THE ROLE OF THE JUDICIARY AND THE LEGAL PROFESSION IN PROTECTING THE RIGHTS OF VULNERABLE GROUPS IN BOTSWANA[1]

Dr Oagile B. K. Dingake J[2]

Introduction

In this paper, I propose to focus on key issues relating to the rights of women, persons with disabilities, children, and sexual minorities, and what I perceive as the role of the judiciary and the legal profession in advancing the rights of these social groups. These groups of people – as human beings – are entitled to enjoy all the fundamental rights and freedoms to which every other human being is entitled. As such, persons that fall within these groups have a right to be treated equally. This therefore puts the right to equality at the centre of the discussion.

This paper explores the emerging jurisprudence on the rights of women, persons with disabilities, children, and sexual minorities to be treated equally and not to be unfairly discriminated against. To this end, the paper interrogates the role of the judiciary and the legal profession in selected jurisdictions in advancing the right to equality of these groups. The meaning of the right to equal protection of the law under the Botswana Constitution is also discussed.

Emerging jurisprudence on the rights of women, persons with disabilities, children, and sexual minorities

Inspired by the Universal Declaration of Human Rights,[3] among other sources, the courts have moulded a coherent body of jurisprudence (particularly in the last century) that asserts, unequivocally, that all human beings are equal.

Article 1 of the Universal Declaration of Human Rights proudly proclaims that all human beings are born free and equal in terms of dignity and rights.

At its core, the principle of equality "communicates the idea that people who are similarly situated in relevant ways should be treated similarly."[4] According to the principle of equality, "no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than against others

1 Keynote Address presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Lansmore Hotel, Gaborone, Botswana, on 28 and 29 March 2014.

2 Judge of the High Court of Botswana and the Residual Special Court of Sierra Leone; LLB (University of Botswana), LLM (London), PhD (University of Cape Town).

3 See http://www.un.org/en/documents/udhr/index.shtml.

4 *Mmusi and Others v Ramantele and Another* (2012) BWHC 1 at para. 64. The High Court decision was appealed to the Court of Appeal. The Court of Appeal judgment can be found at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf.

who belong to other groups."[5] Persons that fall under the social cluster of women, children, persons with disabilities, and sexual minorities are human beings, just like persons who fall under any other social group, and the principle of equality therefore requires that they be treated similarly. Emerging jurisprudence has, however, cautioned that a distinction must be drawn between formal and substantive equality.[6] Formal equality simply requires sameness of treatment and asserts that the law "must treat individuals in like circumstances alike".[7] On the other hand, substantive equality "requires the law to ensure equality of outcome".[8] Substantive equality, therefore, allows disparity of treatment, in order to achieve the goal of equality.[9] Thus, in order to achieve substantive equality, a previously disadvantaged group of people may be lawfully given preferential treatment, in order to address the substantive inequalities that already exist. Due to the conservative and patriarchal nature of our society, women, persons with disabilities, sexual minorities, and (to some extent) children, are some of the social groups considered to be historically disadvantaged.

Early efforts to bring sexual minorities into the human rights discourse have met with some resistance from conservative elements, who have used religion and culture to frustrate such efforts. It has only been in recent years that scholars and some United Nations experts, have reached agreement that it is untenable to treat sexual minorities as if they are not human.

In the South African Constitutional Court, Ackerman J in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*,[10] stated the following on the topic of criminal prohibition on sodomy:

> [I]t punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[11]

The Court thus unanimously concluded that the common law crime of sodomy was inconsistent with the Constitution, and, accordingly, invalid.

5 *Id* at para. 72.

6 See "The Right to Equality and Non-Discrimination" Icelandic Human Rights Centre available at http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/ humanrightsconceptsideasandfora/substantivehumanrights/therighttoequalityandnondiscrimination/.

7 See *Mmusi and Others v Ramantele and Another* (2012) BWHC 1 at para. 65.

8 *Id*. See also "*The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality*" Equal Rights Trust 4 (2007) available at http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf.

9 *Id.*

10 (1999) (1) SA 6 (CC).

11 *Id* at para. 28.

The Botswana Court of Appeal, in *Kanane v The State*,[12] seemed to take a different view to the South African case cited above. Their decision has been criticised as retrogressive in a piece crafted by Chilisa, in one of the journals published by the Botswana Network on Ethics Law and HIV/AIDS (BONELA) a few years ago.[13]

As anyone familiar with the discourse on human rights would easily testify, majoritarian preferences can often be harsh and oppressive to minorities who exist outside the mainstream. It is the function of those charged with dispensing justice, consistent with the test and logic of the Constitution, to come to the rescue of the minorities and to validate their humanity – as long as, in doing so, no prejudice is done to the fundamental rights of any person or group. Equality does not mean uniformity. It also recognises divergence, even if such divergence may be uncomfortable to some.

The role of the judiciary

The theoretical perspective that informs my discussion in this section may be somewhat controversial to some, but it is intellectually and philosophically defensible. It is that judges make law.

Reid LJ, the highly esteemed luminary of the British bench, considered it a fairy tale to think that judges do not make law. This standpoint is controversial and is not accepted by all jurists. In academia, the debate about whether judges make law or not, rages on. Concepts such as separation of powers, counter majoritarian difficulty, and judicial activism – as well as numerous jurisprudential theories – are employed to interrogate the propriety of such law-making and how judges should (or should not) perform their law-making function.

While it can hardly be contested that democratically-elected legislatures are the primary law-making bodies, it cannot be denied that, in a limited way, judges also make law. For judges, law making is a refined art, one that accounts for past legal precedent and one that is based on a clinical and informed analysis of what the law 'is' – rather than what it 'should be'. Tragically though, judges make law, even when their decisions are inelegant, incoherent, or inconsiderate of the relevant legal sources, arguments, and implications. Even wrongly-decided decisions are binding.

In the process of making law, in the manner I have suggested above, judges need to be informed and courageous. They should not be "timorous souls", fearful, or biased.

In one of his most celebrated dissents at the Court of Appeal of England, the legendary common law jurist, Denning LJ, suggested the following classification of judges: "On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required."[14] According to Denning LJ, the progressive development of the law is to be credited to judicial creativity and the courage of bold spirits. He disapproved of "timorous souls" who showed blind allegiance to existing rules and precedent – the "dead hand of the past" – and, in so doing, served a mechanical, not a constructive,

12 (2003) (2) BLR 67.

13 MM Chilisa "Two Steps Back for Human Rights: A Critique of the *Kanane* case" (2007) 1(1) *Botswana Rev of Ethics, L & HIV/AIDS* 42, 45.

14 *Candler v Crane, Christmas & Co.* (1951) 2 KB 164, 178.

role in the law.[15] He was of the considered view that, if "[t]he powerful still abuse their powers without restraint,"[16] it is essentially because of the dominant influence of "timorous souls"; for, according to him, bold spirits will not allow "any rule of law which impairs the doing of justice to stand". Denning LJ saw law as an instrument for doing instant justice, in accordance with the facts and circumstances of each case.

Denning LJ's view that judges must be "bold spirits" and not "timorous souls", has left an enduring imprint on conceptions of the judicial role held by post-colonial Africa's professional and academic lawyers. Nowadays, the term "timorous souls" is often used by contemporary Africa's common law lawyers to describe a judiciary that appears unable to use judicial power to restrain or counter the excesses of the legislative and executive branches. An assessment of the performance of African judiciaries in the post-colonial period – specifically with regard to judicial review of legislative and presidential action – often blames judicial timidity or executive mindedness for the authoritarian turn in Africa's political governance in the early decades after the end of colonialism.[17]

Executive mindedness undermines the people's confidence in the independence of the judiciary and has often been condemned by judges. For instance, Atkin LJ, in the famous case of *Liversidge v Anderson*,[18] had this to say about it:

> I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive.[19]

It is important that judicial officers, in interpreting the law, should never lose sight of the fact that the final cause of law is the welfare of society – of which women, children, and sexual minorities are part.

Cardozo J of the United States, in his much-quoted treatise *The Nature of the Judicial Process,* stated that:

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live." Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was "Be it my will that my justice be ruled by mercy". That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that the judges are commissioned to set aside existing rules at pleasure in favour of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.[20]

15 MD Kirby J "Lord Denning: An Antipodean Appreciation" (1986) 1 *Denning LJ* 103.

16 A Denning *The Discipline of Law* First Edition (1979) 315.

17 H Kwasi Prempeh "Neither 'Timorous Souls' nor 'Bold Spirits': Courts and the Politics of Judicial Review in Post-Colonial Africa" (2012) 45 *Verfassung und Recht in Übersee* VRÜ 157, 158 available at http://www.vrue.nomos.de/fileadmin/vrue/doc/Aufsatz_VRUE_12_02.pdf.

18 (1942) AC 206.

19 *Liversidge v Anderson* (1942) AC 206, 244.

20 BN Cardozo "Lecture II: The Methods of History, Tradition and Sociology" *The Nature of the Judicial Process* Yale University

With the above perspective in mind, what then is the role of the judiciary in advancing the equal treatment of these previously disadvantaged groups, so that they fully enjoy all their fundamental rights and freedoms as human beings?

Broadly speaking, the role of the judiciary is to ensure that the Constitution is enforced. Within the human rights discourse, the judiciary has an enormous task of protecting and advancing human rights.[21] This kind of role requires the judiciary not only to interpret the law, but sometimes to develop the law in a manner that promotes the enjoyment of fundamental rights. Today, most of the existing constitutional democracies – including the Republic of Botswana – require the judiciary to interpret and develop common law and customary law, as well as legislation, in a manner that promotes the spirit, purport, and object of the Constitution, particularly the Bill of Rights.[22] As such, it is the role of the judiciary to interpret and, under certain circumstances, develop the law in a fashion that ensures maximum protection and the widest possible enjoyment of the principle of equality by women, persons with disabilities, children, and sexual minorities.

It is trite law that in interpreting the constitutional guarantees of human rights and freedoms, including the right to equality, the court must adopt a generous approach to constitutional construction.[23] Thus, when interpreting the constitutional right to equality, the judiciary must opt for an interpretation that gives full effect to that right.

In *Smith v Attorney General, Bophuthatswana*,[24] Hiemstra CJ said: "The Bill of Rights is a declaration of values and a statement of the nation's concept of the society it hopes to achieve. It is the duty of the court to make it identifiable as such". Equally, I submit that the provision of the right to equality, under our Constitution, signifies the aspiration of our society to break from a past where women, persons with disabilities, children, and sexual minorities were treated as less human. Through the provision of the constitutional right to equality, our society seeks to advance to a stage where all human beings are treated equally. It is the duty of the judiciary to ensure that such a vision is realised through the proper interpretation of the law.

When interpreting constitutional provisions, including those that relate to the right to equality for previously disadvantaged persons, the judiciary must consider international law as an important guide. International law provides a framework within which the provisions under the Bill of Rights can be evaluated and understood.[25] The judiciary must also consider international law when interpreting not just the constitutional provisions, but legislation and other laws as well. An interpretation that is in line with international law ought to be preferred to that which conflicts with our country's commitments under international law. Botswana is a member of "the

Press (1921) (internal footnotes omitted).

21 L Olivier "Constitutional Review and Reform and the Adherence to Democratic Principles in Constitutions in Southern African Countries" (2007) 31-56, available at http://www.afrimap.org/english/images/documents/OSISA_constitutional_review.pdf.

22 *Id.*

23 See *Dow v Attorney General* (1991) BLR 233 (HC), 234.

24 (1984) 1 SA 196 (BSC) 199.

25 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para. 35. For a more detailed discussion on this case and the relevance of international law, see RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

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."[26] This principle is quite permissible under section 24 of the Interpretation Act.[27] Thus, in order to deduce the correct meaning of the right to equality for persons in these social groups, the judiciary must look at international agreements such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities – to mention but a few. The courts must also explore customary international law.

As mentioned earlier, the role of the judiciary is not just to interpret the law, but, under certain circumstances, to develop the common law and customary law – and they ought to do this in a manner that gives effect to the spirit, purport and object of the Bill of Rights. In this task, the courts must again refer to international law (both treaty law and customary international law) for guidance, in order to determine the content of constitutional provisions which provide for the right to equality for women, persons with disabilities, children and sexual minorities.

I must stress that given the history of our society and our culture, the judiciary has a huge task to develop customary law so that it is aligned with the constitutional right to equality – and international law is helpful in that regard.

Furthermore, in performing the role of interpreting constitutional and other legal provisions, as well as developing customary and common law, the judiciary cannot afford to ignore similar decisions made by foreign courts. In the Botswana High Court case of *Mmusi and Others v Ramantele and Another*, I held that:

> In my considered opinion, gone are the days, if ever they were, when decisions of other countries in any common law countries are to be frowned upon as irrelevant. It is of course trite that the decisions of those courts are only persuasive, given that they may have been rendered under circumstances then prevailing in those countries. Those decisions may give the most needed guidance and the wisdom to be derived from them must always be understood in the proper context.[28]

The role of the judiciary is intrinsically linked to that of the legal profession. The legal profession has an essential role to play in protecting fundamental human rights – a role that becomes more pronounced when dealing with the most vulnerable groups in our society. Although there is still some perceptible reluctance by many within our ranks across the world, and more particularly in Africa, to adjudicate alleged violations of vulnerable groups, as earlier defined, on the grounds that such issues fall within the power of the executive – such a reduced role for the judiciary appears increasingly anachronistic and particularly difficult to sustain in law.

26 *Attorney General v Dow* 1992 BLR 119 (CA) 154. This case is also discussed in RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" and L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

27 Act No. 20 of 1984.

28 *Mmusi and Others v Ramantele and Another* (2012) BWHC 1 at para. 61. This case is discussed in more detail in C Mushota Nkhata & F Kayumba Kalunga "Resolving the Tension between Gender Equality and Culture: Comparative Jurisprudence from South Africa and Botswana" in this publication.

Lawyers have a sacred duty to defend the human rights of all people without exception – bearing in mind, always that the issue of rights is not simply a matter of majoritarian preference. Just as a doctor has a sacred duty to preserve and prolong life, lawyers have a sacred duty to defend and protect the rights of all people – especially the rights of vulnerable groups in our society. Lawyers must be fearless and smart crusaders in the field of the rule of law and human rights. This is important, because history has taught us that governments – even in those countries with eloquent constitutions – are somehow reluctant to honour human rights. There is therefore a duty on lawyers everywhere to take up their strategic positions and protect against any threat to trample upon human rights. In this task, they will, just like judges, find international human rights law very useful.

As we look around our complex world and towards the next millennium, it becomes obvious that the legal profession has many challenges to overcome. In order for us to live up to our mandate, there is a need for continuous reflection, and evaluation of actions and strategies. To this extent, it is professional associations of judicial officers and lawyers who have to take the lead.

Conclusion

In conclusion, I reiterate that the right to equality and freedom from unfair discrimination is the centrepiece of the enjoyment of fundamental rights by women, persons with disabilities, sexual minorities, children, and any other vulnerable or marginalised groups in our society. To this extent, I must register my agreement with Marumo J, in *Muzila v Attorney General*,[29] when he said that:

> History teaches us that the most callous and brutal of human excesses, the most immoral and degenerate of legal orders and the most wicked and dissolute of authorities have been founded on various versions of the notion of superiority and distinction on the part of those in a position to influence the course of events. Such debauched attitudes must never be permitted to take root in our society, and those of us who find ourselves in a position to influence, in whatever small way, public discourse and opinion must be firm and unapologetic in our denunciation of them and their adherents.[30]

It is the role of the judiciary and lawyers to ensure that no human being is treated less favourably because of their social standing in our society. To that end, the judiciary must advance the right to equality and other human rights through proper interpretation of the law and the development of common and customary law – and, in that process, the courts must be vigorous in exploring and using foreign and international law as a guide.

29 (2003) 1 BLR 471 (HC).
30 *Id.*