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TOWARDS A COMPENSATORY APPROACH TO REDRESSING CONSTITUTIONAL VIOLATIONS IN BOTSWANA

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INTRODUCTION

Constitutions of most, if not all, civilised countries contain elaborate provisions on fundamental rights and freedoms of the individual. These are normally entrenched in a Bill of Rights and operate to delineate a general locus of individual liberties and entitlements which the government must not encroach upon without serious justification. Where the fundamental rights are violated redress must be provided to the victims.

For Botswana, basic freedoms of the individual are entrenched under Chapter II[1] of the Constitution. They can be enumerated broadly to include,

(a) Life, liberty and security of the person.
(b) Freedom of conscience, expression, assembly and association.
(c) Privacy and protection from deprivation of property without compensation.

Except in relation to the protection from deprivation of property, Botswana's constitution does not set out the form of redress in the event of violation. The provision dealing with property proscribes any compulsory acquisition or any taking of property without prompt payment of adequate compensation.[2] Disputes arise in relation to promptness and the adequacy of compensation awards made but none have arisen at all as to the fact that compensation is payable.[3]

Problems abound concerning all the other rights for which the constitution makes no express provision for compensation. Violations of these rights and freedoms have been prevalent in Botswana. The result has always been disruption of the life and well-being of an individual or individuals. It can also be argued that there is a consequential loss of property.

This analysis attempts to assess the mechanisms for dealing with constitutional violations other than the acquisition of private property by the state in Botswana. The motivating

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* I am grateful to my good friend and colleague, Marshall Basiame Masilo, who read earlier drafts of this article and made invaluable suggestions. I thank him also for his patience and encouragement. The credit is his. All errors and inelegances in the article are mine.

1. Sections 3-16, Constitution of Botswana.
2. Section 8, Constitution of Botswana; See also Section II of the Acquisition of Property Act (Cap. 33:10) which provides for compensation and the mode of assessing compensation through the Assessment Board and procedures for challenging the quantum of compensation. See also Tribal Land Act (Cap. 32:02) which deals with compensation for expropriation of tribal land, in particular Section 33 as amended by Tribal Land Amendment Act No. 14 of 1993.
3. See *The Attorney General v Western Trust (Pty) Ltd* High Court of Botswana, Civil Case No. 37 of 1981 and Civil Appeal No. 12 of 1981; For a comprehensive discussion of the case see Ng'ong'ola C. "Compulsory Acquisition of Private Land in Botswana: The Bonnington Farm Case" (1989) *CILSA* XXII, 298-319. See also *The President of the Republic of Botswana and others v Pieter Christian Bruwer and Another* Civ. Appeal No. 13/97 (Unreported).

concern is to find out whether the present legal regime adequately redresses the wrongs worked on individuals by state encroachment into their basic constitutional rights. The inquiry will explore the possibility of a healthy and functionally tenable intersection of constitutional law and the law of delict in addressing the problems identified.

THE PROBLEMS

Botswana's courts have handled an increased and ever increasing volume of constitutional litigation. This arises in a variety of settings and may require to be dealt with creatively. Two cases will be used to illustrate the nature and extent of the problems. Reference will, however, be made to other cases to illustrate some aspects of the problems. These two cases will also be relied upon to highlight the limitations of mere annulment or the declaration of rights as comprehensive remedies for the violations involved. The first, *Attorney General v Unity Dow*[4] belongs to a category that involves litigants attacking certain statutes or statutory provisions as violative of certain constitutional provisions. The second, *Student Representative Council of the Molepolole College of Education v Attorney General*[5] involved an attack on certain regulations at an academic institution as a violation of the constitution. In the case of *Attorney General v Unity Dow*[6] the applicant had challenged, as discriminatory, certain provisions of the citizenship Act.[7] In terms of these provisions, a Motswana woman married to a non-citizen male could not confer her Botswana citizenship on children of the marriage. These children took after their father's citizenship and were non-citizens. These children needed residence permits to stay in Botswana. Since the children were regarded as non-citizens they were not entitled to a number of benefits that citizen children enjoy.

They would not be entitled to government sponsorship for tertiary education. This obviously impacted on the way their family ordered its life in order to meet their education expenses. As a result a more onerous financial burden was placed on the family.[8]

Cases of this nature, challenging the constitutionality of statutes or provisions thereof, are necessarily between private individuals and the government or some government agency. They also carry the requirement that the claimant must have suffered or be about to suffer cognisable harm. Section 18(1) of the Constitution provides as follows:

> Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

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4. High Court of Botswana Misca No. 396 of 1993 and Civil Appeal No. 13 of 1994 (Unreported). The case is also discussed in a case note, Quansah E.K., "Is the Right to Get Pregnant a Fundamental Human Right in Botswana?', 1995 *JAL* 39, 97.
5. Civil Appeal No. 13 of 1994.
6. See Note 4 above; See in particular Amissah (Judge President) at p 63 where he remarked, "I do not think I need to comment on the disturbing experiences of a mother who finds different and unfavourable treatment as to residence meted out by authority to some of her three children in comparison to others who are accorded completely different treatment by the same authority. Whether or not the authorities think that eventually the required permission will be given, during her wait she must go through a period of uncertainty, anxiety and mental agony."
7. Cap. 01:01.
8. *Ibid.*

In relation to the form of redress available the constitution confers original jurisdiction on the High Court to hear and determine any application made under section 18(1). The court can then,

> make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 3 to 16 (inclusive) of this Constitution.[9]

The powers conferred on the High Court seem broad enough to enable it to effectively deal with and provide redress for constitutional violations. Yet a look at the way the Court has exercised its powers reveals that the courts have been content only to annul the impugned provisions of a statute, where those were challenged. Apart from the usual costs of the suit, no other remedies have been awarded by the courts.

As indicated earlier, most constitutional claims have been between private individuals and the government or one of its agencies or departments. A few have come up though between private individuals. In the *Barclays Bank of Botswana Workers Union v Barclays Bank*[10] case the trade union alleged a violation of the constitutional right to privacy by a requirement that employees undergo a compulsory HIV / AIDS test. In another case, a provision in the Terms and Conditions of Service of a parastatal organisation prohibiting active and open participation by its employees in politics was challenged as a violation of the employees' freedom of speech and association.[11]

Another type of constitutional case is where in a criminal appeal the appellant alleges a violation of the constitution either in the way the trial was conducted or in the punishment meted out. Here the constitution is invoked at the appellate stage to attack conduct that occurred before the trial court. In this category of cases the dispositive question has always been whether there was any irregularity whose effect vitiates the proceedings of the court a quo. Even though the nature of the irregularity is a factor in determining its effect, that the irregularity involved a constitutional violation has never seemed to carry any special weight.[12]

Private individuals mostly deal with infractions of each other's rights under the law of delict. That is why this analysis concerns itself more with the vertical as opposed to horizontal enforcement of fundamental rights.

EFFECTS OF THE VIOLATION

Constitutional violations result in financial loss, emotional distress and a disruption of a person's enjoyment of themselves and their environment. Where Parliament has made

9. Section 18(2) (a) and (b) of the Constitution of Botswana.
10. The case was disposed of by way of an exception and the merits were never dealt with.
11. *Jacob Phaladi Zachariah and Benjamin Segwape v Botswana Power Corporation* Civil Appeal No. 13/95 (Unreported).
12. See *State v Merriweather Seboni* [1966-70] BLR 153, where there had been a delay of up to two years before bringing an accused person before court for trial. The High Court attributed the undue delay to administrative inefficiencies. The only remedy the court gave was a declaration that the delay was unreasonable and constituted a violation of the constitutional requirements of trial within a reasonable time. The delay was held not to vitiate the proceedings of the Magistrate Court before which it had occurred; See also *State v Makwekwe* [1981] BLR 196.

any law that violates any provision of the constitution the court has, at the instance of a claimant with the requisite standing to bring a claim, pronounced such law *ultra vires* the constitution. In *Clover Petrus and Another v The State*[13] the court stated:

> Under a written constitution such as we have in the Republic of Botswana, the National Assembly is supreme only in the exercise of legislative powers. It is not supreme in the sense that it can pass any legislation even if it is ultra vires any provision of the Constitution.[14]

The remedies sought are always limited to a declaration that the legislative enactment, or any provision thereof challenged, are *ultra vires* the constitution and, therefore, of no force and effect. This may afford the claimant some consolation but it may not be enough. Taking the case of *Attorney General v Unity Dow* as illustration, the mere annulment of the sections of the Citizenship Act in question did not address all the loss she had suffered. To assess the loss it is necessary to set out the fact pattern of the case.

The applicant was a female citizen of Botswana. She had married one Peter Nathan Dow, a citizen of the United States of America who had resided in Botswana for 14 years at the time the case was commenced. Two children were born of the marriage. In terms of section 4 of the Citizenship Act of 1984, children born in wedlock of a citizen mother and a non-citizen father, took after the citizenship of the father. The effect was that, as a female citizen, the applicant could not pass on her citizenship to her children born in wedlock. The applicant challenged the said section of the Citizenship Act as *ultra vires* Sections 3, 5, 7 and 14 of the Constitution. Section 3[15] extends the enjoyment of fundamental rights to every person in Botswana irrespective of their race, place of origin, colour, creed or sex. Section 5 guarantees personal liberty and protection of law. Section 7 prohibits inhuman and degrading treatment while section 14[16] guarantees freedom of movement.

It is perhaps easy to appreciate the applicant's case under Section 3 of the constitution. It simply was that she was invidiously discriminated against on the basis of her sex. The arguments under Section 5 involved the fact that she, as a citizen female, did not enjoy the protection of law equal to that of male citizens. Thus a limit was placed on the choices available to her. If she married a non citizen she would face the reality of not being able to have her children declared citizens. On this basis Section 7 is also implicated. The cumulative effect of the discrimination amounts to inhuman and degrading treatment. Regarding

13. [1984] BLR 14; See in particular note 6 above. Justice Amissah continues at the same page as follows, "In this case, it seems that for some, at least two of the respondent's three children had no more than three months granted each time for their stay in Botswana. Chasing after the extensions itself cannot be a matter of joy".
14. *Ibid.*
15. This provision was held to be a substantive and overarching provision and not a preambular provision as the Attorney General had argued.
16. In relation to the applicant's argument under Section 14, Justice Amissah delivered himself as follows at p 64, "The respondent has, in my view, substantiated her allegation that the Citizenship Act circumscribes her freedom of movement given by Section 14 of the Constitution. She has made a case that as a mother her movements are determined by what happens to her children. If her children are liable to be barred from entry or thrown out of her own native country as aliens, her right to live in Botswana would be limited. As a mother of young children she would have to follow them. Her allegation of infringement of her rights under Section 14 of the Constitution by Section 4 of the Citizenship Act seems to me to have substance."

section 14 on freedom of movement, the children's stay in Botswana was on the basis of a valid residence permit. This was also dependent on their father holding a valid residence permit. Applicant could not travel with her children, unaccompanied by their father. This affected her freedom to move about freely with them, especially if she wanted to travel outside Botswana.

The court enumerated some of the consequences of section 4 of the Citizenship Act on the applicant.[17] The father's, and in effect, the children's, continued stay in Botswana depended on their holding residence permits renewable at regular intervals. Applicant's husband could be expelled from Botswana in which case the children would have to leave with him. This was because, as minors, they were part of their father's residence permit. Although the applicant personally faced no threat of expulsion from her country of citizenship, being liable to this state of affairs interfered with her right to associate and freely establish a family.

The court had no difficulty holding for the applicant. On appeal, the Court of Appeal, by a slender majority of three against two, upheld the decision of the High Court. Both the High Court and the Court of Appeal did not, nor were they called upon to, consider any adverse financial consequences worked on the applicant during the years in which she had to put up with the Citizenship Act. It is difficult to discuss authoritatively what financial implications the applicant had to bear. It would not be entirely out of order to consider some of them.

The process of applying for and constantly having to renew the residence permit involves an expenditure of both financial resources and time.[18] If the couple travelled outside the country there was no way in which the applicant could return to Botswana with the children unaccompanied by her husband since the children could not use their father's residence permit to enter the country without him. Then there is the fact of emotional distress created by the uncertain status of the husband and children. Citizen children are entitled to government scholarships and bursaries to which non-citizen children are not. This is bound to have had some influence in the way the family ordered its life and went about making its long-term plans. All these are a result of section 4 of the Citizenship Act on the applicant and her family.

These may not be all the adverse effects of this violation of the applicant's constitutional rights. The enumeration does illustrate an important issue though. Merely annulling the contentious sections of an enactment as *ultra vires* the constitution may not provide adequate redress to victims of the violations.

In the second illustrative case, *Student Representative Council of the Molepolole College of Education v Attorney General*[19] one of the regulations of the college of education, Regulation 6, as well as the sub-regulations thereof, were challenged as a violation of Sections 3 and 15 of the Constitution of Botswana. This regulation, in critical part, required any student who became pregnant between December and April to leave the college immediately

17. *Attorney General v Unity Dow*, Note 4 above, See p 55 of the judgement, per Justice Amissah.
18. There are in fact a couple of consulting agencies in the country whose business involves processing fresh applications as well as renewals of residence and work permits. Fees are charged.
19. See Note 5 above.

and rejoin the following academic year.[20] It further stated that where the pregnancy occurred between May and November, the pregnant student continue for the remainder of the academic year but miss the next academic year.[21] A second pregnancy whilst still a student at the college would result in a permanent withdrawal of the pregnant student from the college.[22]

These were attacked by the appellants, and held by the court, to be unconstitutional. Of moment to the inquiry are considerations to which the court did not advert itself. It was not even called upon by the parties to do so.

The Molepolole College of Education, and indeed other Teacher Training Colleges throughout Botswana which had similar regulations[23] have been in existence for some years now. These regulations had, obviously, been enforced vigorously. It never arose as an issue how many, and to what degree, female students had been prejudiced thereby. No compensatory redress was sought for the many victims. None was granted. The only remedy was a pronouncement that the regulations were unconstitutional.

More examples can be cited but these two cases do make the point that the present practice of merely annulling impugned statutory or regulatory provisions does not avail the victims adequate redress.

WHY THE NO COMPENSATION APPROACH?

The explanation for the non-award of monetary compensation may lie in the fact that the remedies sought by the applicant did not include monetary compensation. Absent such a specific request, therefore, the court could not make a compensatory award *ex mero motu*. This argument is predicated on the assumption that where the court has not been moved for a specific remedy it is powerless to award any outside those specifically requested. This reasoning is not dispositive of the concern expressed here and it seems singularly inapplicable in view of the powers granted the court under Section 18(2) of the Constitution.

An examination of the pleadings that are filed before the courts reveals that a standard feature is to list what specific remedies an applicant or plaintiff seeks and proceed to include what seems to be a safety net by asking for "further and/or alternative relief". This has the effect of ensuring that in the event the specific remedies are found inappropriate or incompetent, the court may, nonetheless, provide whatever other relief or set of reliefs it deems fit in the circumstances.[24] This standard pleading technique was employed in the Unity Dow case yet the court was neither called upon, nor did it consider itself well placed, to award monetary compensation. In fact the court, and indeed the litigants themselves, never adverted their minds to the compensation question.

Perhaps at another level the applicant had a duty to make the award of monetary compensation an issue in the proceedings. This is because in no previous constitutional

20. 6.2 of the Regulation.
21. 6.3 of the Regulation.
22. 6.5 of the Regulation.
23. It was part of the argument by the Attorney General that these regulations were uniform throughout the country, and were intended for the protection of the female students themselves.
24. Kakuli G. "Civil Procedure in the High Court of Botswana" (Trial edition) 1989 (unpublished monograph).

case had the award of monetary compensation ever been canvassed. It would, therefore, have been reasonable for the applicant to raise it as a serious part of her case.

This failure, or shall we say reluctance, to so much as raise the issue and have it ventilated in court may be said to be structural. The law is basically silent on compensation of victims of constitutional violations other than those involving the acquisition of their property. This prompts a look at the factors that account for this mindset in the legal system.

THE LAW AND MONETARY COMPENSATION

There is an overbearing and pervasive requirement in the legal system that for any wrongs to be compensable the victim must have proved actual pecuniary loss. This approach permeates the entire corpus of the law of torts or delict as it is known in Roman-Dutch law. The requirement is that a claimant must, among other things, allege and prove calculable pecuniary loss. The action that may be brought is known as *damnum iniuria datum*[25] or wrongful infliction of pecuniary loss.

This is compensated only to the extent of the actual patrimonial loss proved. The only exception is a claim in relation to the wrongful and intentional impairment of a person's physical integrity (corpus), dignity (dignitas) or reputation (fama). Recovery for this claim is brought under the *actio injuriarum* and does not involve proof of actual pecuniary loss since it is directed at redressing the victim's injured feelings. This is the only instance where non-pecuniary loss is compensable. The law of contracts also directs its remedies at pecuniary loss. The same applies in selected criminal cases involving loss of property.[26]

Punitive damages have never been awarded in Botswana. They are also a rarity in Roman-Dutch law as they are seen as unduly enriching the plaintiff.[27] All these factors seem to form the central consideration in Botswana's legal system. They explain the unwillingness on the part of the courts to award damages that have not been alleged and proved or, for that matter, in excess of those that have been.

EXPERIENCE FROM OTHER JURISDICTIONS

The courts to which Botswana courts have looked for guidance and support, by way of highly persuasive if not binding authority, have been South African and English Courts. The reason for this selective transjudicial dialogue seems to be legal affinity in the case of South Africa, both countries being Roman-Dutch law regimes, and in the case of England the fact of Botswana being a former protectorate. The influence remains.

Nothing precludes a more extensive dialogue with other courts that have not only encountered the same challenges analysed here but have attempted to work out some

25. *Union Government (Minister of Railways and Harbours) v Warneke* 1911 A.D. 657, see also *Perlman v Zoutendyk* 1934 CPD 151.
26. Section 312 of the Criminal Procedure and Evidence Act (Cap. 08:02); See also *State v Mmipi* (1968-72) BLR 32, per Dendy-Young, Chief Justice (as he then was). For a discussion of compensation in relation to crimes see Nsereko D.D.N., "Compensating the Victims of Crime in Botswana" [1989] *JAL* Vol 33, 157.
27. Joubert, "The Law of South Africa", *Delict*, Vol. 8. See also *Dippenaar v Shield Insurance Co. Ltd* 1979 (2) SA 904.

solutions. The examples of the courts of South Africa and Ireland are instructive and commend themselves to our scrutiny for purposes of drawing comparative parallels.

To start the comparison closer home, the issue of whether the remedies available under common law to victims of constitutional violations were adequate arose in *Ntandazeli Fose v The Minister of Safety and Security.*[28] The plaintiff had sued the defendant for damages arising from a series of assaults allegedly perpetrated by members of the South African Police Force acting within the course and scope of their employment. These assaults were alleged to constitute a violation of the plaintiff's fundamental rights as enshrined in chapter 3 of the Constitution of the Republic of South Africa. The specific rights the plaintiff claimed had been infringed were the right to human dignity under Section 10, freedom and security of the person under Section 11 (1) and (2) and the right to privacy under Section 13. The case had originally been heard and dismissed on an exception by the Witwatersrand Local Division.[29] The basis of the exception was that South African law did not recognise the relief of "constitutional damages" which the plaintiff sought and, further, that "appropriate relief" under Section 7 (4) (a) of the South African Constitution did not include any monetary award separate and distinct from what was claimable under private law.

The issues were framed by the Constitutional Court to include firstly, whether the plaintiff was entitled to "damages to vindicate the fundamental rights of the plaintiff alleged to have been infringed" and, secondly, whether the plaintiff was entitled to,

> punitive damages to deter and prevent future infringement of the fundamental rights in question by organs of the state and to punish those organs of the state whose officials infringed the plaintiff's rights in a particularly egregious fashion.[30]

The court dealt with the question of punitive damages in delictual claims and indicated at paragraph 62,

> It appears to be accepted that in the Aquillian action and in the action for pain and suffering an award of punitive damages has no place.

Coming to the question of damages as a vindication of the plaintiff's rights the court took the view that the plaintiff would, if successful, be awarded substantial damages in delict. The court noted,

> This in itself, will be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages.[31]

The court, guardedly indicated that its reasoning applied only narrowly, to the facts of the case at bar. It does not come out as inveighing against the notion of constitutional remedies in appropriate cases. In fact in the words of Justice Ackerman, who wrote the plurality opinion,

> I have no doubt that this court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights

28. CCT 14/96 decided on 5th June 1997.
29. *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W).
30. *Ibid.* at paragraph 61.
31. *Supra* at paragraph 68 (Per Ackerman J.).

> entrenched in it. In our context an appropriate remedy must be an appropriate remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be, to achieve this goal.[32]

There are many cases in which the Irish courts have addressed constitutional violations and awarded monetary compensation to the victims. In *Kearney v Minister for Justice*[33] damages were awarded to a prisoner where, as a result of the negligence of prison officers, the prisoner's correspondence was not delivered to him. Justice Costello stated that:

> . . . the wrong that was committed in this case was an unjustified infringement of a constitutional right, not a tort; and it was committed by a servant of the State, and accordingly, Ireland can be sued in respect of it.

In another case the plaintiff's telephone had been unjustifiably tapped.[34] The court awarded substantial damages. It viewed the conduct as wrongful interference with the person's constitutional rights.

An examination of the cases decided by the Irish courts reveals an interesting phenomenon. Consonant with the notion that constitutionally entrenched rights and freedoms are directed at ensuring respect and non-interference by the state, action or inaction, that encroaches upon individual freedom and autonomy must necessarily invite constitutional scrutiny and entitle the victim to monetary compensation. No hard and fast rules have hitherto emerged relating to the quantum of these monetary awards. The Irish courts have, however, made mention of aggravated or exemplary damages where the violations were deliberate, conscious and without justification.[35]

Thus, it appears that in terms of the approach of the courts of Ireland it is critical to take violations of constitutional rights by the state out of the ambit of nominate tort law and elevate them to the realm of constitutional scrutiny. As a prerequisite it has to be established whether the conduct or action in question is either directly or indirectly attributable to the state.

STATE ACTION

In determining what amounts to state action the jurisprudence of the Supreme Court of the United States of America would be particularly helpful.[36]

In the Botswana cases mentioned and discussed above, it is clear that the conduct complained of was state action. It involved enactment of legislation by Parliament. This

32. Paragraph 69 of Justice Ackerman's speech.
33. (1986) IR 116 See also *McHugh v Commissioner of the Garda Stochana* IR 228; (1987) IRLM 18.
34. *Kennedy et al v Ireland and the Attorney General* (1988) IRLM 472.
35. Id. Per Justice Hamilton.
36. See *Nixon v Herndon*, 273 US 563 (1927); see also *Terry v Adams*, 345 US 461 (1953). For what has been termed an extreme application of the doctrine of state action see *Marsh v Alabama*, 326 US 501 (1946).

legislation, enforced and applied by organs of the state, was later determined by the courts to be unconstitutional. It had, during its currency, disadvantaged individuals. Conduct may also amount to state action where it involves public functions even though carried out by putatively private entities.[37] The case of *Marsh v Alabama* involved a privately owned town. It was owned by a private company. It operated just like any other town. A deputy sheriff, employed by the company performed police functions in the town. Marsh, a Jehovah's witness, attempted to distribute religious literature in this town. She was asked to stop doing so and leave the town, which she refused to do. She was arrested, charged with and convicted of trespassing. Her conviction was held to violate her First Amendment rights. Her arrest was held to be state action. Justice Black stated that:

> The more an owner, for his advantage, opens up his property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[38]

No brightlines emerge here as to when and how some conduct may be classified as state action. But some guidance may be obtained from the cases cited. The point being made, though, is that it is possible to distinguish state action from the simple interactions of private individuals. The two must, in terms of their consequences, be treated differently. There are a number of reasons for this. Firstly, the state has, at its disposal, vast resources which it can mobilise in fact-finding before it engages in any action. Secondly, the effects of constitutional violations by the state on the lives of ordinary persons may be far-reaching. The third reason may be peculiar only to Botswana and other nascent liberal democracies. These countries do not have a strong and long liberal democratic history. There is need for heightened checks and restraints on any excesses by the state. This will have the positive effect of fostering respect for individual freedoms. Botswana could use such a strengthened constitutional culture.

THE FUNCTIONAL OBJECTIVES

In terms of objectives what emerges from this distillate of South African, Irish and American experiences is a rich blend that translates into the following functional benefits.

(a) Deterrence

The state would become constantly alive to the social costs of constitutional violations. This would factor in *ex ante* in the formulation of legislation or any other state action. There is, clearly here, a direct and deterrent connection between the prospect of *ex post* liability involving monetary damages and the actor's conduct *ex ante*. The effect would be for the state to avoid or substantially reduce the risk of constitutional violations.

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37. See *Smith v Allright*, 321 US 649 (1944) where Judge Smith stated, "[S]tate delegation to a party of the power to fix the qualifications of primary elections is a delegation of a state function that may make the party's action of the state."
38. *Marsh v Alabama*, 326 US 501 (1946) per Judge Black.

(b) Corrective Justice

The resultant compensatory regime will, as far as is reasonably possible, restore victims to their pre-violation status. This can only be achieved by insuring full redress for the victims of constitutional violations. The element of restitution assumes critical relevance where, as a result of a constitutional violation, a major disruption in an individual's life occurs. The many instances of violations of a serious magnitude involve the torture, sometimes to death, of criminal suspects by the police.[39] The result is, obviously, loss of life and for some families, loss of support. Under the law of delict the deceased's estate would be compensated for whatever they may prove as lost support, in other words, actual patrimonial loss. The fact of the loss of a loved one and the social stigma generated by the death of a person in police custody before the person had his or her day in court would go uncompensated. This would defeat the corrective justice element which a broad-based machinery straddling both constitutional law and the law of delict would achieve.

DETERMINING THE QUANTUM

(a) The Temporal Questions

In relation to a successful attack on any legislative enactment the question of when the impugned provision ceased to have the force of law is easily disposed of. For the case of *Attorney General v Unity Dow* this would be the 3rd July 1992 when the Court of Appeal handed down its decision.

The voidness of the impugned provisions of the Citizenship Act would go to 1984 when the Act was passed. By the time the case was settled the Act had been in existence for seven years.

The period could for compensatory purposes, be reckoned from the applicant's date of marriage and in effect how long the Act applied to her in terms of its adverse consequences.

(b) Enforcement Machinery

The court would also have to consider, in the case of the Citizenship Act, that there exists an Immigration Department whose duties as set out in the Immigration Act[40] involve the enforcement of the Citizenship Act. Section 33 of the Immigration Act not only provides for wide and sweeping powers for the declaration of persons prohibited immigrants but also purports to oust the jurisdiction of the courts.[41]

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39. *Kebakile Matere v The Attorney General;* see also *State v Lesego Thebe and Others* in which the three accused police officers were charged with, and convicted of the murder of a suspect, Peter Mokgware. See also more recently *Binto Moroke v The Attorney General* involving the unlawful shooting to death of an individual by the Police. The action was brought in delict and judgement granted for the plaintiff in default of appearance by the defendant. Damages are still to be assessed by the Registrar and the Master of the High Court.
40. Cap. 25:02.
41. In *John Kealeboga v The State* Crim. App. No. 26/79 the Court cautiously asserted its alacrity to disregard the ouster clause of this provision (Per Hayfron Benjamin, Chief Justice, (as he was then) at p 28.

(c) Actual Loss

In some instances the claimant may be able to show actual pecuniary loss. This may be so in situations where a salaried person dies as a result of a constitutional violation by the state. The court should take into account and award such loss. This seems easy to calculate in the case of a salaried employee. The courts in Botswana have, in delictual cases involving loss of support, relied on employment records of the deceased and their actuarial implications.[42]

There is another dimension. The courts have tended to over rely on employment records. The effect has been that where a victim was not in any salaried employment there has not been any compensation in the law of delict. For people who are self-employed or engaged in other activities which generate some income for them there may be no compensation where employment records are the requirement. Domestic labourers and house wives are left out. Yet their loss also deserves compensation.

(d) Non-pecuniary Loss

There are some types of loss which are difficult to express in monetary terms. They have sometimes been referred to as non-pecuniary losses. They have been defined as follows:

> By non-pecuniary damages, we mean those damages awarded to compensate an injured persons for the physical and emotional consequences of the injury, such as pain and suffering *and the loss of the ability to engage in certain activities.*[43]

Although this inexhaustive definition was in the area of tort law it does highlight the notion of non-pecuniary loss. An addition to the definition can perhaps, be the concept of emotional give and take which in the words of Judge Titone includes, but is not necessarily limited to:

> The capacity to enjoy life by watching one's children grow, participating in recreational activities and drinking in the many other pleasures that life has to offer.[44]

It is submitted that these definitions, applying more aptly, as previously noted, in the law of torts, can provide a sound theoretical springboard for a constitutional analysis of the extent of non-pecuniary loss resulting from a violation of a person's fundamental rights. From this analysis broad guidelines for assessing the quantum of damages applicable can be developed.

CRITICISMS

The main criticisms that have been levelled at the approach suggested here relate to the fact that the approach would blur the distinctions between public and private law in terms

42. *Catherine Archibald v Attorney General of Botswana*, High Court Civil Trial No. 573 of 1988. This case involved the shooting to death of the plaintiff's husband at an army roadblock. She had sued in delict. In the Court of Appeal decision Justice Puckrin elaborately dealt with the history and evolution of claims for loss of support under Roman-Dutch law. He then dealt extensively with the method of computation of the damages involved. The judge rejected the English approach of using the "net multiplier method" in favour of the Roman-Dutch law "year by year" method.
43. *Macdonald v Garber* 536 N.E. ed. 372 (N.Y. 1989) per Judge Wachtler at pg 374; Italics added for emphasis.
44. Id. At p 377.

of objectives.[45] The argument here is that the functions of delict are to regulate relationships between private individuals and award damages not to punish and deter but to restore the wronged party to his or her pre-violation status. Public law on the other hand is seen as protecting individuals' rights. It has no punitive element and in any case the compensatory aspect is already in existence, sufficiently, in delict.

In response it bears pointing out that formulating creative solutions to problems new and old may necessarily involve doing violence to some long held conceptions. Irrational reverencing of distinctions which lack functional utility would militate against meaningful approaches and amount to institutional fetishism.[46]

The hybridisation of Constitutional law and delict would appear to be a workable way of avoiding the procedural tedium and serious limitations of Botswana's present approach.

CONCLUSION

It has emerged from this analysis that the present legal arrangement does not make adequate provision, if any at all, for redressing constitutional wrongs. A successful claimant in a constitutional case under Section 18 of the Constitution, may have to institute fresh proceedings in delict if any compensation is to be awarded. This entails additional cost in terms of money and time. The strict insistence on actual pecuniary loss under the delictual *damnum injuria datum* would render a lot of the claims uncompensable.

A system that does not provide for the compensation of victims of constitutional violations in a society replete with such violations denies compensation to persons most in need of it. This holds true for Botswana. Many people have suffered from state encroachment into their constitutional rights. Unless an effort is made to transcend the limitations imposed by the present legal regime, the constitutionally protected rights will remain destitute of any practical meaning.

This analysis has also located the non-accommodation of compensation for constitutional wrongs within the wider logic of actual pecuniary loss so entrenched in the law of delict. It has pointed out the urgent need to reform any legal devices that do not advance any functional ends.[47] The suggestion is that constitutional law can be used to achieve the broad social ends of deterrent and corrective restitution.

It also appears very clearly, if we may be irreverent, that the courts have not properly understood the full extent of their powers under Section 18 of the Constitution. As a result they have failed to creatively deal with violations of sections 3-16 of the Constitution.

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45. See *Whittacker v Roos and Bateman* 1912 AD 92; *Manamela v Minister of Justice and Others* 1960 (2) SA 395 (A) and the dictum of Justice Hattingh in *Essellen v Argus Printing and Publishing Co. Ltd and Others* 1992 (3) SA 964 (T).
46. Valerie Kerruish, *Jurisprudence as Ideology* (New York, Routledge 1992) pp 1-18. "Institutional" is used here to refer broadly to the "routinized collective institutions and preconceptions, the personal habits stylized in the form of a character, and the fundamental methods and conceptions employed in the investigation of nature". See Roberto Mangabeira Unger, *Passion, An Essay on Personality* (New York, The Free Press, 1984) at pp 3-4.
47. Byse, "Fifty years of Legal Education", 71 *Iowa Law Rev.* 1036 (1936); Cohen F., "Transcendental Nonsense and the Functional Approach" 35 *Columbia Law Review* 809 (1935).

It is in response to these problems enumerated here that the suggestions here are made. My sense is that they can help achieve the social ends of deterrence of constitutional abuse and restitution of those affected. On a grander level, respect for constitutionally guaranteed rights would be heightened.