Constitutionalism in Botswana: a valiant attempt at judicial activism

Part two (continued from (1983) 16 CILSA 373)

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The Court of Appeal reacts
The Taxpayer's case on appeal

Unable to persuade the Commissioner of Taxes and the High Court, the taxpayer decided to submit his case to the country's highest tribunal. This time he was successful: by a majority of two to one the Court of Appeal ruled in his favour. The court was unanimous that the Income Tax Act had to be interpreted against the background of the Roman-Dutch law.

In the opinion of Maisels P, with whose judgment Doyle JA concurred, Roman-Dutch law recognised the cession of future wages, the cessionary effectively replacing the cedent so that the director's fees in question had accrued to the cessionary.

According to Dendy-Young JA, however, cession presupposed a vesting of rights; logic, basic principle and the weight of authority were all against the legal possibility of a cession of a mere expectation. In his opinion therefore there had been an accrual to the appellant, even if only momentarily, and the appeal should have been dismissed.

Chief Justice Hayfron-Benjamin's constitutional argument did not figure as counsel for the Commissioner of Taxes had been instructed not to support the High Court's decision in so far as it was based on the anti-slavery provision of s 6(1) of the constitution. The President of the Court of Appeal thought it none the less necessary to note his disagreement with the Chief Justice on this point:

"I am bound to say, that although I appreciate that perhaps the learned Chief Justice was approaching the matter from what he conceived to be a matter of principle, to attempt to apply this principle, if indeed it can be said to be a principle, to the facts of

1980 BLR 273. The decision was reported in the South African Sunday Times of 4 May 1980 under the heading “Chief judge overruled on SA Law.”
the present case would, I think, occasion the most enthusiastic Wilberforce some surprise" (at 282).

The Moagi case on appeal?

Before we turn our attention to the Court of Appeal’s decision in Moagi, mention must be made of the Attorney-General’s application to the High Court for leave to appeal against its decision, as well as Justice Hayfron-Benjamin’s opinion in Kealeboga’s case.

In *The Attorney-General v Moagi*,3 Hayfron-Benjamin CJ refused an application by the Attorney-General for leave to appeal on a point of law on the ground that the point raised was not arguable, and consequently that there were no prospects of the appeal succeeding. A mere departure from a long-standing precedent and the creation of two conflicting lines of authority did not, in his opinion, automatically constitute a sufficient ground for the grant of leave to appeal on a question of law, particularly where the precedent was shown to have been followed for “legally unacceptable considerations of a patently political nature.”

In defence of his original judgment, he said:

“It may very well be that the courts in Botswana have accepted the strong persuasive force of South African decided cases in the fields of criminal procedure and evidence; there are obvious historical and practical reasons supporting this phenomenon. The issue considered in the judgment was, however, a constitutional one involving the fundamental rights of the individual. South African law does not recognise the concept of human rights; this is an undisputable fact. The whole official system of apartheid is the very negation of that concept.

Chapter 2 of the Constitution which makes provision for the protection of fundamental rights and freedoms of the individual, begins with the words ‘whereas every person in Botswana is entitled to the funda­ment rights and freedoms of the individual, that is to say...’ and then proceeds to spell out these rights. The rights are protected not because a person is a citizen of Botswana but because he is an individual, a human being. The concept is that human beings everywhere whether in Jericho or Timbuktu are entitled to these rights. It is this aspect that justifies the court in looking to various jurisdictions where the rights are respected for guidance in determining their scope. Indian courts do it. Nigerian courts, American and English courts all do it. There is no justification for the view that Botswana courts should be tied to the apron strings of South African jurisprudence when considering rights which are conspicuously absent there.

A person whose rights are breached in court has no remedies. This is the reason why a breach of a fundamental right affording the protection of law in court as provided for in s 10 of the Constitution must necessarily vitiate the proceedings. The Constitution does not vest a discretion in judicial officers in the application of these provisions.

There is no doubt that on the whole the courts in Botswana have hitherto adopted a low key approach to the question of fundamental human rights... Nothing in the precedents, however, show that there is a deliberate judicial policy to ignore the fundamental rights’ provisions of the Constitution. With a few notable exceptions, these rights have been given ample scope, whenever an issue is raised involving them, though emphasis has never been laid strongly on s 10 of the Constitution as the controlling provisions for all criminal trials in the country, or on the fact that in

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2Criminal appeal (CA) 28 of 1979 (8 April 1981) (as yet unreported).
3Criminal appeal 73 of 1978 (2 August 1979) (unreported).
Botswana every person has a vested and fundamental right in fair trial procedures. The fact, however, that no such emphasis has been laid in the past does not mean that any such emphasis now is wrong."

This decision caused the Attorney-General to apply to the Court of Appeal for leave to appeal.

In Kealeboga's case which was heard a few months before the Court of Appeal considered Moagi, Justice Hayfron-Benjamin sat as a justice of appeal, together with Maisels P and Aguda JA.

The appellant was convicted in the High Court of murder and there being no extenuating circumstances, was sentenced to death. The evidence had been largely circumstantial. There had, however, been one piece of direct evidence, namely a conversation the appellant had had with a relation of his whilst in custody, and in the presence of police officers, including the investigating officer. The appellant did not take the witness stand at his trial.

Contrary to Maisels P and Aguda JA, Hayfron-Benjamin JA felt that the appeal should have been allowed. In fact, he felt bound to register "a robust dissent" in respect of the decision his brethren had "apparently reached so easily and unanimously". His reasons were that the appellant had been refused the protection of the law by the admission of an extra-judicial statement, and that the trial judge had "solemnized" the appellant's decision not to testify as evidence against him. These, he thought were fatal flaws standing in the way of a conviction, and could not be condoned in terms of the proviso to s 13(3) of the Court of Appeal Act (Cap 04:01 of the Laws of Botswana).

As regards the practice of drawing unfavourable inferences from an accused person's decision not to give evidence at his trial, he had this to say:

"The reasons why an accused person elects not to give evidence are infinite and unless the judicial officer is to undertake an inquiry into these reasons in any particular case any inference drawn not from the evidence adduced alone, but from the accused's failure to testify, would be baselessly presumptive and recklessly speculative ... In a largely illiterate community, with few attorneys and only rudimentary legal services, and where the courts are unfamiliar places and of recent origin, not having grown out of traditional institutions of the people, the injunction against adverse judicial comment on defendant's election to remain silent should be total. Expatriate judicial officers unacquainted with the language, customs and mode of life of the people should, quite apart from constitutional considerations, be discouraged from following this hazardous practice. If the function of a judge is to decide cases on the evidence, and the burden of proving the case against the accused rests throughout on the prosecution, then the case made out by the prosecution on the evidence adduced can only be strengthened by other additional evidence. The decision of the accused not to testify can only be considered as a strengthening of the prosecution case if it is considered as evidence in the case. A judge who takes the decision of the accused not to testify as strengthening the case of the prosecution is in effect doing either of two things: he is treating the decision of the accused not to testify as additional evidence for the prosecution, or he is determining the case by taking into account matters which do not constitute evidence. The principle that in the determination of the guilt of a person..."

accused of crime the court must act only on the evidence adduced at the trial is of fundamental importance; it should not be whittled down. The rule that the burden of proof of guilt of the accused rests on the prosecution throughout the trial has been described as a golden thread running throughout the law; invidious gnawing at this thread should be discountenanced. The protection against testimonial compulsion is the bedrock of any regime of ordered liberty; it should not be eroded" (at 25–27).

When in April 1981, Moagi’s case reached the Court of Appeal, Chief Justice Hayfron-Benjamin had made his point clear.

As the appeal concerned a constitutional issue, namely the interpretation of s 10(7) of the constitution, the court – in accordance with s 9(2) of the Court of Appeal Act – had to be composed of five judges. They were Maisels P and Dendy-Young, Aguda, Kentridge and Baron JJA. Of these justices Kentridge and Baron were recent appointments, and speculation on how they in particular would decide, ran high.

This is what happened: The appeal was allowed. All but one of the judges considered that the Chief Justice had erred in finding that there had been a failure of justice at the trial. With regard to the interpretation of s10(7) of the constitution, however, the court was more sharply divided.

As all five judges delivered separate opinions, Maisels P felt it necessary to issue the following summary “for the guidance of the courts of Botswana”:

“(a) Giving due weight to the provisions of clause 10(7) of the Constitution of Botswana, the failure of the accused to give evidence may properly be considered by the court as a factor in determining the guilt of an accused person.

(b) Save in those cases where the burden of proving certain facts is by law placed upon an accused, the burden of proving the guilt beyond reasonable doubt of an accused person rests throughout upon the prosecution.

(c) The question whether there has been the necessary proof depends upon an appraisal of the totality of the facts, including the fact that the accused did not give evidence. The weight to be given to the failure of the accused to give evidence depends on the circumstances of each case, always bearing in mind that the accused cannot be compelled and is not obliged to give evidence.

(d) A breach of the constitutional rights of an accused person does not ipso facto or necessarily result in a failure of justice at his trial. The High Court and the Court of Appeal must deal with such breach in the same way as it would with any other irregularity in the proceedings, ie it shall not set aside a conviction unless it appears to the court that a failure or substantial miscarriage of justice has resulted therefrom. (Cf s 321 of the Criminal Procedure and Evidence Acts, s 11 of the High Court Act, and s 13(1) of the Court of Appeal Act.)”

The summary leaves no doubt that the majority of the court rejected the Chief Justice’s interpretation of s 10(7) of the constitution to the effect that no evidential value could be attached to an accused person’s election not to testify at his trial.

In the opinion of Maisels P, s 10 in general contained very little, if anything, which was not already law when the constitution came into force, and s 10(7) in particular, was “merely a restatement of the law, traditions and usages at the time the Constitution was framed” (at 38). He

\(^4\)S 10(7) reads as follows: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial."
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also warned that an interpretation of s 10(7) of the sort given by the Chief Justice could lead to "most serious miscarriages of justice" (at 38).

Aguda JA, having expressed himself to be in agreement with the president of the court, elaborated on what he termed "the danger inherent in the courts indulging in extreme legal sophistry":

"[T]hat danger is that such an approach may bring criminal justice, but more frightfully the whole system of justice, into disrepute thus alienating the feelings of the society which the law is meant to serve against the courts as a whole. Neither this country nor any other African country can afford this at this stage of development" (at 50).

In his opinion, the Chief Justice had failed to give due weight to the rationale behind the law and the courts:

"[T]he real basis for the existence of law and the courts ... is to provide for an ordered society in which every member will feel safe not only in his person but also in his property" (at 50).

Briefly, the Chief Justice had made himself guilty of "re-writing" s 10(7) to an extent which did not further the cause of justice but provided "a gratuitous and an undeserving insurance cover for the criminal" (at 52).

Dendy-Young JA, too, was of the opinion that s 10(7) was founded on the law existing at the time the constitution was enacted, but added that only in certain very special circumstances did the law permit an inference adverse to an accused person to be drawn from his election to remain silent.

Kentridge and Baron JJA adopted a different approach.

According to Justice Kentridge, the Bill of Rights was intended to be an instrument sui generis. Section 10(7) could not therefore be interpreted as merely embodying the common law; neither should it be given a narrow interpretation as this would be inappropriate to a Bill of Rights. In his view, section 10(7) prohibited not only direct but also indirect compulsion, and a rule of evidence or practice that an accused's failure to testify could be used as evidence against him, was a form of indirect compulsion and therefore illegal. He added:

"That rule [the South African rule] is by no means an illogical one, and may or may not conduce to the better administration of justice. But Botswana has chosen to give accused persons a wider constitutional protection, as has the United States. If this, in a rare case, saves a guilty man from just punishment, that is the price which must be paid" (at 86).

Justice Baron argued on much the same lines.

The various opinions contain most interesting discussions of South African, Commonwealth and American decisions on the issue. As regards the law of South Africa, Maisels P and Aguda JA remarked that certain references by the Chief Justice to that law had been based on a misconception. According to Maisels P:

"[T]he learned Chief Justice may not fully have appreciated the distinction between the common law of South Africa and certain statutory encroachments on the common law" (at 9).
He added that he was using a euphemism when he referred to "the somewhat uncomplimentary remarks about South Africa and its judicial system made by the Chief Justice" (at 28).

As indicated earlier, there was a greater measure of consensus among the judges when they came to consider whether Hayfron-Benjamin CJ had been justified in deciding that there had been a failure of justice at the trial. Only Justice Dendy-Young found that on the facts of the case there had been a miscarriage of justice. The other judges felt that the evidence, quite apart from the accused's election not to testify, was so overwhelming that no reasonable court could have failed to convict, and that the Chief Justice should have employed the proviso to section 321 of the Criminal Procedure and Evidence Act and section 11 of the High Court Act. Kentridge and Baron JJA emphasised that they did not consider the proviso to these sections to be inconsistent with the constitution or to derogate from a constitutional protection.

The result was that the Attorney-General’s application for leave to appeal was granted and his appeal allowed. The conviction in the magistrate's court was confirmed but in view of the inordinate delay in bringing the matter to finality, the sentence imposed by the magistrate was reduced.

*The Odendaal case on appeal*

It was again the Attorney-General who, desirous of having a question of law decided, lodged an appeal. The ground of appeal was that Hayfron-Benjamin CJ had erred in deciding that the presumption created by section 47(11) of the Road Traffic Act was merely rebuttable.

Of the five justices of appeal only Justice Dendy-Young associated himself with the Chief Justice's decision.

According to the other judges – Maisels P and Aguda, Kentridge and Baron JJA – the Attorney-General’s point was well taken. Justice Kentridge who delivered the majority judgment, stated that the wording of section 47(11) did not create an irrebuttable presumption of fact or of guilt – which indeed would have been unconstitutional – but, by means of an irrebuttable deeming provision, had established a substantive offence. He did not think that there was anything devious or unconstitutional in creating an offence that way, provided it was done in clear terms, as had been the case.

The court none the less dismissed the appeal because it found that the blood specimen had not been taken from the accused at a material time.

**Evaluation**

The decisions of the Court of Appeal immediately show that the majority of the judges held back from interpreting and employing the constitution's Bill of Rights in a "Grundnorm" or "basic law" fashion.

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6Criminal appeal (CA) 57 of 1979 (17 June 1981) (as yet unreported).
In the *Taxpayer's* case, Maisels P went so far as to question the principal value of section 6 of the constitution, and in *Moagi's* case, saw in the whole of section 10 "very little or anything which was not already part of the law existing at the time the Constitution came into force" (at 2). Aguda and Dendy-Young JJA agreed with the president of the court that section 10(7) was in fact a re-statement of the law at the time the constitution was framed.

It is true that in *Moagi's* case Dendy-Young JA "confessed" that his mind had fluctuated as to the right answer to the constitutional question raised there, and in the *Odendaal* case threw in his weight with the Chief Justice, this time to find himself in solitary dissent. He refrained, however, from stating, in so many words, that the constitution occupied a position *sui generis* and should be interpreted accordingly.

Only justices Kentridge and Baron had said so much in the *Moagi* case. According to Justice Kentridge:

"[A] Constitution such as the Constitution of Botswana, embodying fundamental rights should as far as its language permits be given a broad construction. Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law" (at 70).

Justice Baron stated:

"Prior to independence there was no Bill of Rights in Botswana, nor did the common law afford anything like the measure of protection which the Bill of Rights now affords; and an examination of its provisions discloses very close similarities to what has come to be known as the neo-Nigerian pattern, based . . . on the United Nations' Universal Declaration and the European Convention. Clearly therefore the legislature did not intend chapter II of the constitution generally to be interpreted as a restatement of the common law of Botswana" (at 5).

History, too, would seem to indicate that the Bill of Rights must be seen as a new "Grundnorm". As Hayfron-Benjamin CJ pointed out in his *Odendaal* decision when he discussed the constitutional requirements of defining crimes:

"The leader of the Founding Fathers who met at Lobatse to adopt the Constitution has suffered the cruel and unusual punishment of banishment from the country of his birth for an indefinite period [though in the event the banishment was for four years], for having committed no crime whether written or unwritten. The whole country had been moved to protest against this barbaric and inhuman treatment. It is likely that those who wrote the Constitution were more concerned in disabling any future government from decreeing similar iniquitous decrees, and subjecting people to punishment for conduct undefined anywhere as criminal" (at 18-19).

The issue on which the Chief Justice was left with no support - not even from justices Kentridge and Baron - concerned the effect of the proviso to section 321 of the Criminal Procedure and Evidence Act and section 11 of the High Court Act.

In the opinion of Justice Baron:

"This [proviso] is in no way in conflict with, or a purported derogation from, a

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constitutional protection; it says simply that no conviction or sentence shall be set aside or altered by reason of any irregularity or defect . . . unless it appears . . . that a failure of justice has in fact resulted therefrom. The words are any irregularity or defect; there is no warrant for a construction which restricts the type of irregularity or defect to one which does not involve a breach of a constitutional protection” (Moagi’s case at 2–3).

Likewise, Justice Kentridge:

“I cannot, with respect, agree that any breach of the constitutional rights of an accused must ipso facto result in a failure of justice at his trial. Nor do I think that the proviso . . . is inconsistent with the provisions of the Constitution. If there has been an infringement of the constitutional rights of the accused, while being careful not to nullify or abridge his protection, one must consider what effect it has had on the case in question. I see no reason why a constitutional irregularity should in this respect differ from other types of irregularity” (Moagi’s case at 88).

For Chief Justice Hayfron-Benjamin, however, there was a reason - a compelling one at that - namely the sanctity of the constitution. Regrettably, justices Kentridge and Baron stopped short of considering this, and adopted a formalistic or positivistic approach instead.

To a greater or lesser extent therefore all justices of appeal failed to depart from the thought-habits of a lifetime and put brakes on the Chief Justice’s teleological or functional interpretation of the Bill of Rights. The “brake-fluid” they used is known as “legal positivism”.

The rise of legal positivism is perhaps best explained with reference to Max Weber’s Wirtschaft und Gesellschaft (Economy and Society).8 In his monumental work, the famous German sociologist tried to elucidate why modern capitalism arose in Europe and not in other parts of the world. Law, according to him, provided part of the answer. The failure of other civilisations to develop a type of legal order with a high degree of predictability of rules governing economic life explains why it was in Europe that modern capitalism emerged.

It was nineteenth century legal positivism that provided the ideal recipe for effecting such a predictable legal order. Law, it said, was a command and should be separated strictly from morality. As an empirically grounded hypothesis this affirmation was nonsense, but as an intellectual construction it matched the demands made upon the courts. Small wonder that legal positivism lost its scientific garb rather soon and became an ideological instrument and a justification for judicial conservatism instead. CJR Dugard has referred to this new type of legal positivism as an “unsophisticated, out-of-date, popular, crude or vulgar positivism.”9 In terms of it, a judge decides cases by a mechanical application of legal rules which he finds established, quite apart from his judgment as to their fitness. This was the approach the courts in Britain and its dependencies adopted as their credo. It still prevails within the Commonwealth. In fact, it would seem that the courts have come to accept that legal positivism is

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determinative of the spirit of the law. Nothing is further from the truth. Apart from the fact that a number of Commonwealth countries have entrenched in their constitutions an enforceable Bill of Rights, their general law has inherited from the English law — and in the case of anglophone Southern Africa also from the Roman-Dutch law[10] — a sacrosant “natural law” component which, it is submitted, cannot be ignored without simultaneously turning the law into “an ass”. For the courts to pursue their self-imposed hermit’s life in the land of legal positivism amounts to a negation of their traditional function of dispensing justice.

Of the Botswana justices of appeal, Aguda JA’s positivistic approach was perhaps the most remarkable. When Chief Justice of Botswana, he had come out in firm support of a teleological approach, albeit in an extra-curricular statement:

“The Independence Constitution of each of the three States of Botswana, Lesotho and Swaziland, and for that matter of Nigeria and of other African States, generally, but more particularly through the Fundamental Rights provisions, created an infrastructure upon which the courts can, and should, endeavour to erect a homogeneous and democratic society in due course through a deliberate policy of interpretation of that Constitution, perpetually keeping in mind the compelling aim of creating such a society under the Grundnorm of that very Constitution. In consonance with that policy, laws and statutes made applicable to the State in its pre-independence era must in the post-independence era, be subjected, as the occasion arises, to rigorous tests and meticulous scrutiny to see if they are conductive to the creation of such a society. Any pre-independence law or statute which fails that test must be overruled by the courts unhesitatingly as being contrary to, and destructive of the infra-structure created by the Constitution for achieving the ultimate aim of the State. Of course, post-independence laws and statutes should be similarly treated . . .”.[11]

Is it surprising that in the Odendaal case (at 15–16) Hayfron-Benjamin CJ cited this statement with approval?

Exit Robert John Hayfron-Benjamin

The farewell message

When, on 2 February 1981, Chief Justice Hayfron-Benjamin delivered his ceremonial address at the annual opening of the first criminal session of the High Court, a dark cloud hung over his re-appointment. During his three years in office he had antagonised some influential people, in political as well as legal circles. In a direct reference to his opponents, he stated in the opening paragraph of his address that: “Some people no doubt feel that this [address] is one too many, and pray fervently that this be absolutely the last time”, Their prayers were heard. The Chief Justice’s address indeed turned out to be his farewell message. As was to be expected, his message was a powerful one. The following excerpts bear witness to this.

In a plea to judicial officers “to do justice in accordance with the Constitution”, he said:

[10]Hayfron-Benjamin CJ, not being trained in the Roman-Dutch law, was obviously unaware of its rich natural law component.

"No judicial officer is expected to function like a little Pilate. If I may paraphrase Lord Mansfield, no judge or magistrate in Botswana, should do that which his conscience tells him is wrong and against the Constitution or the laws and the usages of Botswana, to gain a nod of approval from any official or politician, or the applause of thousands or the daily praise of the press or news media or avoid that which his conscience tells him is right and in conformity with the Constitution, though it should draw upon him a whole artillery of libels, all that falsehood and malice can invent, and the credulity of a section of the populace can swallow" (at 7).

Stressing the importance of “the localisation of the law”, he said:

“Localising the law has its problems of a historical and ideological nature. Botswana as Bechuanaland Protectorate was for over seventy years administered as part of the High Commission Territories, with the High Commissioner quartered in Cape Town and later Pretoria. The burning and central political issue in the Union of South Africa for over fifty years was whether these Territories should be incorporated in the Union. Laws for these Territories were drafted and promulgated in South Africa. The tendency was just to copy with slight modifications the laws passed by the South African Parliament and apply them here. The colonial judges here had neither the authority nor the standing to challenge the correctness of any decisions of the courts of a British Dominion, which South Africa was before 1961. For a long time there were no lawyers here, and the people had to rely on South Africa for professional legal services. A professional attitude of an unquestioning reliance on South African precedents developed. Even great judges found it difficult to depart from this” (at 10).

Commenting on the South African judiciary, he said:

“[T]he South African judiciary has produced no Mansfield, Atkin or a Denning; it has produced no Marshall, Holmes, Brandeis, Warren or Thurgood Marshall. It has produced none of those referred to by Denning as the bold spirits who can use the law as a weapon to ameliorate ground inequities and inequalities. Some judges of course protest against the harsh crudities of petty apartheid, but none has so far to my knowledge challenged the jurisprudential foundations of apartheid. They all plead parliamentary supremacy and judicial impotence. Yet Mansfield, in the original home of the doctrine of parliamentary supremacy destroyed the basis of institutional slavery in one telling sentence in the Somerset case that the English air is too pure for slavery. The odious practice of racial discrimination or what is known as baby apartheid was cracked wide open by the Warren Court in the case of Brown v Board of Education, and one of the most significant statements in that case was made by Justice Jackson during the hearing when he said: ‘I suppose that realistically the reason this case is here is that action couldn’t be obtained from Congress.’ If Parliament will not act to outlaw an unjust, vicious and obscene social system, the courts in whom the judicial authority of the State is vested must act. Impotence in this regard is self-induced. Yet it is said that the South African judiciary is barely seventy years old, but the judiciary of Australia is not much older, yet it has produced Owen Dixon and Evatt and some claim that it has even produced a Murphy. Yet if the South African judiciary has not produced bold spirits of the stature referred to above, it has produced three judges of considerable erudition, of breadth of vision, and humanity. They are Rose-Innes, Solomon and Schreiner. The fact is not published much in South Africa, but the first two were the only judges who attended a multi-racial educational institution in South Africa in their youth or infancy and therein perhaps lies the key to their humanity and greatness. Schreiner came from a distinguished home of liberals. He served on the Court of Appeal of Botswana as a member from 1964 and as the President from September 1969 to July 1974. He delivered many notable judgments, but even he could not wholly divorce himself from the established judicial attitudes. He started sitting on the Bench here when he was seventy-four years of age. He had retired from the Appellate Division of the Supreme Court of South Africa. At his age his views on the future of the High Commission Territories may have settled and crystallized and could not be affected by the profound implications of the movement towards independence which was then in full swing” (at 11–12).
The Botswana Daily News reports

On 10 July 1981, there appeared in the Botswana Daily News the following brief item:

"Chief Justice Hayfron-Benjamin left Botswana Friday July 3 for his home country, Ghana, at the expiry of his three years' contract as Chief Justice of Botswana . . . At the small farewell party held in his honour at the High Court in Lobatse Mr. Hayfron-Benjamin said his stay in Botswana was beneficial and did not regret working in this country."

Concluding remarks

The Hayfron-Benjamin era has raised some important jurisprudential issues. The first is that of the relationship between the judiciary and the other branches of government, the second relates to the type of interpretation to be given to the constitution, and the third and most important issue is whether the present constitution is really adequate.

Before we consider these issues, it is worth remembering that, like all other independence constitutions of British Africa, that of Botswana bears all the markings of having been designed by Whitehall. What motivated the African nationalist leaders to accept Western-type constitutions is not clear. Did they consider them to be the only means of assuring the welfare of their people, where those constitutions perhaps imposed on them as a condition for independence; or was there just a desire to conform?

There is no evidence that the Batswana were forced to accept the document prepared for them. In the 1965 pre-independence elections the Bechuanaland Democratic Party (now the Botswana Democratic Party) had won an overwhelming victory on a programme that left no doubt about its predilection for this document. Following these elections the government prepared proposals for further constitutional changes which were endorsed by the Legislative Assembly, the House of Chiefs and at public meetings throughout the country. The final document was agreed upon at the independence conference held in London in February 1966.

This, however, does not mean that the adoption of the independence constitution was a logical consequence of the country's historical development. A logical development would have led to one of two choices: either to change the colonial authority without changing the colonial power-structure, or to reintroduce, with necessary modifications, the pre-colonial structure. Perhaps, a serious study would have shown the need for an
arrangement different from the alternatives suggested by history but then the argument for it would have been articulated and justified, not assumed. As it turned out, a completely new structure of tripartite government to which the people were not used, was adopted without prior study of its consequences.

The tripartite formula, it should be added, applies to the central government only and has not been extended to the local tribal governments. The latter continue to operate under their own customary laws, though their traditional powers have been considerably curbed by the colonial administration, and have been eroded even further by the country's first independent administration.\(^{15}\)

*The relationship between the judiciary and the other branches of government*

In both the pre-colonial and colonial eras there was never a real separation of executive, legislative and judicial powers. Only in the last days of the colonial administration was a Westminster type of democracy hastily introduced.

Whereas traditional chiefly government, through the kgotla, was and still is participatory in nature, the colonial government was thoroughly authoritarian. The common law courts were an extension of the executive and faithfully followed its policy. Their approach was one of positivism of the crudest type.\(^{16}\)

It was from this extreme that the independence constitution carried the country overnight into the other extreme, that of entrusting the central judiciary with the task of upholding the country's new fundamental law, if need be in the face of executive and legislative measures and indeed of the whole fabric of the country's common and tribal laws. The Hayfron-Benjamin era has shown that this was too bold a move.\(^{17}\) As it was done with the Canadian Bill of Rights, for example, the transition could have been effected gradually so as to afford the various branches of government and the populace at large, time to readjust. Failure to do this has put Botswana's central judiciary in a precarious position.

Of the three arms of national government the country's judiciary is per force the most fragile. It has no public platform for drumming up support, and for the execution of its decisions depends ultimately on the coercive power of the executive. In addition, traditional respect for its independence is lacking and it has not yet been able to build up a cherished position of its own in the minds of the people. All these factors constitute severe practical limitations upon its power. Prudence demands therefore

\(^{15}\) Cf, in particular, the Customary Courts Act (Cap 04:05 of the Laws of Botswana), the Tribal Land Act (Cap 32:02), the Matimela Act (Cap 36:06) and the Chieftainship Act (Cap 41:01). See also the *Report of the Presidential Commission on Local Government Structure in Botswana* Vol I 1979, chapter 4 (“Tribal Administration”) Government Printer Gaborone, and the *White Paper on Local Government Structure* Government Paper 1 of 1981.

\(^{16}\) Cf the unimaginative decision by Watermeyer J in *Tshekedi Khama and another v The High Commissioner* 1926-1953 High Commission Territories Law Reports 9.

Constitutionalism and judicial activism

that it approaches its relations with the executive, the legislature and the populace at large with a great deal of circumspection. On the other hand, it ought not to compromise its own functions. As Nwabueze pointed out, prudence does not require the elevation of self-restraint into a doctrine, or a slogan of judicial action or rather inaction.\(^{18}\)

For the judiciary to play its constitutional part, a relationship of trust between it and the other branches of government is in the circumstances absolutely essential. The intermediary role falls upon the person of the Chief Justice. Hence the form of his appointment, namely by the head of state himself. It is in the general interest that the relationship between the Chief Justice and the executive, in particular, should be one of confidence and cooperation. Despite its new constitutional function the judiciary remains, after all, part of the government machinery. As Amissah puts it:

"[T]he link role which he [the Chief Justice] is expected to play between the administration and the judiciary, properly discharged, could be one of the more subtle checks on such excesses of judicial independence as would border on irresponsibility. In reverse reaction it would foster a better understanding of the problems of the courts amongst the other branches of government by impressing upon them what the courts are trying to do and what their limitations are".\(^{19}\)

It is, however, difficult to see how such a relationship can be established if, as it has hitherto been the case in Botswana, a Chief Justice never serves for longer than three years.

Interpreting the constitution

Botswana's constitution forms the country's basic law. It determines and defines the organisation and powers of its government, as well as the fundamental rights of its citizens. That the constitution is not just an ordinary statute is confirmed by the provisions regulating its amendment.\(^{20}\)

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\(^{18}\)BO Nwabueze Judicialism in Commonwealth Africa 1977 at 72. Of interest here is the decision of the Court of Appeal in Mothegwana Busang v The State criminal appeal 5 of 1981 (4 April 1981) (as yet unreported). The appellant had applied to the High Court in terms of s 18 of the constitution for an order declaring certain criminal proceedings before the Bamangwato Senior Customary Court null and void. Maisels P had this to say about the procedure of bringing matters involving constitutional rights before the High Court under s 18: “In the United States of America the Supreme Court has refused to pronounce decisions upon constitutional questions unless it has been absolutely compelled to do so in the particular case. Its reason for so doing is to minimise the possibility of conflict between it and the executive or the legislature; cf professor Bernard Schwartz's work on American Constitutional Law at 147 and 148. With respect, I consider this to be a proper approach, and one that this court should follow” (at 15). Aguda and Amissah JJA concurred with the president of the court. Dendy-Young and Kentridge JJA although agreeing with the judgment of the president that the appeal should be dismissed, delivered separate opinions. Only Dendy-Young JA commented on the president's remark so even quoted, and said: “I would not like to be a party to any possible suggestion that there should be some sort of clog on the right of a citizen to bring matters before the High Court under s 18. As I understand the approach of the courts, it is this: where a constitutional issue is raised, but it is possible to decide the dispute without recourse to the constitutional issue, the courts will avoid giving a decision on the constitutional issue” (at 17).

\(^{19}\)Op cit 40.

\(^{20}\)See s 89 of the constitution.
Regarding its interpretation, the constitution itself lays down no general theory. In section 128(13) it says that the Interpretation Act of 1889 applies to it, but this British Act relates to technical detail only.

What constitutes an appropriate interpretation is of course relative to the type of statute. Different types of statutes – like a constitution and a taxing statute, for example – require different types of attitudes and techniques. As a matter of general principle, however, the Botswana legislature has subscribed to a policy of liberal interpretation. This general principle is to be found in section 10(1)(3) of the 1973 Interpretation and General Provisions Act (Cap 01:02 of the Laws of Botswana) which reads as follows:

"A written law shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the objects of the written law according to its true intent, meaning and spirit". (My emphasis.)

The provision which is a modern restatement of the famous "mischief rule" in *Heydon's case*, (1584) 3 Co Rep 7a, albeit cast in mandatory form, is obviously aimed at deterring the courts from applying a narrow, literal approach. It should, however, be read with section 2 of the Act which provides that the provisions of the Act apply to every written law and public document, before or after the commencement of the Act, unless otherwise provided therein, or unless there is something in the subject or context inconsistent with such construction or interpretation.

There can be little doubt that the general test laid down in section 10(1)(3) of the Interpretation and General Provisions Act befits the constitution, particularly its Bill of Rights. In fact, a Bill of Rights assumes that the courts will play an activist role. This, in turn, demands of them that they abandon the notion that values are of no concern. According to Amissah there is no place for such a notion in contemporary Africa:

"There is a need for the courts to appreciate the ultimate goals of the society and within that context to play a positive [or activist] role in their achievement." 13

To which may be added Nwabueze's remark that

"when the courts seek to confine their own function unduly by a narrow, positivist [or legalistic] interpretation of the law, constitutionalism may be endangered." 14

*How adequate is the constitution?*

The Botswana judiciary would have been in less of a predicament had it been clear to what extent the constitution reflects true national values, and what these values are. Obviously the answer to this question does not

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2152 and 53 Vict c 63.
22To what extent this provision is really applied would make an interesting study. References to it in the reported decisions of the High Court and the Court of Appeal are rare.
23*Op cit* 368.
24*Op cit* 286.
lie in foreign experience but in the country's own traditions and aspirations, of which, unfortunately, there exists no single integrated account.25

Tradition-wise the Batswana believe in participatory government or government by popular discussion and consensus. In a recent publication, President Masire confirmed this as follows:

"The Botswana Democratic Party Government built its edifice on the sound Tswana tradition of democracy (mmuālebe o a ba a ba la gagwe) and consultation (therisa-nyo), both cornerstones of our national principles and both not borrowed from an alien culture or foreign ideology".26

But how participatory is the central government structure? How efficient are its input and feedback circuits? To what extent does the independence constitution promote participatory democracy? Incidentally, at the 1978 annual congress of the ruling Botswana Democratic Party a motion calling for the establishment of a one-party state was rejected "out of hand".27 Does that mean that the modern African concept of the one-party democracy and the institutions and procedures that form part of it were regarded as not worth consideration?28

As for the country's Bill of Rights, does it sufficiently conform to the traditional communal spirit of Tswana society?29 Is not the emphasis rather too heavily on the individual as an individual rather than a member of society? A reformulation of the content of the constitutionally protected rights might well make the case for their protection more attractive.

Of course, a country does not live on traditions alone, there are also its aspirations to consider. For Botswana, like all other African countries, these are national unification and economic and social progress. Botswana is fortunate in that from the time of the first external threats by the Boers, and Rhodes' British South Africa Company onwards, a "national awareness" has been apparent. The country was however less fortunate in that the British neglected its development because for too long they fostered the hope that their protectorate, given the right political climate, could be incorporated into South Africa. Development only came with independence, and then rather rapidly. Inevitably, this brought new tensions in its wake, notably between the central and tribal governments, and the new urbanised and traditional rural sectors of the population.

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24 Development studies on Botswana are legion. In fact, the country would appear to be over-researched. Records of development studies on Botswana are held by the National Institute for Research Private Bag 0022 Gaborone. What still needs to be done is to coordinate and make public the various studies and where necessary subject them to public debate.

25 In the foreword to Shaping the destiny of a nation (see footnote 13).

26 Shaping the destiny of a nation 18.


28 According to Richard P Stevens's account of the formation of the constitution, the inclusion of a Bill of Rights was to appease the white population group for whom no parliamentary seats had been set aside (Lesotho, Botswana and Swaziland 1967 at 147).
Although since the formation of the single territory of what now constitutes Botswana, great strides have been made towards creating a national "community" of "mechanical solidarity", how much progress has been made towards the establishment of a national "society" of "organic solidarity"? Progress in this direction can come only from "within", that is to say through a process of self-reliant problem-solving which takes the form of a renaissance of traditional values geared at modern aspirations. This in turn may require, as Nwabueze has suggested, a nationally adopted statement of ideology and its inclusion in the preamble to the constitution. Without such statement the country's government, including the judiciary, is likely to find itself with no sense of direction, and eventually struggling to secure the popular support it cannot afford to dispense with.

\( ^{30} \) The terminology is that of the well-known sociologists Ferdinand Tönnies and Emile Durkheim.

\( ^{31} \) Op cit 24,140-141.