THE CONSTITUTIONAL PROTECTION AGAINST DISCRIMINATION IN BOTSWANA

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I. INTRODUCTION

At independence in 1966 Botswana, like most former British colonies, adopted a Constitution which included a Bill of Rights. Whilst this tried to reconcile the needs of maintaining public order with that of protecting human rights, it did not entirely remove some of the vestiges of authoritarianism and discrimination that had been associated with the preceding colonial administration. Since independence, the country has had to grapple with many problems caused by constitutionally sanctioned discrimination in many areas of its social, economic, and political life. Despite some half-hearted, improvised and short-term solutions, the problems just would not go away.

The very concept of discrimination itself is exceedingly complex and problematic. At the heart of it is the problem of distinguishing between people. On one hand, governments have to classify people into groups for a variety of benign and legitimate reasons. These group characteristics are usually a valued part of the identity of members of that group. On the other hand, distinctions on invidious or malign grounds which subject individuals to a detriment on account of their belonging to a certain ethnic group, religion or race, or other irrelevant physical characteristic should be outlawed. The challenge that lawmakers face is therefore that of framing laws which are sensitive enough to outlaw invidious and unnecessary distinctions whilst permitting and supporting positive distinctions.

Concern with the issue of discrimination, particularly since the Second World War, has resulted in the development of international and regional norms, both customary and treaty based, addressing many aspects of discrimination. Botswana is a party to many of the international and regional instruments containing such norms. Its Constitution, whilst guaranteeing equality and protection from discrimination, not only allows for discrimination in certain circumstances but also contains discriminatory provisions. The latter have been the fertile source of much controversy over the years. Three main issues will be examined in this article. The first is to determine the nature and

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scope of protection provided for under the Constitution.[1] The second will look at the permissible grounds for discrimination. The third will discuss some of the enduring problem areas and vulnerable categories. In the conclusion, the paper looks at some of the reforms that are needed to make the protection against discrimination in Botswana more effective.

II. THE NATURE AND SCOPE OF THE PROTECTION AGAINST DISCRIMINATION

A. The Definition of Discrimination

What exactly is meant by discrimination? Jurists, courts and legislatures have grappled with this concept over the years. Robert K Fullinwider argues that the dictionary sense of the word is neutral while the current political use of the term is frequently non-neutral and pejorative. With both the neutral and non-neutral use of the word having currency, the opportunity for confusion is enormously multiplied.[2] A popular meaning of discrimination treats it as synonymous with action motivated by prejudice: treating a person with a particular characteristic less favourably than others because of feelings of dislike or hostility towards persons with their characteristic.[3] Another general definition refers to it as any form of distinction, exclusion or restriction affecting a person, usually, but not only, by virtue of an inherent personal characteristic, irrespective of whether or not there is any justification for these measures.[4]

The legal concept of discrimination differs from the general ones given above. In constitutional law, the concept of discrimination is usually associated with the effect of a statute or established practice which confers particular disbenefits on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the disbenefits granted and between whom and those not favoured no reasonable distinction can be found. It involves unfair treatment or denial of normal disbenefits to persons because of factors such as their race, age, sex, nationality, or religion.[5] The legal concept

[1] It is necessary to point out here that our discussion is limited to the constitutional position. The Roman–Dutch/English common law principles that apply in Botswana also provide some protection against invidious protection against discrimination in other areas of the law. A good example is the refusal by courts to enforce discriminatory restrictive covenants or conditions in contracts. In administrative law, discrimination by government in administrative decision-making can be challenged in judicial review proceedings by, for example, arguing that the decision-maker took an irrelevant consideration into account or that he reached a decision that is unreasonable.

[2] See *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (New Jersey Rowland and Littlefield 1980) 11–12.

[3] See Christopher McCrudden (ed) *Anti-Discrimination Law* (Aldershot Dartmouth 1991), at xiv.

[4] See UNAIDS, *Protocol for the Identification of Discrimination against People Living with HIV* (Geneva UNAIDS 2002), at 7.

[5] See Chandrachud (ed) *Pramantha Aiyar. The Law Lexicon* (2nd edn Allhabad Wadhwa & Co 1997), at 798.

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of discrimination usually takes account of justification—in terms of purpose, proportionality and effects—of any differences in treatment between people. Thus, not all differences in treatment are necessarily unlawful: differences based on a reasonable and objective criteria may be permissible.

In Botswana, the legislature preferred to define the word, 'discriminatory' rather than 'discrimination'. Section 15(3) of the Constitution puts it thus:

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

The underlying factor in this statutory definition, as in the definitions given above, is the failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured. It is to be noted that the word 'equality' is not mentioned in the definition. However, Section 3 of the Constitution, which 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', was interpreted in the famous *Attorney-General v Dow*,[6] as complementing Section 15 and guaranteeing the right to equal treatment. There is no doubt that the right to equality of treatment permeates and lies at the very heart of the Constitution, but its relationship with the rule guaranteeing protection against discrimination remains a matter of considerable controversy. There are some writers who regard the equality provision as a partial translation of the provision guaranteeing protection against discrimination. Others however, regard it as the very basis of the latter or as its justification.[7] Whatever be the exact situation, we are here concerned mainly with the practical operation of the anti-discrimination provision and its effect today in a fast developing Botswana society in which socio-economic, political and other factors have accentuated the differences amongst its diverse groups.

B. The Scope of those Protected Against Discrimination

Having recognized the fact that some distinctions are legitimate and should be allowed whilst others are invidious and unacceptable, the question then is to determine which should be allowed and which should not be allowed. Before looking at the approach adopted by the Botswana legislature, it is important to appreciate the fact that there are at least three possible legislative approaches.[8]

[6] [1992] BLR 119.

[7] See McCrudden (ed) op cit xviii–xix.

[8] See generally Sandra Fredman, *Discrimination Law* (Oxford Oxford University Press 2002) 67–8.

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The first legislative approach is to frame a broadly worded statutory provision that ostensibly guarantees protection against discrimination in general terms, by merely stating that all persons are equal before the law, without specifying any particular groups. This approach is epitomized in the Fourteenth Amendment to the US Constitution which simply states that no State may 'deny to any person within its jurisdiction the equal protection of the laws'. This has left the responsibility for determining whether or not a particular classification is lawful and thus unconstitutional with the courts and more specifically, the US Supreme Court. From the vast jurisprudence that the Supreme Court has developed over the years, at least three different standards for reviewing decisions or legislation dealing with issues of discrimination have emerged.[9] The first considers legislation as complying with the equal protection standard if it rationally related to a permissible governmental objective. A second standard treats any classification that burdens the exercise of a fundamental right as suspect and places a burden on the government to prove that this was justified by a compelling governmental interest and there was no less onerous alternative. A third has been adopted in mainly gender and illegitimacy cases and requires proof that the classification adopted is substantially related to an important governmental interest. Ultimately, this approach allows a wide scope for judicial discretion.

A second approach, which is at the other end of the spectrum, is to formulate legislation containing an exhaustive list of grounds on which discrimination will be regarded as illegitimate and unlawful. A typical example of this 'fixed category' approach is that found in anti-discrimination legislation in the UK.[10] In the absence of a formal written constitution, the protection against discrimination in the UK is contained in several pieces of legislation. There is a Sex Discrimination Act, which prohibits discrimination on grounds of sex, a Race Relations Act, which prohibits discrimination on grounds of colour, race, nationality, or ethnic or national origins, and a Disability Act that prohibits discrimination because of disability. This fixed category approach often carries the risk of omissions and thus puts pressure on the judiciary to redraw the boundary and expand the list, especially in marginal cases. For example, the failure of the legislature to include transsexuality and sexual orientation as explicit grounds for protection against discrimination in UK legislation has led to pressure on the courts to classify this as a species of sex discrimination.[11]

[9] See generally Barron and Dienes, *Constitutional Law* (Black Letter Series 1991) 203 and Ge Devenish, *A Commentary on the South African Bill of Rights* (Durban Butterworths 1999), at 52.

[10] This approach is fully discussed by Fredman, op cit 68–76, to which the discussion of this section of the paper is indebted.

[11] Ibid 70–5. By contrast, both the European Court of Justice in *P v S and Cornwall Country Council* [1996] ECR I-2143 and the European Court of Human Rights in *Salgueiro da Silva v Portugal* (unreported: ECHR, 21 Dec 1999) have held that discrimination against transsexuals in the former case and sexual orientation in the second case where included in the prohibition against sex discrimination.

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The third approach comes between the two extremes and specifies a list of grounds of discrimination but indicates that the list is not exhaustive. The best example of this, is Section 9(3) of the South African Constitution of 1996, which states:

> The [S]tate may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *including* race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (emphasis added).[12]

This approach, in Common law jurisdictions and countries whose legal systems have been substantially influenced by it, such as South Africa and Botswana, has been interpreting as giving courts some discretion to extend the list in accordance with the *ejusdem generis* rule bounded by the enumerated grounds.

Outside these three main approaches, there are wide variations. The approach adopted by the Botswana legislature is contained in Article 15 of the Constitution. The crucial part of this is subsection 3, which was quoted above. It apparently lists a fixed category of proscribed distinctions, made with reference to 'race, tribe, place of origin, political opinions, colour or creed . . .'. As we noted above, the weakness with this fixed category approach is that it puts pressure on the courts, in cases of groups marginally outside the fixed categories, to stretch their powers of statutory interpretation to its limits. This is exactly what happened in the *Attorney-General v Dow* case.[13]

The facts of this interesting case were fairly straightforward. Unity Dow, a female citizen of Botswana, who was married to Peter Nathan Dow, an American citizen, brought the action. She applied for an order declaring Sections 4 and 5 of the Citizenship Act as ultra vires the Constitution on the grounds that they violated Section 3, guaranteeing equal treatment under the law, and Section 15, granting protection against discrimination. Prior to their marriage in 1984, a child was born to them in 1979. Two more children were born to them subsequent to the marriage. Sections 4 and 5 of the Citizenship Act provided as follows:

> 4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth—
> his father was a citizen of Botswana; or
> in the case of a person born out of wedlock, his mother was a citizen of Botswana.
>
> (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

[12] This approach is also adopted in the European Convention on Human Rights, which states in Art 14 that the enjoyment of the rights and freedoms in the Convention shall be secured without discrimination 'on grounds *such as* . . .'.

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

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> 5. (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth—
> his father was a citizen of Botswana;
> in the case of a person born out of wedlock, his mother was a citizen of Botswana.
>
> (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

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

> I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed . . .
>
> All these lead me to the conclusion that the words included in the definition are more by way of example than as an exclusive itemisation.[14]

[14] [1992] BLR, at 146–7.

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The learned Judge President was prepared to say that other classes or groups with respect to which discrimination would be unjust and inhuman and which, 'should have been included in the definition' but were not, such as discrimination against the disabled or discrimination based wholly or mainly on language or geographical divisions within Botswana, were protected by section 15 of the Constitution.[15] This raises the question as to how one could determine whether or not the legislature would have included a particular group or class in the definition. Two important conclusions can be drawn from this decision with respect to the fixed category approach.

First, whilst it is clear that the fixed category approach is likely to result in pressure being brought to bear on judges such that they may indulge in some form of judicial legislation, the extent to which they can go will depend on whether they are dealing with an ordinary statutory provision or a provision in a constitution. What the *Attorney-General v Dow* case rightly underlines is that judges will probably have more freedom in reading unmentioned groups or classes into a constitutional provision than they would have when dealing with an ordinary statutory provision. The dicta of Dickson, J in the Canadian Supreme Court case of *Hunter v Southam Inc* aptly rationalizes this point:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed and amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions bear these conditions in mind.[16]

In essence, constitutions are now regarded as *sui generis*, requiring generous and purposive construction. To avoid what has been called 'the austerity of tabulated legalism',[17] the ordinary rules of statutory interpretations and presumptions are not rigidly applied.

Secondly, it can be argued that the case for including sex discrimination amongst the protected categories in section 15(3) was made easier because the word 'sex' is mentioned in section 3 and the two provisions are closely linked. It will be more difficult to include other groups such as the disabled, as suggested by Amissah JP. The critical problem which he himself acknowledges

[15] Ibid, at 147.

[16] (1985) 11 DLR (4th) 641 (SCC), at 649. This has been cited with approval in two South African Supreme Court judgments; *De Klerk & Anor v Du Plessis* 1994 (6) BCLR 124 (T) and *Khala v The Minister of Safety and Security* 1994 (2) BCLR 89 (W), at 92.

[17] Per Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, at 329.

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is: 'where does one draw the line as to categories to be included?'[18] The learned Judge President comes up with an apparently innocuous but crucially important answer:

> The only general criterion which could be put forward to identify the classes or groups is what to the right thinking man is outrageous treatment only or mainly because of membership of that class or group and what the comity of nations has come to adopt as unacceptable behaviour.

Having concluded that the groups listed in Section 15(3) of the Constitution were only by way of example rather than as an exclusive itemisation of all protected categories, it was therefore imperative that the Court of Appeal should develop some principles or lay down criteria to assist the courts in the future to determine which other groups or categories to include or exclude. In this regard, it is submitted that the answer is provided by the second part of the statement quoted above. On the basis of this, it can be argued that another good guide as to whether a category or group may be included to or excluded from those expressly mentioned in Section 15(3) in the future may be obtained by looking at least at the anti-discrimination provisions in the international and regional instruments that Botswana has signed and ratified. The country is a party to some conventions that deal with specific aspects of discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which she acceded to on 20 February 1974 and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which she acceded to on 13 August 1996, long after the *Attorney-General v Dow* case. Equally significant here are the definitions of discrimination adopted in the African Charter on Human and Peoples' Rights, to which she is a party and the International Covenant on Civil and Political Rights (ICCPR), which she ratified on 8 September 2000. The former, also adopts a non-exhaustive list approach which in Article 2 provides protection against '*distinction of any kind such as* race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status' (emphasis added). The ICCPR for its part adopts a similar non-exhaustive list approach which states in Article 26 as follows:

> the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on *any ground such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status (emphasis added).[19]

[18] [1992] BLR, at 148.

[19] Also see Art 27, which states that, 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

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The role these international instruments could play in interpreting the Botswana Constitution was further explained by the Learned Judge President in the *Dow* case thus:

> Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.[20]

In the final analysis, it is perhaps more prudent and appropriate to adopt the more flexible non-exhaustive list approach. It will not always be easy for courts to arrive at a principled decision justifying why one group or category has been added or excluded from those specified in provisions such as section 15(3) of the Constitution.

C. The Substantive Nature of the Protection Against Discrimination

The substantive nature of the protection against discrimination is provided for in sections 15(1) and (2) of the Constitution. Subject to a number of exceptions, section 15(1) provides that no law shall make any provision that is discriminatory either of itself or in its effect, whilst section 15(2) states that, 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'. The Constitution therefore protects people from discrimination in two main ways; first against the enactment of any law which is discriminatory either expressly or in its effect, and secondly, against any discriminatory action by persons acting under written law, or in the performance of the functions of any public office or any public authority.

The first substantive prohibition is against any law which contains a provision that is either 'discriminatory of itself or in its effect'. The former, that is, a law containing a provision discriminatory of itself is what has variously been referred to as direct discrimination or de jure, adverse treatment or disparate treatment discrimination. This occurs where a prohibited ground is used as a basis for legislation. For example, legislation that provides for benefits for married men but not for married women in circumstances where they are employed to do exactly the same type of job. By contrast, legislation with a provision that is discriminatory in its effect, also known as disparate impact, adverse impact, indirect or de facto discrimination deals with legislation designed to achieve an apparently neutral objective, but which has the practical effect of placing a protected group at a disadvantage because of past discrimination or present circumstances. It need not be intentional, nor need it appear so on the face of it. One common example is the application of minimum height requirements for recruitment in the military services, which can

[20] [1992] BLR 119, at 154.

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have a disparate impact on particular ethnic groups or women, where such a requirement cannot be shown to be job-related. It is generally recognized that making only legislation which contains provisions that provide for direct discrimination alone as unlawful is an inadequate way of addressing systematic discrimination, which may be embodied in established social patterns and structures. The main advantage of expressly covering indirect discrimination is that it will prohibit legislation which has the effect of disproportionately disadvantaging a particular group or category, whether defined by race or sex or some other characteristic, which cannot be justified by any of the permissible grounds for discrimination. In the final analysis, outlawing direct discrimination is not as effective as addressing indirect discrimination as well.

The second situation contemplated by section 15(2), on the face of it, prohibits discriminatory treatment only from a 'person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'. Does this mean that discriminatory treatment in the private domain is lawful? The broad nature of the exceptions to this provided in sections 15 (6), (7) and (8) suggests that the protection extends beyond acts of public officials into acts of private individuals. It would however have been desirable for discriminatory treatment in the private sector to be explicitly prohibited. Nevertheless, a person who experiences discriminatory treatment in the private sector may still challenge this on the grounds that it infringes the general guarantee of equality before the law in section 3. It is also to be noted that the protection that is given against discriminatory acts by public officials is wider than that given against laws. For example, whilst the protection against anti-discriminatory laws applies to non-citizens, the protection against discriminatory actions by public officials does not so extend.

In a recent case, *Media Publishing (Pty) Ltd v Attorney-General,*[21] the applicants challenged a presidential directive that instructed all government ministries and departments as well as parastatals and private companies in which the government is a shareholder not to advertise in their newspapers, the *Guardian* and *Midweek Sun,* after the latter had published stories critical of the government. The applicant alleged, inter alia, that the directive violated sections 3 and 15(1) of the Constitution. Although the application for interim relief succeeded on other grounds, the judge however rejected the argument that the directive was discriminatory. According to him, the applicant had not 'proved that it has been discriminated against within the recognized grounds under section 15 of the Constitution, nor has it proved any other valid grounds of discrimination'.[22] It is submitted with all due respect that the directive did violate section 15(2), which prohibits any person from being treated in a discriminatory manner by any person acting in the performance of the functions of any public office. Although this prohibition is subject to section 15(7), which allows for restrictions to freedom of expression in section 12, the

[21] MISCA 229/2001 (unreported). [22] Ibid, at 14 of the transcript.

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directive will not pass the test of an act that is 'reasonably justifiable in a democratic society', provided for in section 12(2)(c).[23] It could also be argued that it violated the applicant's right to equal treatment under the law guaranteed under section 3 of the Constitution. This was therefore a clear case of a violation of both sections 3 and 15(2). On the other hand, in *Zachariah & Another v Botswana Power Corporation*,[24] the Court of Appeal held that a clause in the terms and conditions of the contract of the Botswana Power Corporation workers which prohibited employees from taking an active role in political activities or holding elected political office of any nature did not violate section 15(2) of the Constitution. In response to the appellant's argument that the clause was discriminatory not as between employees of the respondent on the one hand and employees not so employed on the other, but as between employees of the respondent who wanted to participate actively in politics, like the appellants and their fellow employees who did not so wish, Amissah JP said:

> The fallacy in the distinction lies in the fact that the clause does not say that employees of one description, should be treated differently from those holding a different opinion, but it says all its employees are subject to the same irrespective of their political opinion.[25]

In the earlier case of *Students' Representative Council of Molepolole College of Education v Attorney-General*,[26] the appellants, inter alia, challenged the constitutionality of the regulations of the Molepolole College of Education, which provided that female students who fell pregnant would have to leave the college for at least a year. After pointing out that sex discrimination following the *Attorney-General v Dow* case was one of the prohibited categories under section 15(3) of the Constitution, the court noted that a regulation or rule of law that provided for women alone was not necessarily discriminatory on the grounds of sex. This was because there may be need to regulate the lives or affairs of one gender in a manner that was not applicable to the other. In such situations, the court had a duty to make sure that the law or regulation under consideration was reasonable and fair and was made for welfare of the gender, without prejudice to the other, and was not punitive. The court also pointed out that the bare statement by the party responsible for the enactment of the regulation or legislation that it was for the benefit of the persons affected by it was not sufficient and the court was under a duty to examine it. From its analysis

[23] As regards whether a restriction is justifiable in a democratic society, it has been said that this requires the courts to do a balancing exercise to determine whether the benefits to a democratic society resulting from the specific restriction demonstrably outweigh the detriment caused to a democratic society by the specific restriction. For a restriction to be reasonably justifiable in a democratic society, the restriction itself must be reasonable. From the facts of the case, no reasonable justification was given for the restrictions imposed by the directive. See generally Art 19, *The Interpretation of Fundamental Rights Provisions* London (1997) at 55.

[24] [1996] BLR 710.

[25] Ibid, at 728.

[26] [1995] BLR 178.

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of the regulation, the court concluded that the regulation was not designed primarily with a view to benefit pregnant female students but rather to ensure that they stayed away from college for at least a year. The purpose of the regulation was therefore purely punitive since it targeted only unmarried female students. Her male counterpart who is responsible for such pregnancy suffers no such punishment. The court accordingly declared the regulation discriminatory and inconsistent with Sections 3 and 15 of the Constitution.

The *Attorney-General v Dow* case is now authority for the conclusion that the categories against which discrimination is prohibited in section 15(3) are not closed and also provides some guide as to what factors may to taken into account in deciding whether or not a particular category which is not presently included could be judicially included or excluded. However, to fully appreciate the nature of protection against discrimination provided by section 15, it is necessary to look at the scope of the permissible exceptions and their actual or potential impact.

III. PERMISSIBLE GROUNDS FOR DISCRIMINATION IN BOTSWANA

Unlike some fundamental rights and freedoms, such as the protection from torture, inhuman and degrading treatment or punishment, the protection against discrimination is not an absolute one but is subject to a number of exceptions provided for in section 15(4) to (8). A number of these will now be examined.

A. The Exception Relating to the Position of Aliens

Although the words 'every person' in section 3 of the Constitution clearly indicates that every person living in Botswana, whether citizen or alien, is entitled to the equal protection of the law, sections 15 (1) and (4)(b) make it clear that the protection against discrimination does not apply to 'persons who are not citizens of Botswana'. There is nothing unusual about this for there persists in international law two diametrically opposed views concerning the treatment of aliens. There are those States, mostly in the West, who argue that this must be in accordance with an 'international minimum standard' of treatment which must be accorded to aliens irrespective of how the particular State treats its own citizens, and those States, mostly in the Third World, who argue that aliens are only entitled to 'national treatment', that is, treatment equal to that given by the State concerned to its own citizens.[27] In spite of this, in almost all countries, aliens are restricted in the ownership of property, participation in public life and the taking of employment. Article 2(3) of the

[27] See generally, DJ Harris, *Cases and Materials on International Law* (London Sweet & Maxwell 1991) 493–4.

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International Covenant on Economic, Social and Cultural Rights provides that, 'developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights in the present Covenant to non-nationals'.

Botswana, like most other countries, does not allow aliens to vote or be voted for in elections, has imposed restrictions on their right to own real property or to employment in both the public and private sector and requires reciprocity from their countries of origin before they can be allowed to practise certain professions.[28] Whilst such discrimination is commonplace and understandable, what is perhaps less understandable is the discrimination against lawful aliens in the provision of certain social services, to which they have contributed through the payment of taxes.[29] This is presently the situation with respect to the imposition in the last three years of the payment of school fees in government schools as well as payment of hospital charges in government owned clinics and other health facilities on aliens but not citizens. It is a policy that does little to stem the rising culture of xenophobia in the country, particularly the hatred of blacks from other African countries that are referred to disparagingly as 'makwerekwere'.[30]

B. The Exception Relating to Matters of Customary Law

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

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

The effect of these provisions is that laws may be valid, even though they are discriminatory in the areas of personal or family law, including the devolution of property or in the application of customary law in any matter to the members of a particular race or tribe exclusively. This is perhaps the most controversial exception. The legislature faced with the difficult task of reconciling the bill of rights with customary law and its many intrinsically discriminatory practices

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

[29] See generally DDN Nsereko, *Constitutional Law in Botswana* (Gaborone Pula Press 2002), at 538.

[30] See Section IV.D. below and FB Nyamnjoh, 'Local Attitudes Towards Citizenship and Foreigners in Botswana: An Appraisal of Recent Press Stories' (unpublished, Department of Sociology Seminar, 13 Sept 2001).

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especially against women, appears to have opted to insulate the later from the constitutional bar against discriminatory laws. Besides these two provisions, it can be argued further that section 15(2), which only prohibits people from being treated in a 'discriminatory manner by any person acting by virtue of *any written law*', implicitly excludes the application of customary law, which is based on *unwritten law*. The preservation of gender inequality which is inherent in the continuous application of customary laws in many of the areas covered by section 15(4)(c) and (d) is clearly a glaring anomaly and an anachronism, which is difficult to easily reconcile with the spirit, purport and objects of the bill of rights. As we shall soon see, the only way that some of these anomalies can be rectified is by the legislature intervening. Although it has been suggested that an imaginative and innovative process of deconstruction of customary law could eliminate gross gender discrimination,[31] the ability for non-customary courts, which only handle customary law matters by way of appeals from customary courts, to do so is quite limited by the fact that very few such appeals ever reach these courts. Ultimately, the radical changes that are needed to bring many rules of customary law in line with modern legal developments can only be brought about by way of new legislation and in a democracy, this is probably right.

C. The Exception Sanctioning Affirmative Action

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

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

It has been argued that the express inclusion of an affirmative action provision such as this is *ex abundanti cautela* because these consequences necessarily follow from the equality provision in section 3 of the Constitution.[32] However, the very contentious and sensitive nature of the concept of affirmative action makes it necessary for this to be expressly spelt out in order to ensure that it could not be arbitrarily used to create its own inequities.

[31] See Ge Devenish, op cit, at 68.

[32] In several US cases, especially *Regents of the University of California v Bakke* 438 US 265 (1978) the courts have held that even in the absence of specific provisions endorsing affirmative action, programmes implementing such action are compatible with the equal protection clause of the Fourteenth Amendment or statutory anti-discrimination provisions. Even in international law, Art 1(4) of the International Convention for the Elimination of All Forms of Racial Discrimination, 1966 also supports this conclusion.

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Affirmative action as provided for in the Constitution basically denotes the deliberate use of preferential treatment or reverse discrimination for the specific purpose of benefiting any member or members of the groups or classes defined in section 15(3) who may have been previously disadvantaged or excluded on the grounds of belonging to that group or class. The net effect of section 15(4)(e) is not only to shield from legal challenge positive action taken (or, as the section puts it, 'privilege or advantage' accorded) but also negative action (or, 'disability or restriction' imposed). The ultimate objective may range from providing a specific remedy for invidious discrimination to increasing the participation of members of such groups or classes in spheres where they are absent or under-represented such as education, politics, and employment. This may require that members of the group are actively preferred over others, who may be equally or better qualified, in the allocation of jobs, promotion, training, and similar benefits. This however, raises a number of questions. Just how far can these measures be taken? Is there any mechanism for ensuring that this is not abused? Can a member of any of the protected categories insist that an affirmative action programme be put in place and implemented to protect them? The subsection is very open-ended and the vagueness of the justifying criteria—having regard to the nature of the discrimination and 'special circumstances'—means that it could be used extensively to render the substance of the right illusory. It could have been framed in more restrictive terms, with clearer criteria for the guidance of both the legislature in future legislation and courts when interpreting and applying such legislation.

However, there appear to be at least two qualifying conditions for any measures implementing an affirmative action programme to be legally valid under the subsection. First, the person or persons targeted must fall within the category of protected persons specified in section 15(3). They must therefore be persons subject to some disabilities or restrictions due to their 'race, tribe, place of origin, political opinion, colour or creed'. Secondly, the measures taken must be dictated by the nature and special circumstances of such persons and must be reasonably justifiable in a democratic society. With the benefit of the voluminous American jurisprudence in this area[33] as well as international law,[34] it can be speculated that the following factors may guide a Botswana court in concluding whether or not particular affirmative action measures were appropriate in any given circumstances:

(i) the efficacy of the measures—this calls for the consideration of alternative and less restrictive measures. The potential benefits must be seen to outweigh any possible disadvantages.

[33] See in particular, *United States v Paradise* 480 US 149 (1987).

[34] See, eg, Art 4 of the Convention on the Elimination of All Forms of Discrimination Against Women, and also Andrew Byrnes, 'Equality and Discrimination' in Raymond Wacks (ed) *Human Rights in Hong Kong* (Oxford Oxford University Press 1992) at 241.

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(ii) the duration of the measures—the measures must be temporary in nature and must be discontinued when their objectives have been met.

(iii) the effect of the measures on third parties—it must be as least intrusive on the rights of innocent third parties as possible under the circumstances.

The third factor is perhaps the most contentious. Affirmative action involves treating a certain group of people differently in order to improve their chances of obtaining a particular good or service. It facilitates the redressing of past imbalances and brings marginalized groups in society to a level where they can compete favourably with the rest.[35] The 'innocent' third party who is not a member of the target group should not bear too great a burden in the attempts to redress the disadvantage of the preferred group. For example, since no one has an absolute right to a job, promotion or training place, the person refused a position in favour of another in the preferred group is not unduly burdened. On the other hand, where this entails the loss of an existing job, by for example, redundancy, then it becomes doubtful whether individual interest should be subordinated to this extent.[36] There must be a particularly strong case where the affirmative measures actually results in the violation of an 'innocent' third party's rights.[37] To this extent, courts can therefore assess, at the instance of an aggrieved party, the lawfulness of any measures taken to implement a programme of affirmative action. The provisions as presently framed do not give any person or persons within the protected categories in section 15(3) of the Constitution, any right to insist that a programme of affirmative action be initiated by the Government for their benefit. But where such a programme is initiated, it is desirable that it tries to balance the interest of the preferred or target group, the potential victims of the preferential treatment and the socio-economic needs of the community as a whole. In other words, there should be a balance between social justice and the imperatives of economic development.

IV. SOME ENDURING PROBLEMS

Measuring the impact of any piece of legislation, especially where this deals with a complex topic like discrimination is notoriously difficult. Nonetheless, there appears to be compelling evidence not only of the ineffectiveness of the

[35] See, Nsereko, op cit, at 267.

[36] In the US case of *Wygant v Jackson Board of Education* (1986) 476 US 267, 106 S Ct 1842, a collective agreement was struck down as contrary to the 14th Amendment because it gave preferential protection against layoffs to minority employees. The result was however, to largely to undermine the effects of positive action programmes incorporating under-represented workers: such workers were in the 'last in' and therefore inevitably the 'first out'.

[37] For example, in the Namibian case of *Kauesa v Minister of Home Office* (1994) 3 BCLR 1 (NmH), the High Court in construing the affirmative action provision in the Namibian Constitution observed that this provision does not authorize a violation of another person's dignity.

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constitutional protection against discrimination but also of the inability of victims to obtain adequate or any remedies within the existing legal framework. Confronted with evidence of widespread discrimination, the Botswana Government has rather uncharacteristically responded timidly. Yet there is in place not only a solid mechanism for reacting to popular demands for change but also a strong tradition of broad consultation operating within what is still without doubt one of Africa's most transparent, open and successful democratic countries. Whilst the Constitution departs from a general prohibition of discrimination, the vague scope of the numerous exceptions permitted has not only diluted the general protection offered but has left in place deeply entrenched structural discrimination hidden behind the veil of customary law. A number of more problematic areas will now be briefly examined by way of illustration.

A. The Problematic Legal Framework

The deeply embedded nature of discrimination in Botswana, a relic of its culture, traditional practices and usages, is such that the Constitution in attempting to address this appears to have merely scratched the surface of the problem. Besides the potential over breadth of the exceptions to the prohibition of discrimination in section 15, some provisions in the Constitution itself, notably sections 77–9 which sanction blatant discrimination, have been a major source of controversy since independence. Section 77 provides for a House of Chiefs consisting of eight *ex officio* members, four elected members and three specially elected members. Section 78 makes it clear that the *ex officio* members shall come only from those who are acting as chiefs in the eight 'principal tribes' of the majority Tswana ethnic group[38] and the four elected members from some smaller specified tribes. Although the House of Chiefs is largely an advisory body with very limited powers, the constitutional restriction of its membership to chiefs from certain specified tribes effectively keeps out minority tribes such as the Basarwa, Herero, Baloi and Bayei. In *Kamanakao & Another v Attorney-General*,[39] a group representing some of the excluded tribes brought a case seeking the nullification of sections 77–9 on the grounds that it discriminated against them. The High Court held that it had no powers to order that the sections be amended but nevertheless went ahead to make the following significant observation:

> There is no doubt that under the wide definition of the expression 'discriminatory', the treatment given to the Wayeyi and other tribes by omitting their tribe from having an *ex officio* member in the House of Chiefs under the provisions of Section 77(2) amount to unfairness and discrimination which if not justified is intolerable.[40]

[38] The eight are, the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana, and Batlokwa, all of who make up almost 90 per cent of the population.

[39] MISCA No 377/99 (unreported).

[40] Ibid, at 58 of the transcript.

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On 28 July 2000, the government appointed a Presidential Commission to inquire into sections 77, 78, and 79 of the Constitution and inter alia, 'seek a construction that would eliminate any interpretation that renders the sections discriminatory'.[41] The Commission whilst, refusing to make a finding as to whether or not the provisions were discriminatory pointed out that the fact that 'enough of the citizenry has the perception that they are [discriminatory, which] is sufficient cause to warrant the change'.[42] It therefore recommended that the provisions should be revised in a way that no tribe or ethnic community is named in the Constitution because unlisted tribes will feel relegated to an inferior status with all the perceived consequences including marginalization of their cultures, languages and identities.[43] In a government White Paper published in 2002, the government accepted the recommendation that the language of sections 77–9 be changed to remove any perceptions of discrimination but has so far taken no steps to implement this.

Another unsatisfactory aspect about the current legal framework is not only that Botswana has so far failed to enact specific laws or adopt programmes and strategies to ensure the practical implementation measures against discrimination as required by some of the international and regional human rights instruments it has ratified or acceded to, but there exist many discriminatory laws on its statute books.[44] Whilst the Citizenship Act, which was the subject matter of the action in *Attorney-General v Dow*, has now been amended, section 2 of the Chieftainship Act, which defines 'tribe' in such a way as to exclude the non-Tswana tribes, was in the *Kamanakao* case declared unconstitutional. The High Court noted in that case that without being designated a tribe under the Chieftainship Act, the Wayeyi and other undesignated tribes could not have a representative in the House of Chiefs, which was contrary to sections 3 and 15 of the Constitution. However, to underline the uncertainties of the scope of the constitutional protection against discrimination, the Tribal Territories Act, which came into force in 1933, long before Botswana became independent, and which also defines 'tribes' with specific reference only to the eight Tswana-speaking tribes and therefore clearly an aberration, was saved from being declared unconstitutional by one of the incongruous exceptions in section 15 of the Constitution.[45]

Perhaps the most serious problem with the present anti-discrimination laws

[41] See Report of the Presidential Commission of Inquiry into Sections 77, 78, and 79 of the Constitution. Government Printer, Gaborone (2000), at 9.

[42] Ibid, at 94.

[43] Ibid, at 95.

[44] See, eg, the Concluding Observations of the Committee on the Elimination of Racial Discrimination Report on Botswana, hereinafter referred to as the CERD Report CERD/61/CO/2 of 23 Aug 2002.

[45] This is s 15(9), which as an exception to the rule that no law should contain any provision that is discriminatory, excludes laws that were enacted before the coming into operation of the Constitution and which have continued in force since then, like the Tribal Territories Act, which was enacted in 1933.

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and policies in Botswana is that not enough has been done, especially by way of affirmative action measures to protect some of the most vulnerable groups in society, some of which are expressly mentioned in section 15(3) like women and others who are not mentioned like the Basarwa, people living with HIV/AIDS (PLWHA), the disabled, the aged and others. The specific situation of some of these vulnerable groups will now be examined.

B. Women

The ambivalent nature of section 15 of the Constitution, particularly the omnibus provision, subsection (4)(c), which sanctions discrimination in 'matters of personal law' and therefore covers such matters like domicile, guardianship, legal capacity and the rights and duties in the community, have been reinforced by laws that put women in a position of inferiority and subordination to men. Many present laws have incorporated discriminatory elements of customary law, particularly in the areas of marriage, adoption, devolution of property upon death and the ownership and use of property.[46]

Under customary marital law, most marriages, whether in or out of community of property still leave the marital power in the husband. He is the sole administrator of any joint properties and this allows him to sell, burden, donate, destroy or otherwise deal with property without his wife's consent. A married woman cannot make a legally binding agreement or take court action without the husband's consent. Even where the marriage is in community of property that allows the couple to share equally their joint property, in practice, the wife, who is considered as a minor and subject to the husband's guardianship, has little or no control over what happens to the estate. The payment of *bogadi*, where a man presents cattle or sheep or their equivalent in cash to the father or guardian of his bride to be, perpetuates the idea of women being their husband's property and has been used by many as giving them the right to control their wives.

Children, under customary law, belong to their father and, he is their sole legal guardian. On divorce, the father retains the legal guardianship, although actual physical custody does not always follow. Fathers have the final say in matters concerning their children. Even under the Marriage Act, the father's consent alone is sufficient to allow the marriage of a legitimate minor child, even where the mother does not agree.[47] Botswana males are subject to guardianship only until marriage or until they break ties with their family home, whilst the women are subject to guardianship throughout their lives. Under customary law, they remain under the guardianship of their father until

[46] For a full discussion of discrimination against women in Botswana, See Human Rights Watch/Africa Human Rights Watch Women's Project, *Botswana: Second Class Citizens,* vol 6 no 7 (1994).

[47] See Athaliah Molokomme, 'Marriage—What Every Woman Wants or Civil Death?, in *Women and Law in South Africa* (Harare Zimbabwe Publishing House 1987), at 183.

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they are married at which point guardianship is transferred to the husband. If the marriage ends whether due to the death of the husband or divorce, the woman is expected to return to the guardianship of the father.

A woman is not her husband's customary heir and generally has no real rights to any inheritance under customary law, although she is entitled to remain in the family home and be maintained by the heir until she remarries or dies. The natural heir of a deceased man's estate is his eldest son and only where a man dies without a male son does his daughter become his principal heir. Even then however, the property has to be managed by her male guardian.

Even statutes that do not defer to customary law, such as the Income Tax Act, have incorporated discriminatory provisions. The Act provides that any income earned by a married woman shall be deemed to have accrued to her husband. The husband is therefore expected to file tax returns based on his and his wife's combined earned income. Although the tax payments are withheld directly from a married woman's pay, any refund that is owed her is given directly to her husband.

Discrimination against women is most acute in rural areas where women engage primarily in subsistence agriculture and have weak property rights. Women still do not have access to military or national service training, although in 2000, the Botswana Parliament passed a resolution calling for young women to be allowed to serve in the Botswana Defence Force 'as soon as practicable'. Women make up about 52 per cent of the population, but only about 37 per cent of them, as compared to 63 per cent of men, were in paid employment in 1991. The situation is worse when it comes to their participation in policy-making or decision-making structures.[48] Women constitute only about 18 per cent of the Members of the National Assembly, 13 per cent of the mayors, 19 per cent of members of the local government councils, and 33 per cent of members of the cabinet. Although this shows quite some progress in gender equity, it still falls quite short of the recommended mark.[49] The government has not taken any steps to implement Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women, under which it undertook to take appropriate measures to 'eliminate discrimination against women in the political and public life of the country'.[50]

In 1998, consultants submitted to the Ministry of Labour a report identifying provisions of existing laws that potentially discriminate against women. The government's response so far has been to amend some of these, such as the amendment to the Affiliation Proceedings Act 1999, which now makes it

[48] See Nsereko op cit, at 269.

[49] The SADC Declaration on Gender and Development calls on Member States to take measures to ensure that women occupy at least 30 per cent of the total decision-making structures.

[50] See Nsereko, op cit, who at p 270, gives the example of the Ugandan Constitution, which contains provisions on affirmative action and which are designed to ensure that there must be at least 'one woman representative for every district'.

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possible for a person other than the mother of a child born out of wedlock to institute proceedings for the maintenance of the child, and an amendment to the Public Service Act in 2000, which recognizes sexual harassment as misconduct carrying penalties under the Act. On the whole, the inescapable conclusion is that the government has not done enough to remove the various impediments to women enjoying equal status to men under the law, especially with respect to discriminatory laws and adopting policies and laws that can rectify and correct the long legacy of discrimination under which women still languish.

C. The Basarwa or San of the Central Kalahari Game Reserve (CKGR)

The Basarwa or San, who inhabit mainly the Central Kalahari Game Reserve in the Kalahari Desert, are the earliest known inhabitants of Botswana until the Bantus arrived in the sixteenth century. Although they are physically, linguistically, and culturally distinct from the rest of the population, it is not clear whether they can be classified as a race distinct from the other inhabitants of the country. However, their distinct features have made them the object of discrimination by the rest of the Batswana. The estimated 52,000 to 55,000 Basarwa represent only about 3 per cent of the population and because of their isolation, ignorance of their civil rights, and lack of political representation, they have been marginalized politically and economically.

Traditionally, the Basarwa are hunter-gatherers but the creation of the CKGR by the colonial administration in 1961 has since substantially interfered with their traditional way of life and as a result many of them are now being employed as agricultural workers on farms or at cattle posts belonging to other ethnic groups.

The most serious problems facing the Basarwa today has been the government's policy of resettling them outside the CKGR in order to preserve the wildlife in the reserve for tourism.[51] Despite severe criticism by several national and international NGOs, the government has continued its policy of reducing the fairly limited social services it has provided to the Basarwa living within the reserve as a way of putting pressure on them to move to the new settlements it has constructed outside the reserves.[52] Besides this, the

[51] See generally, US Department of State, Country Reports on Human Rights Practices, 2001, Botswana; and Botswana Council of Churches, *Who Was (T)here First. An Assessment of the Human Rights Situation of the Basarwa*, Occasional Paper No 10 (1992).

[52] The CERD Report of 2002 in its point 13 states: 'The Committee expresses concern at the ongoing dispossession of Basarwa/San people from their land, and about reports stating that their resettlement outside the Central Kalahari Gamer Reserve does not respect their political, economic, social and cultural rights. The Committee draws the attention of the State Party to its General Recommendation XXIII on indigenous peoples, and recommends that no decisions directly relating to the rights and interests of members of indigenous peoples is to be taken without their informed consent. The Committee recommends that negotiations with the Basarwa/San and non-governmental organisations be resumed on this issue, and that a rights-based approach to development be adopted.'

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languages of the Basarwa are not used in any forum outside their own groups. They are forced to speak Setswana.[53] Their customary law is also in danger of extinction because they are now regulated following Setswana customary law. Basarwa children also suffer discrimination because the language of instruction is Setswana and this has caused many of them to drop out and very few proceed beyond the secondary school level. Thus, although the Basarwa are given a right to education, the education they receive is not culturally linked nor does it take note of their cultural identity. The treatment of Basarwa as second-class citizens has been reinforced by reports citing incidents in which they were abused and assaulted by government officials and law enforcement officials.[54]

The Basarwa are an indigenous group whose numbers are not only rapidly declining but their language, culture, and way of life risks extinction with the all the consequences that this entail to the country's cultural and ethnic diversity. The government policy of 'forced' removals into the new settlements threatens their very survival. On the other hand, no positive countervailing measures have been introduced by way of affirmative action or otherwise, as sanctioned by the Constitution, to compensate these people for the wrongs they have suffered since the colonial days when their land was declared a national park without their consent nor does it appear that the government is ready to negotiate a satisfactory compromise as has been done by the South African government with their San population.[55] Apart from the considerable pressure being exerted on the government by some foreign governments and national and international NGOs, the existing legal framework does not provide the Basarwa with a satisfactory legal remedy that they can pursue. It was thus no surprise that a highly critical CERD Report on Botswana of 2002, after noting that the cultural and linguistic rights of the Basarwa had not been fully respected, recommended that the government should fully recognize and respect the culture, history, languages, and way of life of the different ethnic groups as an enrichment of the country's cultural identity, and adopt measures to protect and support minority languages, particularly within its educational system.

D. Aliens

As we pointed out earlier, section 15(4)(b) of the Constitution allows for the making of laws that discriminate against aliens. In March, the Immigration

[53] See the Botswana Christian Council, *Who Was (T)here First. An Assessment of the Human Rights Situation of the Basarwa*, op cit, which at pp 22–3 reports of cases of Basarwa who came before Customary Courts, were remanded in custody because they could not understand Setswana.

[54] See, Supplementary Report for the Committee on the Elimination of Racial Discrimination, submitted by Ditshwanelo—The Botswana Centre for Human Rights, Aug 2002, at 13.

[55] During the 1990s, the Southern Kalahari San claimed extensive rights to a large portion of the Kalahari Gemsbok National Park in South Africa. After a process of protracted negotiations between the South African Government and the San Community, a settlement was arrived at, which recognized the San as a distinct group with rights to a large portion of their traditional land.

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(Amendment) Bill, 2003, which introduces stiffer penalties for illegal immigrants was given a second reading in Parliament. However, many Members of Parliament still felt that the measures introduced by the government had not gone far enough to discourage illegal immigration.[56]

Botswana, like South Africa (the two richest countries in the southern African region), has become the target of many people fleeing from the political instability, drought and food shortages that has ravaged most of the countries in the region. Most of these immigrants are from Zimbabwe where the crisis precipitated by the controversial land reform programme and the irregularities surrounding the re-election of President Mugabe in 2002 have resulted in a political stalemate and economic chaos, which has now been aggravated by drought forcing many Zimbabweans to leave the country. According to a recent report, some 135,000 Zimbabweans legally enter Botswana every week, but many stay behind after their travel permit expires.[57] On the other hand, about 100,000 Zimbabweans are estimated to enter the country illegally each month.[58] Although about three truckloads of these illegal immigrants are repatriated everyday, the Botswana authorities admit that it is an extremely expensive but almost futile exercise because the deportees re-enter the country again, illegally, within hours.

The rapid increase in the number of illegal immigrants has coincided with a rising level of xenophobia in the country. Most of the illegal immigrants who are usually unskilled and work as domestic servants or farm labourers have been blamed for taking jobs away from the locals and creating unemployment as well as creating a number of social ills such as violent crimes, drug abuse and counterfeiting. However, Botswana appears to suffer from what could be referred to as the 'small nation' phobia or the fear of being overrun by the larger and more powerful neighbours that surround it.

As noted above, blacks from other African countries north of Botswana are referred to, as is the case also in South Africa, as the *makwerekwere*, a derogatory term that denotes exclusion on the basis of perceived cultural differences. The word itself is meant to reflect the 'unintelligible noises' closely related to the languages they speak, and is used to promote hatred on the basis of language, incompetence and even calls into question the humanity of other blacks from the north.[59]

Although the extremes of xenophobia that have led to the deaths of many illegal immigrants from other African countries has not yet reached Botswana, the hatred for foreigners in general, whether legal or illegal, in both private and official circles is becoming a cause for concern. There have been numerous

[56] See *Mmegi/The Reporter*, 28 Mar 2003.

[57] See, 'Zimbabwe migrants "flood" neighbour' <http://news.bbc.co.uk/2/low/europe/2709829.stm>.

[58] See 'Botswana: A crisis in the making' <http://www.africaonline.com/site/Articles/1%2C3%2C51937.jsp>.

[59] See generally, Sichone, 'The Making of Makwerekwere' 14 SAPEM (2002).

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reports of illegal immigrants being assaulted and subjected to humiliating treatment by police as well as some allegations of deaths resulting from police brutality. Such ill-treatment is however, not officially sanctioned and disciplinary or judicial action has sometimes been taken against officials responsible for such abuses.

Many politicians have exploited the issue of illegal immigration, thus increasing the level of xenophobia by making alarmist claims about the high cost of and impact of illegal immigration on various social services and the cost of repatriation. In 2001 the House of Chiefs defeated a motion that would have asked them to condemn hatred against foreigners. Although the government has itself condemned xenophobia, as we have seen it has introduced measures that unfairly discriminate against tax-paying legal immigrants.

The government has not yet adopted policies towards foreigners that are consistent with internationally accepted human rights norms.[60] The rising levels of unemployment and the effect of the global economic slowdown that is beginning to have an impact on the otherwise robust Botswana economy may only raise the level of xenophobia. This upward trend is likely to continue and figure prominently in next year's general elections. The failure to introduce legislative and administrative measures to protect foreigners, especially those legally within the country, for a country that still depends quite heavily on expatriate foreign expertise, is likely to be counterproductive in the long term.

E. People Living With HIV/AIDS (PLWHA)

With an HIV prevalence estimated at 35.4 per cent in 2002, slightly down from about 36 per cent in 2000, Botswana—with a small population of about 1.7 million—has the highest incidence of infection in the world.[61] More than one in three Batswana between 15 and 49 are HIV positive and an estimated 320,000 are living with HIV. The HIV/AIDS epidemic poses one of the greatest threats to the sustainability of Botswana's economic miracle because the vast majority of those PLWHA are in the prime of their productive and reproductive lives and thus of critical importance to the country's development.

Faced with the HIV/AIDS pandemic, the response by the government has

[60] The Universal Declaration of Human Rights 1948, whose principles are today considered to have become part of customary international law, and the International Covenant on Civil and Political Rights confer the great majority of the rights they enumerate to 'everyone'. Both the CEDAW and the Convention on the Rights of the Child, to which Botswana is a party, make no distinction between citizens and non-citizens, in the rights they establish. The 1985 UN General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live, also sets some standards of practice by states with respect to dealing with aliens.

[61] See Republic of Botswana, *Status of the 2002 National Response to the UNGASS Declaration of Commitment on HIV/AIDS. Government of Botswana Country Report*, United Nations General Assembly Special Session on HIV/AIDS, Mar 2003, Gaborone (2003), at 13.

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been championed by President Festus Mogae himself, which has won the latter many international awards for his openness and the campaign he has led to bring the virus under control. Although the government has adopted an aggressive multi-sectoral strategy to confront the epidemic on all fronts and this appears to be bearing fruits now with the slight drop in the rate of infection, there remains a crucial area that does not appear to have received adequate attention—the problem of protecting the very large number of PLWHA in the population against discrimination.

Discrimination is today one of the most serious human rights abuses to which the PLWHA are subjected in Botswana. A number of these people who have gone public have given shocking accounts of their social ostracism and rejection by their family members, friends, and even employers.[62] Arbitrary discrimination against PLWHA or those suspected of being such can have three devastating public health consequences.[63] First, it tends to instil fear and intolerance and creates a climate that interferes with effective prevention by discouraging individuals from coming forward for testing or seeking information on how to protect themselves and others. Secondly, it may encourage a dangerous complacency in individuals and groups who are not targeted and therefore assume that they are not at risk. Thirdly, it tends to exacerbate other existing forms of marginalization such as gender-based discrimination, homelessness, and discrimination against children.

One of the main areas of discrimination is in the health sector. This usually takes many forms, such as a refusal to treat on grounds of HIV/AIDS status, testing for the virus without a person's knowledge or consent, refusal to inform a person of the results of an HIV test, health controls, compulsory notification of HIV/AIDS status or non-respect of the confidentiality of a person's HIV/AIDS status.[64] In 2000, the government for a while introduced a compulsory HIV/AIDS tests for all those going on scholarship to study abroad. Despite criticism Debswana, the diamond mining company, conducts these tests for all those who want to benefit from its scholarship scheme. In the area of employment, discrimination against PLWHA is manifested through the requirement of mandatory testing at recruitment or during employment, questions on recruitment forms or during interviews related to a person's HIV/AIDS status or lifestyle, dismissal or changes in condition of employment on grounds of HIV/AIDS status or denial of employment on this ground.[65] Even the creation of specific offences for the deliberate transmission

[62] See Ditsebe-Mhone, 'People Living with HIV/AIDS and the Law: Identification of Major Concerns', in Ditshwanelo, *Conference on HIV/AIDS, the Law and Human Rights,* 7 Dec 1999, Gaborone Botswana, Ditshwanelo, Gaborone (2002) 29–30.

[63] See generally, UNAIDS, *Protocol for the Identification of Discrimination Against People Living with HIV*, UNAIDS, Geneva (2002), at 6.

[64] On the issue of confidentiality, see generally, CM Fombad, 'The Crisis of Confidentiality in the Control of the HIV/AIDS Pandemic in Botswana', 170 International Social Science Journal (2001) 643–56.

[65] For some examples of this, see Ditsebe-Mhone, op cit, and Justice MB Marumo, 'The Role

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of HIV/AIDS and the difference in conviction or sentencing on such grounds are examples of discrimination against PLWHA.[66] Other areas where such persons have been discriminated against in Botswana include the denial of or restrictions on access to insurance and other financial services.[67]

There is at present no specific legislation dealing with the problem of discrimination against PLWHA or even more generally with HIV/AIDS. This is also not addressed by any provisions in other pieces of legislation such as the Employment Act, the Trade Disputes Act and the Public Health Act. All that applies today is the Botswana National Policy on HIV/AIDS formulated by the Ministry of Health that organizations, institutions, employers and others are called upon to observe until legislation is enacted. Clause 6.2 discourages HIV testing without the individual's consent. Clause 6.4 of this Policy, dealing with AIDS and employment provides that, inter alia:

(i) Workers with HIV infection who are healthy should be treated the same as any other workers, with regard to training, promotion, etc.

(ii) Workers with HIV-related illness and AIDS will be treated the same as any other worker with an illness and should be retained in employment for as long as they are medically fit to work.

(iii) HIV-infected employees should have access to and receive standard social security and occupational related benefits.

(iv) PLWHA in workplaces should be protected against stigmatisation and discrimination by their colleagues, employers, unions and employers.

These are sound principles that should go a long way to improve the lot of PLWHA, but the stigma that goes with HIV/AIDS and the depth of social ostracism that usually leads to all sorts of discrimination can not be wished away simply by formulating policy prescriptions that have no legal force. The Botswana legislature can take a leaf from the book of the South African legislature, which has taken strident steps, especially in the all-important area of employment to protect PLWHA from discrimination in the Employment Equity Act of 1998. Any strategy to control and mitigate the worst effects of HIV/AIDS, especially on economic development, that does not protect the

of the Judiciary and the Legal Fraternity in Response to the HIV/AIDS Epidemic in Botswana', and Justice De Villiers, 'Employment Law and HIV/AIDS in Botswana', in BONELA, *Report, Seminar on Justice, Reason and Hope in the HIV Epidemic in Botswana*, 26 Oct 2002, BONELA, Gaborone (2002) 13–14 and 18–24 respectively.

[66] Section 11 of the Public Health Act provides that it is a criminal offence for any person who, while suffering from any communicable disease, wilfully spreads the said disease. Although AIDS is not specifically mentioned, it is a communicable disease. Section 147 of the Penal Code also provides that any person who has been found guilty of having sexual intercourse with a person under the age of 16 years shall be required to undergo an HIV test. If such person tests positive, he shall be sentenced to a minimum period of imprisonment. See also, Justice De Villiers, 'The Legal and Equitable Protection of Employees Living with HIV/AIDS', in Ditshwanelo op cit, at 7.

[67] See D Schneider, 'What Would Happen if Insurance Companies were not Allowed to Underwrite for AIDS?', in Ditshwanelo, op cit 11–13.

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PLWHA from the arbitrary discrimination they are subject to, is doomed. As one of them has remarked:

> How can you live positively with the virus if you are not working? You have to eat well, you have to sleep well and you have to avoid stress. How can you avoid all these things if you are unemployed? You must have money.[68]

There is therefore need to translate the existing policy prescriptions into a general anti-discrimination legislation that ensures the full integration and participation of PLWHA in the economic development of the country.

F. The Disabled

Disability has only recently been recognized both nationally and internationally, as a legitimate subject of anti-discrimination legislation. Before the 1930s, in Botswana, as in most African countries, a child born with a disability, depending on the extent, was killed. Even when the colonial governments in the 1930s finally stamped out this practice, disabled or deformed children were segregated, hidden away or just ignored as non-people.[69]

The disabled are in an unusual category in that it deals with a situation that all members of society face, since disability could come upon anyone at any time of his life. The disabled suffer from stigma, prejudice and exclusion in many subtle and indirect ways. For example, in Botswana, most public facilities have been constructed without them in mind.

Section 15(3) of the Constitution does not mention the disabled, but in *Attorney-General v Dow*, Amissah JP, indicated that any 'discrimination wholly or mainly attributable to them as a group or as such, would . . . offend as much against Section 15 as discrimination against any group or class'.[70] Some international instruments, such as Section 18(4) of the African Charter on Human and Peoples' Rights, state that disabled people have a right to special measures of protection in keeping with their physical or moral needs.

There is no legislation in Botswana that is designed to protect the disabled. All that exists is again, a National Policy on Care for People with Disabilities, which was approved by the government in a Presidential Directive CAB:5/96 of February 1996. Although its principle 1 provides for the 'recognition and protection of human rights and dignity of every individual' and principle 6 indicates an undertaking to 'ensure that the integration of the person with disability into society is actively promoted', no legislation has been introduced to make some of these commitments legally binding. Because the government

[68] See Ditsebe-Mhone op cit, at 30.

[69] See B Otlhogile, 'Educating the Disabled in Botswana: Implications for Government', in Okechukwu Abosi, Clement Didimalang, et al (eds) *Issues of Access and Opportunity to Basic Education for Disabled Children in Botswana*. Proceedings of the Second National Seminar of Botswana Council for the Disabled (BCD), 25–27 Nov 1998, BCD, Gaborone (1999), at 12.

[70] [1992] BLR 119, at 147.

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has left most of the needs of the disabled to the benevolence of local NGOs who only have limited means, the 10 per cent or so of the population who are disabled suffer from numerous prejudices. In a study carried out in 1999, it was found that 74 per cent of the disabled persons involved in the survey were unemployed and stated that their disability was the main reason for their unemployment.[71] Other causes for their unemployment included lack of job opportunities and lack of work skills. In general, employment opportunities for the disabled are very limited. A Report of the National Commission on Education in 1993 concluded that most employers were reluctant to take on disabled staff and will not allow them the opportunity to prove their worth.[72] On the whole, the general neglect of the disabled by the government both in terms of implementing the Presidential Directive of 1996 and the failure to introduce any specific or general legislation designed to get rid of stereotypes and prejudices that concern the disabled has prevented the latter from contributing their quota in the nation's development. The future looks particularly bleak because of discriminatory practices against those teachers who have chosen a career in special education for teaching disabled children who today are leaving and moving into normal education because of poor career prospects, absence of mobility, poor remuneration and lack of job satisfaction in institutions such as the schools for the deaf, the blind and the mentally handicapped, all of which are run by NGOs.

F. Sexual Orientation

In spite of the extension of the categories protected against discrimination under section 15(3) of the Constitution by the Court of Appeal in *Attorney-General v Dow* to include sex discrimination, this does not appear to cover discrimination on grounds of sexual orientation.

Sexual orientation broadly covers any person who does not adhere to the well-established and conventional heterosexual relationship between men and women such as gay men, lesbians, transvestites and transsexuals. A number of provisions in the Penal Code were amended in 1998 to expressly criminalize certain sexual activities usually associated with these types of relationship.[73] Section 164(a) makes it an offence for a man or woman to have carnal knowledge of another person (male or female) contrary to the order of nature.

[71] See O Abosi, W Sison, and P Nwaogu, 'Report on Situational Analysis of Some Adults with Disabilities in Botswana', in SB Kaye (ed) *Equal Opportunities for Training and Work: Meeting the Learning Needs of Adults with Disabilities*. Proceedings of the Third National Seminar of Botswana Council for the Disabled (BCD), 22–24 Nov 1999, Gaborone, BCD, Gaborone (1999), at 20.

[72] See M Overeem, 'Work-related Training and Employment Opportunities for Disabled Adults', ibid, at 38.

[73] See, AB Tafa, 'Right to Sexual Orientation: The Line of the Botswana Government', in Ditshwanelo, *Conference on Human Rights and Democracy,* 17–19 Nov 1998, Gaborone, Ditshwanelo, Gaborone (2000) 127–8.

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Section 164(c) also makes it an offence for a person (male or female) to permit another person (male or female) to have carnal knowledge of himself or herself contrary to the order of nature. The effect of the 1998 amendment was to extend the previous legal definitions by specifically allowing for situations whereby carnal knowledge (that is, penetration) is not necessarily limited only to the male sexual organ (the penis), but to include objects such as vibrators. Section 167, which previously proscribed acts of gross indecency between males (falling short of carnal knowledge or penetration), was also amended in such a way that two females can now commit acts of gross indecency between themselves, or a woman can be charged with an act of gross indecency on a male (or vice versa), which had not previously been the case.

It has been plausibly argued that the effect of these provisions in the Penal Code is not to proscribe the homosexual or lesbian and similar status but merely to criminalize certain activities associated with their sexual orientation.[74] Be that as it may be, what is clear is that the present law discriminates against persons with any unconventional sexual orientation. Sandra Fredman has pungently suggested that 'discrimination on grounds of sexual orientation is a particularly vicious denial of dignity and equality, since it strikes out against the sexual intimacy at the very core of an individual's identity and well-being'.[75]

Homosexuality and lesbianism have generally been a taboo subject in Africa as a whole. There are even some who claim that it is 'unAfrican' and was brought by the whites.[76] There have been accounts in Botswana of how such persons have been rejected by their families, refused promotion or even dismissed from work and in some cases physically assaulted. Discrimination on this ground in Botswana has not reached the extremes it has in some of the neighbouring countries. For example, President Mugabe of Zimbabwe caused an outrage among homosexuals worldwide when he described them as 'worse than dogs and pigs', and in 2002 issued an order for a crackdown on all such 'sexual perverts' in his government.[77] In Namibia, President Nujoma declared that 'The Republic of Namibia does not allow homosexuality or lesbianism' and ordered the police to arrest, deport or imprison them, whilst his Home Affairs Minister, Jerry Ekandjo ordered police officers to 'eliminate' gays and lesbians 'from the face of Namibia'.[78]

As with most vulnerable groups and categories, it can be argued that the recognition and protection of differing sexual orientations is no more than the recognition of the diversity of human experience and character. It is part of the

[74] See D Boko, 'The Case for the Decriminalization of Voluntary Homosexual Conduct in Botswana', in Ditshwanelo, op cit, at 129.

[75] Ibid, at 54.

[76] See M Olivier, 'The Reality of being Gay in Botswana', in Ditshwanelo, *Conference on Human Rights and Democracy*, at 135.

[77] See W Marwizi, 'Mugabe to Root out Gays', *Zimbabwe Standard*, 2 July 2003.

[78] See <http://www.namibian.com.na/2001/march/news/01DC9DF150D.html>.

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indivisible variousness of human beings and human nature.[79] Nevertheless, there is still deeply ingrained prejudice, suspicions and misgivings about same-sex and other unconventional sexual orientations in Botswana that has been reinforced by the Penal Code. Unlike in many African countries, the topic is freely discussed and associations to defend the rights of homosexuals and lesbians are allowed to operate freely.[80] But legislation to recognize the right of sexual orientation or prohibit any discrimination against them is still far off. Even in Europe, same-sex sexual activity between men remained a criminal offence in countries like the UK until 1967. The Botswana legislature cannot move too far in advance of the prevailing social mores and attitudes towards such conduct. South Africa has once again taken the lead in what has been described by one commentator as the most progressive provisions on sexual orientation in the world.[81] Section 9(3) of the 1996 South African Constitution not only recognizes the right to sexual orientation but also prohibits any discrimination on this ground. It is however not clear whether this prohibition extends to discrimination on grounds of sexual orientation in the private sector.

V. CONCLUSION

Discrimination is a cost both to the individual victim and the society at large. The real test of the effectiveness of any anti-discrimination legislation or any system of human rights provided for in a bill of rights is the extent to which individuals who believe that their rights have been violated can seek remedy. Judged by these standards, it is submitted that the legal framework and the practical measures taken to implement this in Botswana, in spite of its enviable reputation for good governance and respect for the rule of law, is far from being satisfactory.

The law as presently framed in the Constitution is formulated in extremely complicated and archaic language. The delicate balance between the prohibited grounds of discrimination and the exceptions to this swings a little bit, in spite of the quite generous and liberal interpretation of section 15(3) by the Court of Appeal, in favour of the latter because of the obscure and wide-ranging grounds allowed for lawful discrimination. Exceptions and exemptions to any anti-discrimination legislation are understandable but these must be narrowly framed to avoid the purpose of the legislation being thwarted. It is submitted here that the exceptions to the prohibition against discrimination in section 15 of the Constitution are too wide.

[79] See K Botha, 'Regional Perspective of the Right to Sexual Orientation', in Ditshwanelo, *Conference on Human Rights and Democracy*, at 123.

[80] See International Lesbian and Gay Association (ILGA) Africa 2000 Report, <http://www.afrol.com/archive/documents/ilga_2000htm>.

[81] See Ge Devenish op cit 59–60.

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In a number of areas, the law and practice in Botswana appear to be inconsistent with some of the international and regional human rights instruments that the country has signed and ratified guaranteeing equality and non-discrimination. The most problematic include the treatment of women and the Basarwa. As regards women, although many of the discriminatory laws and practices are covered by the exceptions in section 15, particularly those excluding discrimination sanctioned by customary law and usage, it must now be recognized that customary law is not static but dynamic. Many of the customary laws and practices that perpetuate gross gender stereotypes and inequality can no longer be condoned on the pretext of preserving traditional culture. An imaginative and innovative process of purging these relics of a bygone age must now be undertaken. Although section 15(4)(e) provides for positive discrimination in the form of affirmative or corrective action which can reverse the deep-seated structural discrimination not only against women but also against other groups such as the Basarwa, the government, which is primarily responsible for initiating or encouraging this, has done very little. As a result, this provision has become nothing more than a pious rhetorical declaration of abstract possibilities. Several measures need to be introduced to remedy the present weak and ineffective remedies available to victims of discrimination.

The first is premised on the role that the State has to play. The possibility of compelling the state to take anti- or reverse discrimination measures on the basis of the existing legal framework is quite limited. There is a need to impose a positive and enforceable duty through legislation that explicitly defines the obligations of government or government bodies with respect to certain groups. Such legislation must specify both when the duty arises and its content. For example, the problem of the Basarwa, as an indigenous group will not simply go away if they are not formally recognized as a distinct group who need special protection. There are enough international instruments that can guide the government on how to formulate a law that is forward-looking and balances all the interests involved in an equitable and transparent manner. As of now, the Basarwa or those acting on their behalf have no legal basis on which they can challenge some of the present policies that threaten their very existence, and the survival of their language, culture, and way of life.

The second is premised both on the absence of an entirely satisfactory complaints mechanisms for successfully challenging some of the widespread patterns of discrimination and the general inadequacy in these human rights issues of relying exclusively on judicial remedies. It is now clear from the experiences of the South African Human Rights Commission and other similar bodies elsewhere, that such bodies have now become an important feature of effective anti-discrimination law and practice.[82] Experience from these

[82] Botswana has an ombudsman who could also perform such functions, but his mandate is presently limited to investigating acts of maladministration. See generally, Fombad, 'The

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jurisdictions show that persons from vulnerable groups who would not otherwise be able to bring a claim in court or compel the government to initiate a programme for affirmative action in their favour can bring their legitimate grievances to the commission for investigation and conciliation.[83] An independent human rights commission should provide not just an informal and quick avenue for dealing with these matters but can also play the important educational role and advisory functions that are necessary to eradicate discrimination.[84]

On the whole, the 1966 Constitutional provisions are today an inadequate response to a serious problem of discrimination in Botswana. More comprehensive and specific anti-discrimination legislation that targets certain vulnerable groups need to be introduced. Since a purely legalistic remedy is necessarily limited in impact, a more diversified approach based on the creation of a human rights commission with wide powers to carry out investigation and reconcile parties will complement and make up for the inevitable limitations of legal remedies in such complex matters. Discrimination by private individuals should be made expressly unlawful. Any future legislation, whether dealing with discrimination in a specific area or generally, should adopt the more flexible non-exhaustive list formulation rather than the open-textured or fixed category approach. The emergence of new categories which need protection against discrimination, such as PLWHA, underlines the need for legislative intervention in this area.

Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995', 27 Journal of Southern African Studies (2001) 57–77.

[83] The South African Human Rights Commission established under s 184 of the Constitution has the task of promoting and protecting the fundamental rights encapsulated in the bill of rights. The Commission may, on its own initiative or upon receipt of a complaint, investigate any alleged violation of a fundamental human right. Besides its supervisory role in relation to human rights, the Commission is authorized to provide financial assistance to complainants and other affected persons to enable them to seek redress for grievances in any appropriate forum.

[84] See further, T Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Oxford Clarendon Press 1984).

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