arguing that investigations were ongoing. In November 1992, before a different Magistrate, the Magistrate indicated that the delay had been too long. The Attorney-General prepared a charge indicting the accused persons before the High Court. The accused persons applied for bail, the judge granted a bail application. He held that, "the cardinal rule is that all the accused are deemed innocent until they have been convicted. Even where he is subsequently proved guilty the courts try not to deprive him of his liberty until he has been proved guilty".

322. The Constitution guarantees the right to legal representations (Section 10 (2) (d)) in criminal cases at the defendant's own expense.

323. The Constitution provides in Section 10 (2) (b) and (f) that a person charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he/she understands, be given sufficient time and facilities for the preparation of his defence and be provided, free of charge, with the services of an interpreter if he/she does not understand the language of the charge at the trial.



324. It is provided that, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render continuance of the trial in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

325. The Magistrate Court Act, section 5 (2), provides for interpretation from English, the court language, to the language understood by the parties concerned. However, in civil proceedings the parties may be called upon by the presiding Magistrate to bear part of or the whole of the cost for interpretation where the language understood by the parties or witnesses is not one of the languages commonly spoken within the area of jurisdiction of the court.

326. Proceedings of the courts except with the consent of all parties involved, including the announcement of the verdict, are held in public. Exceptions as provided in the Magistrate Court Act, section 6, subsection (2), are in cases of national security or the welfare of the persons under the age of 18. In circumstances where publicity will prejudice the interests of justice, or the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18, or the protection of the private lives of persons concerned in the proceedings. Section 9 of the High Court Act makes a similar provision.

327. The records and proceedings of every court are in all cases accessible to the public under the supervision of an officer of the court, at convenient times and upon payment of a fee. Section 10 (e) of the Constitution provides that every person “shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution”.

328. Government assistance to criminal defendants who do not have the means is limited to those charged with capital offences. In such cases, *pro-deo* counsel is provided. However the amount paid by the Government is not attractive compared to private sector fees. The Registrar of the High Court has tried to address the problem by decreeing that every law firm should take up one such case a year but this has not resolved the problem of the quality of representation for the needy. The University of Botswana runs a poorly resourced legal clinic in an attempt to fill the void.

329. A number of NGOs have some legal aid programmes for the needy. However, it is acknowledged that some of them have financial constraints.

330. All detained persons including juveniles are given appropriate training and instructions to promote their rehabilitation and reintegration into society (see article 10 of this report).

331. The highest court in Botswana is the Court of Appeal, which is the superior court of record and to whom appeals can be taken from the High Court. The High Court has inherent original jurisdiction to hear and determine civil and criminal proceedings. It acts as an appellate body for the Magistrate Court and the Customary Court of Appeal.

332. Customary Courts are localized (tribal-based), but their decisions can be appealed to a national Customary Court of Appeal whose decisions can be appealed to the Magistrate Court or directly to the High Court.

333. There is no automatic compensation save for an official apology in a situation where a conviction has been reversed or person pardoned on the ground that a new or newly discovered fact shows that there has been a miscarriage of justice and one has wrongly suffered punishment.

334. Section 10 (5) of the Constitution and section 19 of the Penal Code of Botswana provides that “no person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal”. Subsection (6) states that “no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence”.

#### **Article 15**

335. The principle of non-retroactivity is provided for in Section 10 (4) of the Constitution, which states that “no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed”. In practice, courts observe this prohibition.

#### **Article 16**

336. There is no provision in the legislation that stipulates the moment at which legal personality is acquired, however, common law recognizes acquisition of legal personality at birth.

#### **Article 17**

337. Section 9 of the Constitution makes provision for the protection of privacy of all persons in Botswana. Paragraph (1) states: “Except with his own consent, no person shall be subjected to the search of his person or his property or entry by others on his premises.” Moreover, this right may be limited where the law provides for an interference with one’s privacy.

338. There is no definition of “family” or “home” in the law of Botswana. The family, as a basic unit of society, has seen many changes in Botswana. In the past, Botswana lived in extended families where members of the same kin stayed together. Due to the evolving socio-economic situation, this family structure is changing, particularly in urban settings where the emphasis is increasingly on nuclear units. More children are born outside marriage and desertion/divorce rates have increased the number of single parents, especially female-headed families.

339. Section 9 (2) of the Constitution provides that situations where privacy may be violated are:

(a) To serve the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, for the purpose of conducting any census or in order to secure the development or utilization of any property for a purpose beneficial to the community;

(b) When it is necessary to protect the rights and freedoms of other persons;

(c) To allow agents of the Government of Botswana or local government authority or any other body established by law for a public purpose to enter the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or duty;

(d) For the purpose of enforcing the judgement or court order in any civil proceedings, the search of any personal property by order of a court or entry upon any premises by such order.

340. Section 18 of the Constitution provides for redress where an individual alleges that his rights in respect of Section 9 have been violated.

### **Article 18**

341. Section 11 (1) of the Constitution of Botswana guarantees freedom of conscience. It states that “except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience and for the purpose of this Section, the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone, in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance”.

342. The Constitution further provides in its Section 11 (2) that “every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains; and no such community shall be prevented from providing religious instructions for persons of that community in the course of any education provided at any place of education which it wholly maintains or in the course of any education which it otherwise provides”.

343. Section 11 (4) of the Constitution states that “no person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief”.

344. Section 11 (5) outlines conditions under which the enjoyment of this right may be limited. These include: defence, public safety, public order, public morality or public health or for the protection of the rights and freedoms of other persons.

345. In Botswana, registration of churches is provided for under the Societies Act. Section 3 of the Act defines a society as including any club, company, partnership or an association of 10 or more persons, whatever its nature or objectives.

346. In Botswana there is no official religion, however, the dominant religion is Christianity, which is constituted by a number of denominations such as the Methodist, Roman Catholic, Lutheran Church, and Churches of Zion. It is estimated that at least 50 per cent of the population practises indigenous beliefs. There is also a sizable number of Islamic, Baha'i and Hindu faithful. The following categories of religious denominations have registered with the Registrar of Societies: Christian (520); Hindi (2); Islam (Sunnite) (1); Islam (Shiite), (1); Baha'i (1); Sikh (1); and Buddhist (1).

347. All registered societies are required to have a constitution and by-laws as well as rules and regulations consistent with the written laws of Botswana.

348. Registration of an organization may be refused when:

- (a) Such an organization applying for registration is affiliated or connected to an organization(s) outside Botswana, which is of a political nature;
- (b) The Registrar of Societies is not satisfied that the rules of the organization adequately define its membership and provide for the control and management of its affairs;
- (c) The rules of the organization are inconsistent with any written law;
- (d) It appears that any of the objectives of the organizations are likely to be used for unlawful purpose or for a purpose incompatible with peace, welfare and good order in Botswana;
- (e) The name under which an organization is to be registered is identical to or resembles the name of another registered organization so much that it is likely to deceive the public or members of either organization or is inconsistent with any written law.

349. Between 1999 and 2001 the following churches were denied the right to register: the Reconciliation International House of Prayer; the Heaven Assemblies of God (International); and the Jesus is alive Ministry. The Reconciliation International House of Prayer application was turned down on the basis of the fact that the applicant was a fraudster. The other two had furnished false information to the Registrar about membership.

350. Section 8 of the Societies Act provides that “any society aggrieved by the refusal of the Registrar to register it may, within 28 days immediately after the date of such refusal, appeal against the refusal to the Minister and where a society has so appealed it shall not, notwithstanding section 20, be deemed to be an illegal society pending the decision of the Minister on appeal”.

351. Section 20 of the Societies Act stipulates that “every local society, not being a registered society or an exempted society, shall be deemed to be an illegal society”.

352. The Penal Code provides that an unlawful society is one formed for any of the following purposes:

- (a) Levying war on the Government or any part of Botswana;
- (b) Killing or injuring of any persons;
- (c) Destroying or injuring of any property;
- (d) Committing or inciting acts of violence or intimidation; or
- (e) If declared by the President to be a society dangerous to peace and order in Botswana.

353. All societies shall in the manner prescribed make application to the Registrar for registration or exemption from registration under this Act.

### **Article 19**

354. Freedom of expression is guaranteed in Section 12 (1) of the Constitution, wherein it is stated that no person shall be hindered in the enjoyment of their freedom of expression which is inclusive of:

- (a) Freedom to hold opinions without interference;
- (b) Freedom to receive ideas and information without interference;
- (c) Freedom to communicate ideas and information without interference (whether such communication is to the public in general or to any person or class of persons);
- (d) As well as freedom from interference with their correspondence.

355. There are certain restrictions on freedom of expression as captured in Section 12 (2) of the Constitution. These extend to security in the interest of defence, public safety, public order, public morality or public health in cases where there is a need to protect the reputations, rights and freedoms of other persons or preventing the disclosure of information received in confidence, maintaining the authority and independence of courts, regulating educational institutions in the interests of persons receiving instructions therein, regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television, for the purpose of imposing restrictions upon public officers, employees of local government bodies or teachers.

356. Section 90 of the Penal Code provides that any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour is guilty of an offence and is liable to imprisonment for a term not exceeding six months.

357. Section 91 of the Penal Code provides that any person who does any act or utters any word or publishes any writing with intent to insult or to bring into contempt or ridicule: the Arms or Ensigns Armorial of Botswana Government; the National Flag of Botswana; the Standard of the President of Botswana; or the National Anthem of Botswana, is guilty of an offence and liable to a fine not exceeding BWP 500 (approximately \$100).

358. Section 92 (1) of the Penal Code states that any person who utters any words or publishes any writing expressing or showing hatred, ridicule or contempt for any person or group of persons wholly or mainly because of his or their race, tribe, place of origin, colour or creed is guilty of an offence and liable to a fine not exceeding BWP 500.

359. Section 93 (1) of the Penal Code provides that any person who in a public place or at a public gathering uses abusive, obscene or insulting language in relation to the President, any other member of the National Assembly or any public officer is guilty of an offence and liable to a fine not exceeding BWP 400 (\$80).

360. There is no legislative restriction on the importation and distribution of foreign newspapers in the country. In this regard, government ministries and departments subscribe to foreign publications. However, the only restriction that may be imposed would be as per section 178 of the Penal Code, which prohibits the distribution, public exhibition, production of obscene materials.

361. There is no legislation prohibiting the media from publishing and broadcasting news and events, subject to respect for the rights and freedoms of others and for public interest. A mass media communications bill has been drafted and is due to be submitted to Parliament to regulate print media in order to complement the Broadcasting Act. The Broadcasting Act provides for regulation to prescribe a code of practice to be observed by broadcast licensees.

362. There exists a forum called the Botswana Media Consultative Council with representation from the private media and other stakeholders, which provides another avenue to further promote the right to freedom of expression. Its primary mission is to promote and preserve the multimedia in Botswana.

363. The Botswana Telecommunication Authority (BTA) was established in 1996 as a statutory agency with responsibility for licensing telecommunications and broadcasting operators, settling disputes among operators, approving tariffs, promoting and monitoring free and fair competition, allocating and managing the radio spectrum, type approving terminal equipment, and protecting consumers.

#### **Article 20**

364. Section 38 of the Penal Code reads that “any person who without lawful authority carries on, makes preparations for carrying on, or aids in or advises the carrying on of, or preparation for, any war or warlike undertaking with, for, by, or against any person or a group of persons within Botswana” is guilty of an offence and liable for imprisonment for not less than 15 years no more than 25 years.

365. Section 136 of the Penal Code stipulates that any person who destroys, damages or defiles any place of worship or object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any person is likely to consider such destruction, damage or defilement as an insult to their religion is guilty of an offence. Further, section 137, stipulates that, any person who voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremony is guilty of an offence. Additionally, section 140 of the Penal Code makes it an offence to write or utter words with intent to wound religious feelings.

366. By virtue of section 92 (1) any advocacy of national or racial hatred constitutes incitement to discrimination and is prohibited by law. Additionally, section 94 (1) makes it an offence to discriminate against another person and 94 (2) provides that a person discriminates against another if on the grounds of colour, race, nationality or creed he treats such person less favourably or in a manner different to that in which he treats or would treat any other person.

## Article 21

367. Section 13 (1) of the Constitution provides as follows:

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

368. Section 13 (2) of the Constitution makes limitations to the freedoms contained in Section 13 (1) to the extent that, the law in question makes provision that:

- (a) Is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) Is reasonably required for the purpose of protecting the rights and freedoms of other persons;
- (c) Imposes restriction upon public officers, employees of local government bodies or teachers.

369. The Penal Code defines an unlawful assembly as: three or more persons assembled with an intent to commit an offence or to carry out some common purpose, conduct themselves in a manner to commit a breach of the peace or by such assembly provoke other persons to commit breach of the peace.

370. The Public Act regulates and controls public meetings and public processions. Section 4 (3) provides that any person who wishes to convene a public meeting or to form a public procession must make an application to the regulating officer of the area concerned unless such officer is satisfied that such meeting or procession is likely to cause or lead to a breach of peace, he shall issue a permit in writing authorizing such meeting. Any meeting or procession that takes place without a permit issued under section 4 is an offence and persons that take part in such meeting or procession shall be guilty of an offence.

371. As a matter of practice, when permission is sought under section 4 to convene a public meeting or public procession, persons organizing or taking part in the meeting or procession are afforded police escort and protection.

372. With regards to the registration of societies, formation of religious organizations, associations and political parties, there exists a Societies Act governing registration of such entities.

## Article 22

373. The protection of freedom of association is provided for under Section 13 (1) of the Constitution (see a detailed discussion of Section 13 in the discussion relating to article 21 above).

374. There are presently 11 political parties in Botswana. Only three are represented in Parliament, namely, the ruling Botswana Democratic Party (40), Botswana Congress Party (1) and Botswana National Front (3). There exists a forum called the All Party Conference where political parties consult with each other. The forum is a legitimate institution comprising the 11 political parties registered in terms of the Societies Act. The institution affords all political parties the opportunity to discuss issues of national interest and formulate recommendations to Government.

375. There is legal provision allowing for the establishment of NGOs on human rights and other activities. Their activities are duly regulated.

376. The Trade Union and Employer's Organisations Act provides the legal framework for governmental regulation, registration and development of trade unions. Section 2 (1) defines a "trade union" as "an organisation consisting wholly and in part of more than 30 employees the objects of which include the regulation of relations between employees and employers or employers' organisations or between employees and employees".

377. Section 5 of the Act provides for compulsory registration of trade unions. Section 6 requires every trade union formed in Botswana to apply to the Registrar of Trade Unions and Employer's Federations for registration within 28 days of its formation. Every officer of a trade union that fails to apply for registration within 28 days is guilty of an offence (section 8). It is an offence for the union, its offices and its members to operate without being properly registered.

378. Section 6 (1) provides that application for registration must be made on the prescribed form accompanied by:

- (a) Prescribed fees;
- (b) Three printed copies of its constitution;
- (c) A copy of the resolution forming the union;
- (d) Full names of all the members of the union;
- (e) Name, postal address and location of the union's principal office;
- (f) Date of its formation;
- (g) Titles, full names, ages, postal and residential addresses and occupations of signatories to the application;
- (h) Name of every employer or industry of which the union seeks legal recognition under section 50. Particulars must also be given of every negotiating body or body or branch for which the union seeks the recognition of.

379. Section 10 provides the grounds on which the Registrar may refuse to register a trade union:



- (a) The name is identical to another registered union or similar enough to be likely to deceive or mislead;
- (b) The union has not complied with the provisions of the Act;
- (c) The union's constitution is unlawful;
- (d) The union is used for an unlawful purpose;
- (e) Union funds are being used unlawfully;
- (f) Union accounts are not kept in accordance with the Act;
- (g) Within five years immediately before the date of the application an officer of the union has been convicted of an offence under this Act or under the Trade Disputes Act or any offence involving fraud or dishonesty which led to a sentence of imprisonment;
- (h) Any of its officers is not a Motswana citizen;
- (i) Existing registered unions which the Registrar considers to be sufficiently representative of the interests of workers in the industry or trade which the new union is seeking to represent;
- (j) Principal objects are not in accordance with the Act.

According to section 13, an appeal against the Registrar's decision to refuse registration can be made to the High Court.

380. It should be observed that Botswana is a member of the International Labour Organization (ILO).

### **Article 23**

381. The definition and concept of family has already been discussed under article 17. It suffices to note that there is nothing in the legislation pertaining to the protection of the family. However, the traditional system of settling disputes within families is still active to ensure the stability of the family unit. It is government policy to ensure that working married couples employed in the public service are not posted to different working places.

382. Section 14 of the Marriage Act stipulates that "no insane person who is incapable of giving consent to a marriage and no person below the age of 18 years may marry".

383. Section 15 provides that "no minor or person below the age of 21 years not being a widower or widow may marry without the consent in writing of his or her parents or guardian".

384. There are, however, remedies available in instances where consent was not granted. Section 15 (I) provides that where such consent is given by one parent but refused by the other

parent, the minor may apply to a Magistrate Court or to the High Court for consent to the marriage and such matter shall not, for purposes of such application, require the legal assistance of his/her legal guardian.

385. Section 15 (iii) provides that where a minor has no parents or guardian, an administrative officer in the district in which such minor resides may give an order in writing authorizing the marriage of such minor.

386. There are two forms of marriage, that is, marriage executed under civil law and that under customary law. Although not legally recognized under the two systems as a form of marriage, cohabitation is also recognized under the two systems as a union that brings about rights and obligations akin to those of married persons. This is more pronounced in cases of custody, maintenance and inheritance.

387. The Marriage Act regulates the solemnization and registration of marriages, but does not apply to marriages contracted under customary law. Common law marriages can be contracted in or out of community of property, on the other hand; those contracted under customary law are automatically in community of property. Under customary law polygamy is not prohibited.

388. Nothing in the legislation and in practice prohibits marriage on account of nationality, religion, race or creed.

389. The Marriage Act also makes provision for customary, Muslim, Hindu and other religious marriages to be recognized. Section 22 provides that nothing contained in the Marriage Act shall be taken as in any manner affecting or casting doubts upon the validity of any customary, Muslim, Hindu or other religious marriages.

390. Section 23 (1) stipulates that “Parties to a customary, Muslim, Hindu and other religious marriage shall ensure that their marriage is registered within two months of contracting such marriage.”

391. Failure to register such marriages is an offence under section 23 (4) which provides that “Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding BWP 800 (\$160) or to imprisonment for a term not exceeding one year, or to both.”

392. The right to marriage does not exist in the following situations: intermarriage of persons who are related; or a person has already contracted marriage under the country’s Marriage Act unless the previous marriage is dissolved by death or court or annulled by sentence of a court.

393. The Marriage Act provides for certain requirements and procedures for entering into a valid marriage. Section 3 stipulates that “no marriage shall be valid unless within a period of not more than 3 months previous to its solemnisation bans have been published or a special licence has been obtained”.

394. Section 7 (1) provides that “no marriage shall be valid unless solemnised by a marriage officer”. Section 7 (2) provides that the following shall be marriage officers:

- Administrative officers;
- Any minister of religion or person holding a responsible position in any religious denomination or community, whom the Minister has by notice published in the *Gazette* appointed a marriage officer.

395. Cohabitation of men and women without formal marriage exists in the country. This has caused problems especially when couples separate or one dies and a dispute arises concerning the division of property. The traditional attitude in most areas has always been that disputes between lovers who are not married cannot be heard in the *kgotla* (Customary Court). Where one of the parties dies, relatives often dispute over the property. It is generally assumed that most valuable property belonged to the man, and women are often told that since they were not wives they have no rights to inherit. Property disputes between cohabitants are increasingly coming before the Customary Courts. Some Customary Courts appear to have revised their earlier tendency to dismiss cohabitation cases.

396. In *Moswelakgomo v. Kekgaretswe* (unreported) the parties had been living together for 26 years when their relationship came to an end. Although they had never married, they had had a son and built a house together. The woman argued that despite the fact they had never married, she had performed certain duties within the household that indicate that the appellant took her as his wife. Among these duties was the fact that she had played major roles in burying his maternal uncle, paternal uncle and his parents, who had died during that time. She said that the reason for the break-up of their relationship was that the man had now found another woman with whom he wanted to spend his life. The man on the other hand stated that his elders had never liked the plaintiff and that he did not even know her parents. He further said that the plaintiff had grown old while living with him and that he would not get back together with her, but would rather let her live in the house. The court then held that the plaintiff and her child would live in the house. The man then changed his mind and appealed to the Customary Court of Appeal against the decision, saying that it was shocking that the court actually gave his house to a concubine. The court dismissed the appeal on the basis that the relationship between the parties had not been one of concubinage but a closer one, and that the appellant had not built his house on his own so it had not really been his house. The court therefore decided that the way the property had been divided had been the most fair to parties.

397. The Matrimonial Causes Act regulates matters pertaining to the dissolution of marriage. The Act does not apply to marriages contracted under customary law. Any spouse to the marriage can bring an action for divorce on grounds specified by the Act. However, for purposes of establishing jurisdiction in matrimonial cases, a wife must as provided for in section 7 (1) (b) be “resident in Botswana for a continuous period of three years immediately preceding the date of the institution of proceedings”. This requirement applies only to women.

398. Matrimonial domicile, according to the laws of Botswana, is that of the husband at the time of marriage. Section 13 (1) of the Matrimonial Causes Act deals with property rights of spouses. It provides that “Any court which tries an action for divorce or for judicial separation under this Act shall also have jurisdiction to make an order:

- (a) Determining the mutual property rights of the husband and the wife;

(b) Concerning the custody, guardianship and maintenance of any minor children born to the marriage subsisting between the parties; and

(c) Varying an order made under paragraphs (a) and (b).”

399. Section 28 (1) of the Act provides that “In any proceedings for divorce, nullity or judicial separation, the court may from time to time, either before or at or after the decree or declaration, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings.” Subsection (2) further makes provision that:

“On any decree of divorce or declaration of nullity of marriage, the court shall have the power to order the husband, and, on a decree of divorce, where the decree is a decree of divorce and is made on the ground of the husband’s insanity, shall also have power to order the wife to secure for the benefit of the children such gross sum of money, or annual sum of money as the court may deem reasonable, provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child attains 21 years of age.”

#### **Article 24**

400. Young persons are protected by the Children’s Act. The Act defines a “child” as any person who is under the age of 14 years. The Citizenship Act defines a “child” as including a child born out of wedlock.

401. Botswana has never been involved in armed conflicts and therefore has never had to conscript in its army any person below the age of 18. Furthermore, the Botswana Defence Force Act, section 17 (2), provides that “a recruiting officer shall not enlist a person under the apparent age of 18 years”. As indicated earlier in this report, any person below the age of 18 years cannot legally enter into marriage.

402. Order 7, rule 2 (1), of the High Court rules stipulates that a person under the age of 21 years may not bring or make a claim in any proceedings except by his guardian and may not defend, make a counterclaim or intervene in any proceedings except by his guardian.

403. Section 13 (1) of the Penal Code provides that a person over the age of 8 years but before the age of 14 is not criminally liable unless it can be proved that at the time he had the capacity to know that he ought not to do the act or make the omission. Section 13 (3) provides that a male person under the age of 12 is incapable of having carnal knowledge.

404. There are certain rules that apply to the employment of children. Section 105 (1) states that “subject to the other provisions of this section, no child shall be employed in any capacity whatsoever”. In cases where children are employed, the following rules apply:

(a) Section 105 (2) allows a child who has attained the age of 14 years and is not attending school to be employed on light work not harmful to his health and development. This employment can only be done by a member of the family of such child or if the work is of a character approved by the Commissioner. Such a child shall not be required or permitted to work more than 6 hours a day or 30 hours a week;

(b) Section 105 (3) provides that a child who has attained the age of 14 years who is attending school may, whilst on vacation from school, be employed on light work not harmful to his health and development of a character approved by the Commissioner for not more than five hours a day between 6 a.m. and 4 p.m.;

(c) Under section 105 (4), no child shall be required or permitted, in the course of his employment, to lift, carry or move anything so heavy as to be likely to endanger his physical development.

Any violation of the above sections shall be an offence under the Act, with various penalties.

405. Sections 106 and 107 prohibit the employment of children or young persons (defined under the Act as a person who has attained the age of 15 years but is under the age of 18 years) on underground work or any kind of work during the night. There are however exceptions to the prohibition of young persons working at night. Section 17 (1) and (2) a young person may be employed on work during the night in the case of an emergency which could not reasonably have been foreseen and prevented or where he is so employed under a contract of apprenticeship or indenture to learn. Section 108 (1) specifically prohibits the employment of young persons on any work which is harmful to his health and development, dangerous or immoral.

406. Section 14 of the Act defines a child in need of care as a child who:

- (a) Has been abandoned or is without visible means of support;
- (b) Has no parent or guardian who does not or is unfit to exercise proper control over the child;
- (c) Engages in any form of street trading, unless he has been deputed by his parents to help in the distribution of merchandize of a family concern;
- (d) Is in the custody of a person who has been convicted of committing upon or in connection with a child any offence referred to in part IV; or
- (e) Frequents the company of an immoral violent person, or is otherwise living in circumstances calculated to cause or conduce to his seduction, corruption or prostitution.

407. Section 15 (1) outlines obligations of the society to a child in need. It provides that: “where any person observing any child has reasonable cause to believe that the child is in need of care, he shall immediately make a report therefore to the social welfare officer or a police officer in the district in which the child is resident”.

408. Section 6 (1) stipulates that “a prescribed notice of every child born alive or of any stillborn child born alive or of any stillborn child shall be made within sixty days of such birth or stillbirth to either a district registrar or a registration officer by:

- The father or mother of the child or by the occupier of the dwelling in which the child is born in the case of a birth or still birth that occurs outside a health institution;

- The medical practitioner or midwife in charge in the case of a birth or still birth that occurs in a health institution.

Section 6 (2) provides that “In case of a child born out of wedlock, no person shall be required to give information under this Act as the child’s father.”

409. The exploitation of children for any reason is a great concern for the Government of Botswana. To protect children from economic exploitation and to force compliance with the ILO Conventions, several legislative and administrative measures are applied.

410. Botswana has ratified the following ILO Conventions:

- Minimum Age Convention, 1973 (No. 138);
- Worst Forms of Child Labour Convention, 1999. This Convention prohibits exposure of children to situations which are dangerous to their health, morals and well-being and to conditions of slavery, debt bondage and serfdom.

411. The Employment Act is being amended to align it with the ILO Conventions ratified.

412. Section 146 of the Penal Code states that any person who indecently assaults a girl below the age of 16 years is guilty of an offence and is liable to imprisonment for a term not exceeding 7 years, with or without corporal punishment, even if consent was obtained from the victim. Any person who indecently assaults a boy under the age of 14 years is guilty of an offence and is liable for a prison term of a maximum of 7 years (section 166 of the Penal Code).

413. As stated in Botswana’s initial report to the Committee on the Rights of the Child, under section 34, “professionals involved in child-related services such as teachers, social workers and the police have been sensitized to working with children who have been abused and reporting cases of which they become aware. The introduction of guidance and counselling in schools has further provided children with an avenue for reporting abuse and obtaining support at school”.

414. Non-governmental organizations have joined the drive to assist children in preventing abuse and exploitation. Concerted efforts of organizations such as Child Line Botswana have been crucial in service provision, advocacy and community mobilization.

## **Article 25**

415. The electoral process in Botswana was discussed in some detail under article 1 (see paragraphs 48-51 above).

416. The new Section 65A of the Constitution establishes the Independent Electoral Commission (IEC).

417. IEC is responsible for:

- (a) The conduct and supervision of elections of the elected members of the National Assembly giving instructions and directions to the Secretary of the Commission in regard to the exercise of his functions under the Electoral Act;

(b) Ensuring that elections are conducted efficiently, properly, freely and fairly.

418. The Electoral Act was enacted to consolidate laws relating to the elections and registration of voters and the conduct of such elections.

419. Section 6 (1) of the Act disqualifies any person who:

- By virtue of his own acts is under any acknowledgment of allegiance or obedience to a foreign power;
- Is under a death sentence or imprisonment sentence;
- Is insane or of unsound mind;
- Is disqualified from voting at any election under any law for the time being in force.

420. Section 7 makes provision for the registration of voters. IEC is responsible for setting a general registration period.

421. Section 9 of the Act deals with the registration of non-resident citizens, whilst section 10 deals with application for registration during the general registration period.

422. In Botswana, every person has the right to take part in the conduct of public affairs, directly or indirectly, through freely chosen representatives. In addition to this, every citizen has the right to take part in the elections except for those who have been proved insane, those who have been sentenced to imprisonment for more than six months as well as those who have allegiance to any foreign power. In terms of Section 91 (3) of the Constitution, general elections are held every five years.

## **Article 26**

423. The issues of discrimination have been covered substantively above under article 2 of this report. It suffices to observe that the Constitution as the supreme law of the land protects the rights of all people. This is provided under Section 3 of the Constitution which states that “where as 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 opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest”.

424. If citizens’ rights are violated, they are allowed to seek redress from the courts of law. Any Act that is *ultra vires* the Constitution is null and void e.g. the Citizen Act was declared invalid in the *Unity Dow v. Attorney-General* discussed earlier in the report.

425. Reviews have been made relating to gender discrimination resulting in amendment of several government policies and administrative practices. These have already been discussed elsewhere in the report.

**Article 27**

426. In Botswana, there are minority groups and they enjoy all the rights under the laws of the country. They have the right to practice their own culture, to profess and practice their own languages. In both government and private institutions employment opportunities are based on merit, which is why there are members of minority groups who hold high positions of responsibility. Access to social services is also available to every person without discrimination.

427. Some minority groups are not represented in the House of Chiefs and in some quarters this is viewed as being discriminatory. Hence, the Government of Botswana appointed a commission to look at the constitutional provisions that are alleged to be discriminative. The commission's findings were that the Sections were indeed discriminatory and needed to be amended to make them tribally neutral.

428. Minority groups acting within their rights under the Constitution have started forming cultural associations. Currently there are four minority group associations registered with the Registrar of Societies and these are the Society for the Promotion of the Ikalanga Language (SPIL), Lentswe la Batswapong, Kamanakao Association and Reteng. The main objectives of these associations are to promote, maintain, protect and develop their languages and cultures.

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