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AN AGENDA FOR CONSTITUTIONAL REFORM

Oagile Key Dingake

Lecturer in Law, University of Botswana

INTRODUCTION

The purpose of this article is to identify aspects of Botswana's Constitution that need to be reviewed in order to keep pace with the international human rights culture and also to deepen democracy in Botswana. A few areas have been identified for a brief discussion. This does not mean that these are the only areas that need to be reviewed. There are many others. The selected areas are, in the view of the author, amongst the most pressing. These areas are: electoral, gender, labour, discrimination on the basis of sexual orientation, and entrenchment of socio-economic rights in the constitution. Where appropriate this article suggests the way forward.

ELECTORAL REFORM

More than a decade ago, A.J.M. Saunders wrote the following about the constitution of Botswana,

... so far, there has been no significant challenge to the independence constitution: neither is there one in sight. In fact, the country's political leadership, including most of the opposition groups, and indeed the populace at large would seem to be content with their constitution, almost to the point of apathy...¹

Today the situation is totally different. In the area of electoral reform in particular, the opposition and sections of civil society have called for fundamental reforms in the running of elections. At the centre of these calls is the demand by opposition parties that an independent electoral commission be established. There is, however, noticeable silence on the efficacy and appropriateness of the first past the post electoral system. Botswana inherited the first past the post electoral system from Britain in 1966. The first past the post electoral system is sufficiently discredited in many countries. It produces all sorts of anomalies. Under this electoral system a party elected by a minority of electors can get a majority of seats in parliament.

The following example from Britain will illustrate the point better. The Labour Party lost power in 1951 despite having almost 1% more of the popular vote than the Conservative Party. In 1974, the Labour Party won power despite having 1% less votes than the Conservative Party. In 1983, the Liberals and the Social Democrats polled over 25% of votes but obtained under 4% of total seats in parliament.²

The 1994 combined opposition popular vote in Botswana was about 45%, but the opposition got about 32% of parliamentary seats. In fact only one opposition party whose share of the votes accounted for about 37% of the popular vote got 13 seats in a 40 member parliament. The rest failed even to secure a single seat. The first past the post electoral system tends to promote the dominance of two bigger parties and marginalise the small ones. But if

1 A.J.M. Saunders, "Constitutionalism in Botswana — a valiant attempt at judicial activism", xvi *CILSA* 1983.

2 Peter Haine, *Proportional Misrepresentation*, 1986, Chapter One.

democracy is about inclusivity and securing the greatest participation of the greatest number of all shades of differing opinions, then the electoral system that has taken root in Botswana and which is hardly challenged, is undemocratic.

To this extent, electoral reform appears to be a pressing necessity. A critic of the first past the post electoral system does not automatically translate into a thumbs up approval or endorsement of Proportional Representation, which in itself has numerous sub-types, some of which have similar tendencies with the first past the post electoral system. What needs to be done is to re-appraise our electoral system and determine whether it is time to fine tune it or strike a balance between the existing electoral systems and come up with a system that will be suitable to our own circumstances.

Proportional Representation's major virtue is said to be achieving proportionality and giving a voice to minority parties who are muffled by the first past the post electoral system. Its critics point out that it promotes the emergence of splinter parties that render governments unstable and unable to deliver on their promises. The first past the post electoral system is credited with creating direct link between a member of parliament and his constituents. It is also said to provide stability in governance.

Electoral systems are important in that they determine who is going to rule the country. It is for this reason that elections lie at the heart of modern parliamentary democracy. Botswana's period of reckoning on matters of elections has come. A multi-party democracy cannot insulate itself against change. To do so is not only unscientific but it is to compromise the future stability of the country. The three major legal instruments that govern the conduct of elections must be reviewed in order to improve the efficiency of election administration.³ Happily the political players have now agreed in principle after a prolonged period of stalemate to establish an independent electoral commission. How "independent" the independent electoral commission will be remains to be seen. Political parties have also agreed in principle to reduce the voting age from 21 to 18 in order to keep pace with the majority of democratic countries. Obviously this age limit should not be regarded as immutable and where circumstances dictate a further reduction, that must be done. An absentee ballot system (the details of which are still to be worked out) is also said to be on the cards. We will have to determine whether we would want to extend a franchise to a newly wed couple on holiday in Mauritius at the time of elections.

The conduct of local government elections is in law the responsibility of a ministerially appointed supervisor of elections, whose position is not constitutionally entrenched. It is reported that this anomaly will be addressed by subsuming the office of the supervisor of local government elections under the office of the national supervisor of elections. It is also important that election registration be a permanent process to avoid an unnecessary rush when elections are about to be called. This may go a long way in avoiding low voter turnout in general elections. The issue of election deposits which are required by law has not been a subject of serious debate. It appears, however, that plucking a figure from the air and requiring candidates to meet that amount is not only arbitrary but is also undemocratic. It opens the electoral process to charges that it favours the property owning classes or the rich.⁴ The justification for the requirement of the deposit is presumably that it discourages frivolous candidates from contesting. The best way of discouraging such candidates is through insisting on a higher number of nominators. The insistence on a higher number is

3 The Constitution, The Electoral Act Cap 04:04 and the Local Council (conduct of elections) Regulations Cap 40:04.

4 See generally, Holm *et al* (eds): *Democracy in Botswana*, 1989.

a better guide to a person's support than financial capability. It is important to debate whether the electoral process must give primacy to the individual or the party in order to enable us to tackle the controversial question of defections. The question is whether or not an elected candidate should lose his or her seat when he or she defects to another party. Reduction of the Presidential term of office to two terms appears to be a noble idea. It is also important to amend the constitution to provide for a President who is popularly elected by the voters at nation-wide elections. This will enhance the legitimacy of the President.

GENDER ISSUES

Botswana's constitution is not written in a gender neutral manner.⁵ In the present era, such an approach appears distasteful if not outright outdated. A gender neutral approach is necessary even if the significance thereof is only symbolic. Tswana traditional society is patriarchal. The century's old socialisation process is reflected in many of our statute books. Although the law cannot always influence behavioural change, a systematic repeal of all laws that offend against the equality provisions of the constitution will be most welcome. Such attempts will be part of developing a culture that is anti-sexist and that rejects gender oppression. Developing an anti-sexist culture will also be enhanced by writing in ways that do not exclude women. The constitution must be the last document that promotes sexual stereotyping. Women married in community of property are, in terms of the law, minors and can therefore not enter into legally binding agreements without the consent of their husbands. Such women cannot dispose of property without the consent of their husbands, who have the marital power. The marital power also means that women cannot launch legal suits to protect and enforce their rights without their husbands' assistance. The subordinate position of women in Botswana has been neglected by government and opposition parties for quite a long time. Only recently has there been increased agitation of women's rights by the women's government.⁶

It is important that the concept of marital power which entrenches male domination should be abolished so that marriage can be a partnership of equals. Namibia deserves to be singled out for praise for according equal rights to men and women before, during and after marriage.⁷

When it comes to reproductive rights Botswana's Penal Code Amendment Act of 1991 heavily circumscribes the circumstances under which women can obtain abortion.⁸ The circumstances are the following:

- (i) Where the continued pregnancy endangers the life of the woman or constitutes a serious threat to her physical health;
- (ii) Where the continued pregnancy constitutes a serious threat to the mental health of the woman;
- (iii) Where there exists a serious risk that the child to be born will suffer from physical and mental defects of such a nature that the child will be irreparably and seriously handicapped;
- (iv) Where the foetus is alleged to be a result of rape and or incest.

5 The Constitution employs the word "he" throughout. This is not the case with the South African Constitution.

6 For instance, Emang Basadi and Women and the Law in Southern Africa (WLSA). Emang Basadi is an organisation committed to increasing women's participation in the country's political structures, while WLSA is committed to campaigning for legal reform.

7 See Joseph Diescho "The Namibian Constitution in Perspective" 1995.

8 The Penal Code Amendment Act of 1991.

Under all the above circumstances, two qualified medical practitioners must certify in writing that in their opinion one of the above described situations exists. Prohibiting abortion, or setting up stringent conditions for a lawful abortion, denies women the right to control their bodies. It forces women to be mothers against their will.

Within the criminal justice system, offences relating to physical violation of women are the most worrisome, particularly rape.⁹ The laws of rape are retrogressive and insensitive to experiences women go through. In order to convict someone of rape, the state must prove that the accused had carnal knowledge of the woman. The issue of intention usually arises in connection with the element of lack of consent. Rape proceedings are held in public and this occasions serious embarrassment to the victims. In fact, most victims do not report to the police after they have been raped because they fear ridicule. The issue of consent in rape is usually critical. What is unsatisfactory in relation to this particular element is that given that the court structures are dominated by males, the question of the woman's consent is judged by men based on men's standards. It is common cause that Botswana society, being a patriachal one, has bred all sorts of myths, assumptions and stereotypes in sexual offence cases. A few of these myths and assumptions can be stated:

- (i) there is a myth that a woman cannot be raped against her will, lack of struggle on her part is construed as consent;
- (ii) that women cannot be raped by their husbands.
- (iii) that women are full of spite and are capable of fabricating stories, especially in seeking revenge on past lovers.

It is difficult to get a conviction in a rape case. This is because the courts view with extreme caution the uncorroborated evidence of the victim — what is called the cautionary rule. The position of women is not helped in any way by the adversarial manner of cross examination which lies at the heart of our legal system. Within the marriage context, the general position is that a husband cannot rape his wife. It is said that at the time of entering into the contract of marriage, the woman irrevocably consented to sexual intercourse.

It is time that the definition of rape was changed to include marital rape. The urgency of such a change is made imperative by the advent of AIDS.

Customary law or practices do not recognise equality of men and women when it comes to matters of inheritance. The constitutionality of these practices is extremely doubtful. It is in areas of this nature that the courts can play a creative role in ensuring that the equality provisions of the constitution are respected.¹⁰

Botswana's statute laws also discriminate against women when it comes to access and control of resources like land. The Deeds Registry Act precludes women married in community of property from registering title of property in their own names. This retrogressive position of the law which is inspired by patriarchal ideology ensures that women are dependent on men. Because women married in community of property have no contractual capacity, they have to suffer gross injustice when irresponsible husbands dispose of their joint property without their consent. In order to reverse this position, it is important that all people of goodwill, not only women, should strive to effect far reaching

9 According to the penal code any person who has unlawful carnal knowledge of a woman or a girl without her consent is guilty of the offence termed rape.

10 For a comprehensive account on the prevalence and consequences of rape in Botswana, see Somolekae G, 'The Prevalence and Consequences of Rape in Botswana: An Agenda for Research and Action' 1994 (unpublished paper).

changes in the socio-economic arrangements of our countries. Tragically, people have always put blind faith in constitutions. Rights are not given, they are won in a struggle. The discrimination against women in Botswana continues unabated notwithstanding S3 and S 15 of the constitution of Botswana and the seminal decision of the court of appeal in the case of *Unity Dow*.¹¹

The Affiliations Proceedings Act governs circumstances under which unmarried mothers may obtain maintenance for their children. Effectively, the Act prescribes that a claim for maintenance must be brought within 12 months, unless it can be shown that the alleged father was outside the country within the 12 month time frame prescribed by law, or the said father's conduct induced the mother not to bring the claim within the permissible time limit. The Affiliations Proceedings Act provides that the court can award the maximum of P40.00 per month. Two problems can be easily identified. One is that P40 is far too little. In fact a figure need not be mentioned in the Act. The other is that the prescribed time period of 12 months should be abolished as it leads to children being deprived of maintenance. Magistrate Courts must be given the discretion, after considering such factors as the means of the alleged father to determine the appropriate award. Quite clearly the benefits of expanding the time limit far outstrip the benefits for maintaining the *status quo*. It is difficult to understand why such a restriction was ever considered necessary.

The legislature must urgently attend to archaic legislation that is oppressive to women. It must be pointed out, however, that law reform has minimal impact in bringing about social change. Legal reform however, helps enlarge the space within which women's rights can operate to bring about far reaching social changes. Legal reform must simply be seen as a weapon of political mobilisation.

LABOUR ISSUES

At the labour front some areas of concern need to be attended to urgently.¹² This section only summarises those areas.

The starting point for an analysis of labour issues in Botswana is the constitution. The constitution provides in section 13(1) that except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests. Section 13(2) provides for exceptions that allow the state to impose legal restrictions upon public officers, employees of local government bodies or teachers and to impose restrictions that are reasonable in a democratic society.

The Trade Unions and Employers Organisation Act allows the Minister to intervene in the affairs of the Union. Section 51(1) of the Act empowers the Minister to call upon a trade union to produce certain books or documents for his inspection where he considers it to be in the public interest to do so. The minister may also order the production of books where the affairs of the trade union are conducted in a manner oppressive to one or more members of the trade union. This provision is highly divisive and may undermine the internal democracy of trade unions. Trade unions are still required by law to seek a Minister's permission if they want to secure external funding. In the interest of the right of the trade-unions to function freely it is important that unnecessary intrusion in the affairs of the

11 *The Attorney General v Unity Dow*, Civil Appeal No. 4 of 1991.

12 To date Botswana has not signed critical International Labour Organisations Conventions such as Convention No. 98 on the Right to Organise and Collective Bargaining Convention of 1949.

trade-unions be removed. Trade unions should not be unduly hindered in administering their financial affairs.

The right to strike, despite its potentially disruptive consequences, is now universally acknowledged as a fundamental human right. It is entrenched as a right in International Labour Organisation Conventions.¹³ It is indeed an intrinsic part of collective bargaining. The Trade Disputes Act theoretically provides for the possibility to strike, but for a trade union to do so it must exhaust a cumbersome and complex procedure that effectively denies that right. The Act provides particularly stringent procedures in essential services. A host of services which ought not to be classified as essential services, are listed by the Act. The schedule to the 1982 Act, (as amended by the Trade Disputes Order, S.1. No. 33 of 1989) specifies the following as essential services:

- a) Air traffic control services
- b) Bank of Botswana
- c) Barclays Bank of Botswana Limited
- d) Botswana Vaccine Laboratory
- e) Electricity Services
- f) Fire Services of the government, railways and local authorities
- g) Health and Sanitary Services
- h) Standard Chartered Bank Botswana Limited
- i) Telecommunication Services
- j) Water Services
- k) Transport services necessary to the portion of any of the foregoing services, and
- l) Operational and maintenance services of the railways.

The wisdom of classifying commercial banks as essential services is not readily apparent, what is clear though is that the list represents the views of government alone as to what is essential service. This list must be subjected to negotiations by government, the private sector and the labour movement, if its legitimacy and chances of obedience are to be enhanced.

When it comes to collective bargaining the Public sector employees are at a serious disadvantage. They are not permitted to join trade unions.¹⁴ Public sector employees are only allowed to belong to associations which are not trade unions, but associations that facilitate consultation between the public sector employees and government. The constitution empowers the president to make regulations for the setting up of an association for purposes of consultation. Consequent to such regulations, the Botswana Civil Servants Association (BCSA) was formed to cater for central government employees, whilst at local level it is the Botswana Unified Local Government Service (BULGSA). These organisations can not bargain collectively with the government, but can only consult. Collective bargaining within the public sector only applies to the industrial class employees. To this extent the provisions of section 13(2) of the Constitution that empowers parliament to impose restrictions upon public officers, employees of local government bodies or teachers must be amended.

Other provisions which restrict workers' freedom of association are those that define members of management so broadly that some employees — junior clerical staff — may

¹³ *Ibid.*

¹⁴ See S13 of the Constitution of Botswana.

find it difficult to join a trade union which is not sufficiently representative of their interests.¹⁵ To this extent the provisions of section 61 of the Trade Unions and Employers Organisation Act may have to be reformulated to avoid such anomaly.

The Trade Unions and Employers Organisation Act is silent on the need to facilitate meaningful collective bargaining by requiring Employers to disclose information regarding performance of the Companies. It is patently unfair to expect employees who have no information to articulate credible alternatives during negotiations with the Employers.

Although Botswana is a member of the International Labour Organisation, its record of ratifying labour conventions is very poor. It was not until 1996 that the Botswana government officially recognised May Day as an official holiday. The Botswana Government has not as yet ratified Convention No. 87 of 1950 on Freedom of Association and Protection of the right to organise; Convention 98, concerning the application of the principles of the right to organise and bargain collectively and Convention No. 151 regarding the right to organise for public servants — the Public Service Convention of 1978.

The National Security Act also has a bearing on trade union rights and activities. This Act empowers the President to declare any service a "necessary service" for purposes of outlawing a strike action. According to the Act "necessary service" includes any service to provide electricity supply or distribution; fire service; health and ambulance service; service relating to the production, supply and distribution of water, food or fuel.

HOMOSEXUALITY

Homosexual issues are not frequently debated in Botswana. Empirically, the extent of homosexual tendencies is not known; in any event the phenomenon does not appear to be widespread. Serious debate however cropped up sometime around August 1995, after President Mugabe's much publicised homosexuals bashing at the Harare International Book Show. Even then, the debate was only confined to a small circle of intellectuals, with the broader community generally contemptuous and not willing to engage in serious debate about the issue. Although the intellectual community is by no means unanimous, there are some voices, particularly emanating from the University of Botswana, that are calling for equal treatment for homosexuals. Despite the enormous capacity of such arguments to court controversy, the general response of the public was one of cynicism. This general lack of interest among the general populace contrasts sharply with the enthusiasm and interest on the issue, just across the border, in South Africa, where there are numerous homosexual associations. The South African constitution prohibits discrimination on the basis of sexual orientation, which has paved the way for homosexuals to be employed in the army, an advance that is unparalleled in modern democracies.

Other than South Africa, only three countries deserve equal praise. These are Denmark, Norway and Sweden. Denmark passed its Registered Partnership Act, No. 372 of 1989 in terms of which recognition was extended to homosexual relationships or partnerships. Norway and Sweden have similar legislation. Surprisingly the United States, notwithstanding the equality provisions in its constitution still lags behind in recognising homosexual rights. Court battles against homosexual discrimination have been raging for decades.

15 See S62 of the Trade Unions and Employers Organisation Act.

Botswana's criminal law prohibits consenting adults of the same sex from having a sexual relationship, because that is said to be unnatural. Within the framework of Botswana's constitution there can be no doubt that the prohibition of sexual relationships between consenting male adults of the same sex is unconstitutional.¹⁶ No free society can, in this era, afford to treat its citizens differently on a basis that is patently irrational. Every individual is, in terms of the constitution, equal before the law and has the right to equal benefit of the law without discrimination. The legal recognition of homosexuals will confirm Botswana as a democratic country that is advancing with time.

It needs to be said however, that it is fruitless to bury our heads in the sand and hope the issue will disappear for good. In time we will have to confront the issue head on. In time blind prejudice that stigmatises homosexual relationships will have to stand up to rational scrutiny. It is advisable not to turn a blind eye to the pain of discrimination suffered by few of our fellow countrymen and women. In a democracy it is unacceptable that the majority should oppress the minority.

SOCIO-ECONOMIC RIGHTS

The continued exclusion of socio-economic rights puts Botswana in a category of countries that refuse to accept an integrated approach to issues of human rights, a position which was dominant in the 1950s when the General Assembly of the United Nations refused to endorse an integrated approach and came up with two separate covenants separating civil and political rights from socio-economic rights.¹⁷ Botswana is still stuck with the thinking of the 1950s. A lot has changed since then. Human rights are now regarded as indivisible and interdependent. The justification for separating the two groups of rights was that the two required legal obligations of a different nature. Civil and political rights were regarded as imposing negative duties on the states, for example the prohibition against arbitrary arrest, and hence were capable of being enforced. Socio-economic rights were regarded as imposing positive obligations on states and whose enforceability depends on economic ability. To the majority of people the right to food, shelter, and clothing is as important as the right to free speech. Consequently it is important that they be entrenched in the constitution. It is important to entrench socio-economic rights in the constitution for the following reasons: (1) it will establish the necessary framework for government to adopt necessary legislative measures to redistribute the country's wealth equitably, (2) it would establish a legal basis for seeking appropriate legal remedy if governments or other public bodies breach those rights.

CONCLUSION

Botswana's constitution is more than thirty years old, and during its lifespan it has not been substantially amended. Indeed it is in the nature of the constitution that it must not be amenable to easy amendments, because it is a document which ought to be insulated from the whims and caprices of politicians, to ensure stability and protection of people's rights. The constitution must be a dynamic document, able to serve generations yet unborn. Its dynamism is dependent to a large measure on the willingness of the judiciary to keep pace with modern human rights thinking and notions of accountability and transparency. Thirty years in the life of a nation is too long. The time to fine tune the constitution to serve

16 Note 14, S3.

17 Covenant on Civil and Political Rights, 1966.

the current generation, its needs and aspirations, is now. There is a limit to which even innovative judges can go when interpreting a written constitution. In some cases judges have literally no room to manoeuvre because the provisions of the law are so clear, for instance the death penalty. The constitution allows it. The judiciary has no choice *but* to give effect to it. It can not be expected to re-write the constitution. The constitution needs radical reforms to entrench even further certain rights, making them even more difficult for politicians to temper with. Certain watch dog institutions like the Ombudsman must be entrenched in the constitution and not governed by a mere statute. It is necessary to entrench other watchdog institutions in respect of gender and the press in the constitution — all these can not be done by the judiciary no matter how radical it may be.



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