

TREATIES

RATIFICATION AND WITHDRAWAL-BOTSWANA

CONSTITUTION

- Section 86 of the Botswana Constitution provides that *“subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana.”*
- In her Constitution, Botswana makes no provision for ratification from treaties.
- It also makes no provision for withdrawal of treaties.
- It's a 1966 Constitution which has never been subjected to a review process, although there has been piecemeal amendments over the years.

RATIFICATION AND WITHDRAWAL

- *Tiyanjana Maluwa* states in “*Ratification of African Union Treaties By Member States: Law, Policy and Practice*” that: “*In all AU member states, the power to negotiate and enter into treaties and international agreements is assigned to the executive. In most of these states, the executive is also empowered to ratify treaties.*”
(Melbourne Journal of International Law Vol 13)
(emphasis added)
- This statement is true insofar as Botswana is concerned.
- Whilst Parliament is empowered to make “*laws for the peace, order and good government of Botswana*”, it plays no role in the ratification and withdrawal.

BOTSWANA INTERPRETATION ACT

- Section 24 of the Botswana Interpretation Act provides that:

*"24. (1) For the purpose of ascertaining that which an enactment was made to correct **and as an aid to the construction of the enactment** a court may have regard to any text-book or other work of reference, to the report of any commission of inquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment, **to any relevant international treaty, agreement or convention** and to any papers laid before the National Assembly in reference to the enactment or to its subject-matter, but not to the debates in the Assembly."* (undermining mine)

JURISPRUDENCE

- Our jurisprudence is that treaties are only binding if they have been incorporated into national law. In the oft-cited **Dow v Attorney-General 1992 BLR 119 (CA)**, the Court of Appeal said at p154:

“That does not seem to me to be saying that the O.A.U. Convention, or by its proper name the African Charter of Human and Peoples Rights, is binding within Botswana as legislation passed by its Parliament. The learned judge said that we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations. Indeed, my brother Aguda J.A. referred in his judgment at p. 37 to the Charter and other international conventions in a similar light in the Petrus case. I am in agreement that Botswana is a member of the community of civilised 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. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex.” (underlining my emphasis)

JURISPRUDENCE Ctd

- In ***Botswana Federation of Public Sector Unions & Others v Attorney-General & Another 2014 (1) BLR 626 (HC)***, Leburu J. said that at p636 that “*from the above legal authorities, international law, though not binding, is persuasive and offers useful guidance on the nature and scope of our legal scheme.*”
- In *Ramantele v Mmusi & Others 2013 (2) BLR 658 (CA)*, the Judge President of the Court of Appeal, Kirby JP said at p687: “So prevailing public opinion, as reflected in legislation, international treaties, the reports of public commissions, and contemporary practice is a relevant factor in determining the constitutionality of a law or practice but it is not a decisive one”. (underlining our emphasis)

JURISPRUDENCE Ctd

- The above authorities show that the Botswana courts have continued to apply, within their constraints, principles of international law as aids to construction of our Constitution and other pieces of legislation
- However, there has been major set-backs in other decisions of our highest court, the Court of Appeal
- Bonolo Dinokopila observes in “*The Role of the Judiciary in Enhancing Constitutional Democracy in Botswana*” (University of Botswana Law Journal June 2017) that “*other cases which are indicative of the Courts*” shortcomings in the adjudication of human rights” includes ***Good v The Attorney-General 2005 (2) BLR 337 (CA)***

JURISPRUDENCE Ctd

- In ***Good v Attorney-General***, Professor Kenneth Good was declared a prohibited immigrant under the provisions of the Immigration Act (1991) which provided, *inter alia*, that once a person is declared a prohibited immigrant by the President they will not have recourse to the Courts. According to the provisions of the Act, any person declared to be prohibited immigrant does not have the right to be heard before or after such a declaration. Specifically, the Act provides that “...*no Court shall question the adequacy of the grounds for any such declaration.*” Thus, Professor Good was denied the right to be heard.
- The court gave effect to this provision and refused to strike down same as being unconstitutional

JURISPRUDENCE Ctd

- On Thursday, 14 March 2019, a full bench of the Botswana High Court will hear a case challenging the constitutionality of sections 164(a), 164(c) and 167 of the Botswana Penal Code . These provisions criminalise same-sex sexual conduct between consenting adults in Botswana and imposes a maximum sentence of seven years imprisonment.
- The organisation Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), which we represent, is admitted as a friend of Court (*amicus curiae*) in the proceedings (***Motshidiemang v Attorney-General with LEGABIBO as amicus curiae, MAHGB-000591-16***).

JURISPRUDENCE ctd

- We shall rely on, inter alia, the principle that domestic law is to be interpreted in a manner that does not conflict with Botswana's international obligations (see, for instance, ***Dow*** and ***Good supra***)

COURTS ON RATIFICATION AND WITHDRAWAL

- As far as I know, the issue of ratification from and withdrawal of treaties has never arisen in the Botswana courts.
- Botswana can learn a lot from the South African jurisprudence, although our Constitution has no provisions dealing with international law unlike the South African Constitution which has, for instance, ss231 (international agreements), 232 (customary international law) and 233 (application of international law).
- If Botswana ratifies a treaty and, as a dualist state, domesticates it, then withdrawal from it would not affect the law in Botswana unless parliament repeals it in accordance with the laws of Botswana





RATIFICATION & WITHDRAWAL Ctd

- In line with the doctrine of separation of powers, parliament makes the laws, parliament makes the laws and the executive deals with the treaties at international level as representatives of Government.
- There is no provision, in the Constitution or any other piece of legislation, how the executive should exercise this mandate.
- It is conceivable that parliament can pass a law that obliges the executive not to withdraw, but we have never had such a situation.
- So, the meaningful ways of parliamentary “control” would be by way of domestication by parliament itself or amendment of the Constitution in line with the Namibian or South African model at least.

THANK YOU!!