Emergency Laws in Botswana: Some Critical Reflections

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1 INTRODUCTION

Law is a double-edged sword. On the one hand it is an instrument of liberation and justice when applied by men of conscience. On the other hand, when it is placed in the hands of wicked men, they use it to oppress and brutalise other fellow human beings, especially those they do not share political viewpoints with. Many 'good' laws have been misapplied for parochial and illegitimate ends by governments of the day. These laws are systematically used to inflict deadly harm on civilians and to create an atmosphere of fear for political or ideological purposes. In Africa, in particular, these laws have been used to oppress citizens rather than protect them. Professor Fombad observes that many African dictators such as Mobutu Sese Seko of former Zaire, Marcias Nguema of Equatorial Guinea and Jean Bedel Bokassa of the Central African Republic used constitutions as convenient cloaks behind which they unleashed terror upon terror on their citizens.[1] He further observes that some world's notorious dictators like Adolf Hitler of Germany and Benito Mussolini of Italy also operated under 'valid constitutions.'[2] Despite that Botswana is not notorious for abusing such laws, we need not wait for oppressive rulers to begin (mis)using these laws to crack down on the opposition and clamp the space for dissent before we revisit them.

Emergency laws are an immediate example of laws that African leaders have manipulated to undermine the rights and freedoms of their people. We see it every day in Africa where rulers of states declare emergencies so that they can create a state where fundamental rights of citizens are suspended so that they can summarily deal with political opponents under the guise of a state of emergency. The use of emergency laws in this manner is arbitrary and antithetical to the notions of liberties and fundamental freedoms of individuals. A proper balance must be struck between the power of the state to suspend constitutional structures for the protection of rights of the individuals and the power of the state to protect its security needs. The test for the extent to which the rights of individuals can be limited or suspended is

[1] Fombad "The Swaziland Constitution Of 2005: Can Absolutism Be Reconciled With Modern Constitutionalism?" 2007 *SAJHR* 27.
[2] *Ibid*.

that of factual necessity.[3] This means that if the targeted exigency is extremely grave, it may well mean that the government is entitled to ignore constitutional norms and dictates and suspend rights of individuals, to the extent required by the exigency at hand, and deal with the situation in order to save the nation.[4] As shall be shown below, international law, through the International Covenant on Civil and Political Rights (ICCPR)[5] have sought to lay down a criterion in terms of which states should exercise their prerogative to declare states of emergency.

This paper analyses the emergency laws of Botswana both at theoretical and practical levels, and tests their compliance with norms of international law and best practice. The article begins by discussing the concept of derogation of rights at a general level. It proceeds to briefly discuss principles of international law that govern emergency situations. It further looks into Botswana laws in this regard from a comparative perspective. Lastly, it makes propositions for reform of Botswana law to harmonise it with principles of international law.

2 DEROGATIONS FROM FUNDAMENTAL RIGHTS IN SITUATIONS OF EMERGENCY UNDER INTERNATIONAL LAW

Many human rights instruments allow for derogations of fundamental human rights and freedoms in certain situations, such as in public emergencies where the life of a nation is threatened. These include the European Convention on Human Rights (European Convention, article 15), article 4 of ICCPR[6] and article 27 of the American Convention on Human Rights (American Convention, article 4). However, what is critical to note is that a public emergency, whatever its cause may be, is not an occasion to roll to the ground all legal protections afforded to citizens by the law, but a legitimate ground to limit the level of that legal protection.[7] It has been opined that the decrease in legal protection during states of emergencies can be expressed two ways: First, by a short-term interruption of the normal organisation of powers of the state in favour of the Executive and Administrative authorities, civil or military, which has the consequence of giving legitimacy to measures that are otherwise illegal. Second, the decrease in legal protection can also be expressed by a

[3] Gross 'Constitutions and emergency regimes' in Ginsburg and Dixon *Comparative Constitutional Law* 2011 345.
[4] *Ibid.*
[5] General Assembly res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).
[6] This article will be discussed in detail below and the article progresses.
[7] Sermet "The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion" 2007 *African Human Rights Law Journal* 143.

'reduction' of rights and freedoms normally accorded to individuals in accordance with domestic law and international legal instruments.[8] But what does the concept of public emergency mean? The term public emergency does not lend itself to easy definition. Hamilton has properly observed that:

> '[i]t is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.'[9]

Despite the difficulty of defining the concept of public emergency, writers in this area generally agree that examples of emergency situations contemplated by international instruments and municipal constitutions include armed conflicts, civil war, civil unrest and natural disasters. Although derogation of rights during emergency situations is a permissible procedure, certain requirements must be met before a right is derogated from under international law. These requirements include qualifications of temporariness, severity, proclamation and notification, legality, consistency with other obligations incurred under international law, proportionality, non-discrimination, and recognition of non-derogable rights recognised as such under the applicable treaty.[10] These principles will be teased out in greater detail below. As already observed, in essence, international law emphasises the idea that derogation of rights is not intended to create a legal vacuum in a state or create a smoke screen behind which the state must violate human rights.[11] As indicated above, the derogation regime thus seeks to strike a delicate balance between the protection of fundamental rights and freedoms of individuals on one hand and the protection of legitimate interests of a nation in a situation of crisis by placing reasonable restraint of emergency powers of a state.[12] In this regard, The Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Minimum Standards)[13] seek to ensure, among other things, that even in cases where a

[8] *Ibid.*
[9] Hamilton "The Necessity of an Energetic and Active National Government" Paper no. 23, 2. Available at: http://www.saf.org/journal/2/federalist12-18-07.pdf (Last accessed 13-05-2013).
[10] Karimova "Derogation from human rights treaties in situations of emergency: Rule of law in Armed Conflict" Projects" [undated] http://www.geneva-academy.ch/RULAC/derogation from human rights treaties in situations of emergency.php (last accessed 08-05-2013).
[11] *Hartman, "Derogations from Human Rights Treaties in Public Emergencies" 1981 Harvard LR 2.*
[12] *Ibid.*
[13] Adopted in 1985 by the International Law Association.

government declares a *bona fide* state of emergency, non-derogable fundamental rights and freedoms of people continue to be observed and respected.

International instruments establish different emergency derogation regimes. For instance, whereas the ICCPR permit for derogation of rights under its article 4, the African Charter does not contain a derogation clause. For countries like Botswana which are signatories to both treaties, the ICCPR and the African Charter,[14] the inconsistency in the two treaties presents confusion on the nature of obligations of states that are parties to the two treaties in so far as the concept of derogation of rights is concerned. However, despite that the African Charter is silent on derogations, numerous of its provisions contain claw-back clauses that empower states parties to limit the rights it articulates to the extent permitted by municipal law.[15] Some commentators argue that claw-back clauses are a form of derogation clauses and that these clauses can work as substitutes for derogation clauses.[16] It might as well be that this logic influenced the position of the African Charter in this regard.[17] Hatchard contends that the absence of a derogation clause in the African Charter signifies the fact that the Charter places much premium on peoples' rights as opposed to 'individual rights'.[18] However, Byfield argues that the exclusion of a derogation clause in the scheme of the African Charter could create a wrong impression that the question of derogation of rights has been left exclusively to local authorities of states parties to determine the time and manner in which rights and freedoms of citizens could be derogated from – which understanding will be dangerous given the prevalence of dictatorships on the continent.[19]

Another view that has been expressed is that the absence of a derogation clause in the Charter implies that all rights are derogable in emergency situations.[20] Some commentators hold the view that by not providing for derogations under any circumstances, framers of the African Charter intended to guarantee the rights it espouses in a firm fashion.[21] Heyns powerfully contends that the silence of the African Charter on derogation of rights is a major weakness.

[14] Botswana ratified the African Charter on 17 July 1986 and the ICCPR on 08 September 2000.
[15] Baimu "Derogation of rights in states of emergency: shortcomings in the Tanzanian Law and propositions for reformation" 2002 *East African Journal of Peace and Human Rights* 253.
[16] See for instance Hartmann "Derogation from human rights treaties in public emergencies" 1981 *Harvard J of International Law* 1.
[17] Baimu 2002 *East African J of Peace and Human Rights* 254.
[18] Hatchard "States of siege or emergency in Africa" 1993 *JAL* 60.
[19] Byfield "Personal liberty and Reasons of state" 1989 2 *Developing human rights Jurisprudence* 129.
[20] Oraa *Human rights in states of emergency in international law* (1992) 210.
[21] Baimu 2002 *East African J of Peace and Human Rights* 254.

He argues that this silence will not prevent states from declaring states of emergency, but rather, would result in them ignoring the Charter at such times.[22] The African Commission on Human and Peoples' Rights (Commission) has interpreted the absence of a derogation clause from the African Charter to mean that no derogation is permissible under any circumstances whatsoever – not even a situation of war. In *Commission Nationale des Droits de I'homme et desliberte v Chad*[23] the Commission delivered itself on the point thus:

> The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.[24]

Again in *Media Rights Agenda & Others v Nigeria*,[25] the Commission repeated itself thus:

> In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.[26]

The ICCPR is the most prominent instrument that comprehensively deals with the issue of derogation of rights under international law. It also presents hard law and is binding on states parties such as the Republic of Botswana. Thus, it is fully in order to treat some norms and standards presented by this instrument on the question of derogation of rights with some appreciable detail in order to place the present work into perspective. Article 4 of this instrument states:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not

[22] Heyns "Civil and political rights in the African Charter" in Evans and Murray *The African Charter on Human and Peoples Rights: the system in practice 1986 – 2000* (2002) 139.
[23] Communication 74/92, Ninth Activity Report 1995-1996, Annex VIII (Documents of the African Commission at p 449).
[24] *Ibid.* para 62.
[25] AHRLR 2000 (ACHPR 1998).
[26] *Ibid.* para 67. See also *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41.
(2000) AHRLR 227 (ACHPR 1999),para 41.

> involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
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> 2. No derogation from articles 6 [right to life], 7 [freedom from torture or to cruel, inhuman or degrading treatment or punishment] , 8 [paragraphs 1 and 2, dealing with slavery and servitude], 11 [imprisonment for failure to perform a contractual obligation], 15 [punishment for omission or commission which did not constitute a crime at the time of omission or commission], 16 [a person's right to recognition under the law] and 18 [freedom of thought, conscience and religion] may be made under this provision.[27]
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> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Commentators have extracted seven key principles that govern derogation from the above provision.[28] These are the principle of exceptional threat, the principle of non-discrimination, the principle of proportionality, the principle of non-derogability, the principle of proclamation and notification and the principle of consistency with obligations incurred under international law. A brief insight into these principles is apt.

A. The principle of exceptional threat

In terms of this principle, the existence of a situation amounting to public emergency that threatens the life of a nation is a *conditio sine qua non* to the declaration of a state of emergency. The ICCPR is silent on the meaning and scope of the concept of 'state of emergency' which doctrinally means the same thing as the concept of 'public emergency'. The Paris Principles state that 'public emergency' 'means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the

[27] See also article 58 of the Siracusa Principles. It lists non-derogable rights along the same lines.

[28] See for instance Beyani "International Law and Lawfulness of Derogation from Human Rights During States of Emergency in Zambia" 1998 *Zambia L R* 69.

organized life of the community of which the state is composed.'[29] In this connection, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (The Siracusa Principles)[30] provide that states may only take measures derogating from its obligations under the ICCPR 'only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation.'[31]

What can be deduced from the above definition is that for a declaration of emergency to occur, the situation in question must be threatening the life of a nation. In this connection, the Human Rights Committee stated that, '[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of a nation.'[32] Although civil wars and other cases of serious or violent internal unrest are always asserted for declaring a state of emergency, an armed conflict does not automatically satisfy the criteria for derogation. For an armed conflict to meet the derogation criteria, it must firstly meet the qualitative measure of severity that requires that derogations be resorted to 'only if and to the extent that the situation constitutes a threat to the life of the nation'.[33] In *Lawless v Ireland*,[34] the European Court of Human Rights described public emergency as 'an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed.' In *Denmark & others v Greece* (popularly known as the *Greek* case),[35] the European Commission admirably crystallised the position of the law in this regard. It observed that in order for an emergency to be competently declared, there must be: (a) actual or imminent harm arising from the situation in question (b) the effects of emergency must involve the whole nation,[36] (c) the continuance of the organised life of

[29] Article 1(b).
[30] U.N. Doc. E/CN.4/1985/4, Annex (1985).
[31] Article 39.This provision proceeds to record that: 'A threat to the life of the nation is one that:
(a) affects the whole of the population and either the whole or part of the territory of the State, and
(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant'. In terms of article 40 thereof 'Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations' under the ICCPR. So too, in terms of article 41 '[e]conomic difficulties per se cannot justify derogation measures.'
[32] General Comment no. 29 'States of Emergency' (31 August 2001) ICCPR/C/21/Rev.1/Add.11. Available at: http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf (accessed 11 May 2013) para 3.
[33] *Ibid.*
[34] Case no. 1/61, Judgment of 01 July 1961.
[35] Applications No. 3321/67, judgment of 18 November 1969.
[36] Some authors argue that it is still competent for an emergency to be declared in relation to events of a localised nature. See for instance Hatchard 1993 *JAL* 3. See view also appears in section 31(1) of the Constitution of Ghana which states that the President may 'declare that a state of emergency exists in Ghana *or*

community must be facing imminent disruption and (d) the crisis or danger must be exceptional so as to make a mere limitation of right (not derogation) inadequate.

B. The principle of proclamation and notification

It is a requirement of international law that before an emergency is declared, it must be officially proclaimed within the nation.[37] This procedural prior condiment is intended to eliminate possibilities of *de facto* states of emergency by enjoining states to declare the emergency following laid down domestic procedures.[38] In terms of General Comment No 29 of the Human Rights Committee, states 'must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers'.[39] Proclamation ensures that states act 'openly from the outset of the emergency and to delegitimise after-the-fact justifications for violation of fundamental human rights'.[40] Following proclamation, the concerned state must notify the international community of the proclamation of emergency through the office of the Secretary General of the United Nations. Notification procedures enjoin the concerned state to inform the parties to the Covenant in order for them to discharge 'their obligations under the Covenant.'[41] To enable the parties to the Covenant to act, the notification must be compressive.[42] The requirements of proclamation and notification are obligatory on the part of that state and are not simply 'technical and dispensable formalities'.[43] They are procedural guarantees important for purposes of national and international monitoring or supervision. They foster accountability in emergency situations, which is necessary given the adverse implications of emergencies on liberties and fundamental freedoms of individuals.

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in any part of Ghana …' In terms of section 31(8) thereof, the provisions of any enactment … dealing with a state of emergency … shall apply only to *that part of Ghana where the emergency exists*. These provisions appear to suggest that it is competent for authorities of Ghana to declare a state of emergency in relation to events of a localised nature.

[37] See article 42 of the Siracusa Principles.

[38] Baimu 2002 *East African J of Peace and Human Rights* 256.

[39] See para 2 thereof.

[40] Hartman 1981 *Harvard LR* 99-100.

[41] Article 45 of Siracusa Principles.

[42] In terms of the afore-cited article 45, the notification must contain the following information: '(a) the provisions of the Covenant from which it has derogated; (b) a copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency in order to assist the states parties to appreciate the scope of the derogation; (c) the effective date of the imposition of the state of emergency and the period for which it has been proclaimed; (d) an explanation of the reasons which actuated the government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and (e) a brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification.'

[43] Hartman 1981 *Harvard LR* 99.

C. The principle of proportionality

Proclaiming the principle of proportionality, the Siracusa Principles stated that 'the severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.'[44] As indicated above, the proclamation of an emergency does not create a legal vacuum. Thus, derogations from fundamental rights and freedoms are only permitted to the extent required by the exigencies of the situation;[45] that is to say, they need to be strictly proportionate to what is demanded by the situation. According to Hartman, the requirement of proportionality is one of the substantive guarantees that disciplines state power in an emergency by 'requiring specific scrutiny and specific justification of each measure taken in response to an emergency, rather than an abstract assessment of the overall situation.'[46] It is therefore necessary that 'competent national authorities shall be under a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.'[47] The Human Rights Committee has identified three factors in the scheme of proportionality. These are severity, duration and geographic scope. In an attempt to ameliorate the rigours of states of emergency, the Human Rights Committee has stated that limitations that are already permissible under the Covenant on certain rights, such as the right to movement and the right to assembly are generally sufficient to cater for instances of 'mass demonstration including instances of violence, or a major industrial accident.'[48] In addition, the Human Rights Committee is of the view that 'no provisions of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a state party.'[49] The Committee has also relevantly observed that:

> The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for the States Parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.[50]

[44] Article51.
[45] Baimu 2002 *East African J of Peace and Human Rights* 257.
[46] Hartman 1981 *Harvard LR* 106.
[47] Siracusa Principles, article 52.
[48] General comment no. 29, para 5.
[49] *Ibid* para 4.
[50] *Ibid* para 6.

However, the European Court of Human Rights permits states a 'wide margin of appreciation' in balancing the scales to attain proportionality. In other words, the court defers to the policy choices of states in their attempt to give effect to protected rights in emergency situations. In *Ireland v UK*,[51] the Court stated that it was for the domestic authorities to decide 'how far it is necessary to go in attempting to overcome emergency.'[52] Similarly in *Brannigan and McBride* v *UK*,[53] the court stated that it is incumbent upon the national authorities of states to determine 'the nature and the scope of derogations necessary.'[54]

D. The principle of non-derogability

Although states enjoy the power to abrogate rights of individuals in an emergency, as can be seen from Article 4(2) of the ICCPR reproduced above, there are those rights which a state cannot derogate from even when the heavens are falling - so to speak. These include the rights to life, freedom from torture or cruelty, inhuman and degrading treatment or punishment, freedom from slavery and servitude, freedom from retrospective penal legislation, the right to enjoy recognition as a person before the law and freedom of conscience, thought and religion. The justificatory basis for the non-derogability of these rights is that they present the baseline for common human decency below which humanity cannot descend. The principle of non-derogability sets a bright line upon which a state may not step in derogating from the rights of individuals in an emergency situation. The Human Rights Committee stated that the listing of non-derogable rights 'does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of a nation exists'.[55] In this connection, the Committee observed that derogations can never be used to sanction acts of genocide, or crimes against humanity as defined by the Statute of the International Criminal Court,[56] although these are not listed under the ICCPR. The Committee also observes that as 'norm of general international law …' persons deprived of liberty must be treated humanely; and further that the prohibition against taking of hostages, abductions, or unacknowledged detention is not derogable under international law.[57] Further, the rights of minorities are non-derogable due to the prohibition of discrimination under Article 4 of the ICCPR. Even in an emergency situation, ordinary courts

[51] Series A, No. 25, Judgment of 18 January 1978.
[52] *Ibid*. para 207.
[53] Case no. 5/1992/(1993) Judgment of 23 May 1993.
[54] *Ibid* para 43.
[55] General comment no. 29, para 2.
[56] *Ibid* para 13(c).
[57] *Ibid.* para 13(b).

of law must maintain their jurisdiction and independence to adjudicate claims where non-suspendable rights have been violated.[58]

E. The principle of consistency

The principle of consistency is to the effect that derogation measures taken during the state of emergency must not be inconsistent with obligations incurred by the state concerned under international law.[59] This principle presents another safeguard of the derogation process based 'on principles of legality and the rule of law inherent in the Covenant as a whole'.[60] The expression 'other obligations under international law' has been interpreted to mean principles of customary international law and international human rights instruments.[61] Beyani is of the view that this expression covers a wide spectrum of legal bases upon which emergency powers can be tested for legality.[62] The ICCPR itself asserts this position by stating that 'there shall be no restriction upon or derogation from any fundamental rights recognised in other instruments on the pretext that the Covenant does not recognise such rights or that it recognises them to a lesser extent.'[63]

F. The principle of non-discrimination

The principle of non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a cardinal and general principle relating to the protection of human rights. Derogation measures should not be discriminatory of themselves or their effect solely on ground of race, colour, sex, language, religion or social origin.[64] Baimu correctly observes that it is not clear whether prohibited grounds for discrimination in emergency situations include political or other opinion, national origin, property, birth and other status.[65] He argues that from the linguistic treatment of the ICCPR text, it would appear that discrimination on these bases is permissible.[66] It should be noted that the inclusion of national origin as a prohibited ground for discrimination in emergency

[58] Article 60 of the Siracusa Principles.
[59] Baimu 2002 *East African J of Peace and Human Rights* 258.
[60] General comment no. 29 para 16.
[61] Nowak *UN Covenant on Civil and Political rights: CCPR Commentary* (2005) 99.
[62] Beyani 1998 *Zambia LR* 38.
[63] Article 5(2).
[64] Article 4(1) of the ICCPR.
[65] Baimu 2002 *East African J of Peace and Human Rights* 259.
[66] *Ibid.*

situations was rejected on the basis that 'disparate treatment' of aliens may prove necessary in wartime.[67]

In seeking to import the ICCPR norms on derogation of rights into Botswana, it must be noted Botswana is a dualist state. Thus, for provisions of the ICCPR to form part of Botswana municipal law, they must be legislatively incorporated into its law. Botswana has only ratified and not domesticated the ICCPR. Although it is not bound by its provisions, it cannot ignore them because they are of persuasive value. In addition, section 24 of the Interpretation Act[68] of Botswana enjoins its courts to consider international instruments for purposes of construction of provisions of statutes. Despite the above assertions, although the ICCPR remains influential in Botswana in the protection of human rights in an emergency, at the end of the day, the domestic law of Botswana will be determinative in cases of emergency situations arising in the country. This is particularly so because the higher judicature of Botswana has been loath or tepid to apply norms arising from international human rights instruments in the adjudication of human rights claims. In the following section we discuss Botswana's emergency laws, identify gaps and make propositions for reform.

3 LEGAL FRAMEWORK AND PRACTICE OF EMERGENCY LAWS IN BOTSWANA

3.1 Praxis

Since independence in 1966, Botswana has experienced relative political stability. Over the years, its political stability has only been matched by its economic prosperity. Owing to its relative stability, Botswana has only experienced one instance of state of emergency since independence. The state of emergency was declared in peace time and was in no manner dramatic or violent to warrant the invocation of derogation provisions of the Constitution. An account of this state of emergency can briefly be restated as follows. On 2 September 1999, before the country's general elections for that year which were scheduled for 16 October, Mr Festus Mogae, who was Botswana's President at the time, dissolved Parliament and issued a writ of elections in terms of section 34(1) of the Electoral Act[69] setting the date for elections.

[67] Karimova, http://www.genevaacademy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php.
[68] Cap 01:01, Laws of Botswana.
[69] Cap. 02:09, Laws of Botswana.

As at the time of dissolution of parliament and issuance of the writ of elections, the voters' roll had not been updated. Over 65 000 registered voters had not been added to the roll, thus disqualifying them from voting. The issuance of the writ of elections had the effect of nullifying the supplementary voter registration because in terms of section 27 of the Electoral Act, after the issuance of the Writ of elections, no person or authority shall have the power to amend the voters roll. To address the situation, the President recalled the dissolved parliament to amend the Electoral Act in order to make provision for potential voters who did not appear in the voters roll to participate in the elections.[70] In terms of the Constitution of Botswana, the President must declare a state of emergency before reconvening a dissolved Parliament.[71] Thus, the state of emergency was declared for that purpose. The state of emergency lasted for six days and largely went unnoticed.[72] As stated earlier, before this state of emergency and after it, there has been no other state of emergency in the country.

Although there has only been one incident of a state of emergency in Botswana, the possibility of its repeated occurrence in future, in a violent and specular fashion, cannot be overruled precisely for the reason that no country is immune from civil strife. Many African nations that were traditionally acknowledged as stable, like Ivory Coast, Libya, Kenya, Tunisia and others have slid into the abyss. The experiences of these countries give an important lesson that it is imperative for every nation to have appropriate laws and legal institutions for the protection of human rights in times of emergencies. We turn to take a look at the legal framework for emergency situations in Botswana.

3.2 The legal framework for emergency situations in Botswana

In terms of the Constitution of Botswana, derogations from human rights are governed by section 16 read *in tandem* with section 17. Section 16(1) thereof states that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 [guaranteeing personal liberty] or 15 [guaranteeing protection from discrimination on ground of race etc] of this Constitution to the extent that the law authorizes the taking during any period when

[70] Somolekae, *An evaluation of the performance of the Independent Electoral Commission (IEC) in Botswana's 1999 elections*, quoted in Sebudubudu and Osei-Hwedie *Democratic Consolidation in SADC: Botswana's 2004 Elections* (2005) 14.
[71] Section 91(5) thereof.
[72] See Sebudubudu and Osei-Hwedie *Democratic Consolidation in SADC: Botswana's 2004 Elections* 2005 14. For a detailed discussion on the emergency see Molomo"'Democracy under siege: the presidency and the Executive powers in Botswana" (2000) *Pula: Botswana Journal of African Studies* 99-100.

> Botswana is at war or any period when a declaration under section 17 of this Constitution is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.

In terms of section 17, the President of Botswana may, by proclamation published in the Gazette, declare that a 'state of public emergency exists', which declaration shall cease to have effect after:

a. Seven days (if Parliament is sitting or has been summoned to meet within seven days) or
b. 21 days in all other circumstances

This provision further states that if the National Assembly approves the declaration, it will remain in force for six months (although this can be extended for up to six months at a time). Significantly for present purposes, section 16 (1) of the Constitution of Botswana specifically allows laws passed when Botswana is at war or under a state of emergency to derogate from the rights to personal liberty and equality. From the afore-cited provisions, it is clear that in terms of the Constitution, the President is empowered to declare a state of emergency in two instances: Firstly, in terms of section 16(1) when Botswana is at war. Secondly, in terms of section 17 when Botswana is at peace. Notably, section 17 is silent on circumstances that must arise before a state of emergency is declared.

Section 17 does not set out objectively discoverable or identifiable pre-condiments that must be met before a declaration of emergency is made. Put differently, section 17 is silent on whether or not there must exist a real threat to the public before an emergency can be declared. In addition, the section does not set out a criterion in terms of which the President will be required to comply with when declaring a state of emergency. Clearly, this provision of the Constitution does not meet the international law requirement that there must be an exceptional threat which places the life of a nation under peril before a state of emergency can be declared. However, section 16(1), which authorises the declaration of states of emergency 'during any period when Botswana is at war,' does meet the 'exceptional threat' test.

In almost every country the declaration of war is a major basis for the adoption of emergency powers. In this connection, section 21(1) of the Constitution of Lesotho states that a state of

emergency will be declared 'in time of war or other public emergency which threatens the life of the nation.' The Constitution of Namibia authorises the President to declare a state of emergency in times of 'national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order'.[73] The South African Constitution[74] provides that a state of emergency can only be declared in terms of an Act of Parliament and where there exists a situation that threatens the life of the nation.[75] The perilous situation contemplated by the South African Constitution could be a state of war, invasion, general insurrection, disorder, natural disasters or other public emergencies.[76] A declaration of state of emergency under the South African Constitution is only valid if the threat is of such a scale and imminence as to warrant the adoption of exceptional measures of a state of emergency to restore peace and order.[77] This underscores the fact that in order that a declaration of emergency be made, an exceptional threat must exist. According to the Constitution of Ghana[78] a state of emergency can be declared in cases of natural disasters, where the essentials of life of a community are actually or threatened to be deprived, public safety, the defence of Ghana, the maintenance of public order and of supplies and services essential to the life of the community action taken against individuals.[79] To this end, it is argued that the Constitution of Botswana must be amended to authorise the declaration of a state of emergency only in exceptional circumstances as contemplated in section 16(1), that is, when the life of a nation is in danger as a result of war or other calamity as advocated by the Constitutions of the fore-mentioned countries. In other words, the declaration of states of emergency in peace time must be disallowed.

To its credit, the Constitution of Botswana requires that exceptional measures undertaken to quell an emergency situation must be 'reasonably justifiable for the purpose of dealing with the situation that exists during that period'.[80] This is in line with the international law principle of proportionality set out above.

[73] See section 26(1) thereof.
[74] Constitution of South Africa, 1996.
[75] See Section 37(1).
[76] *Ibid.*
[77] *Ibid.*
[78] Constitution of Ghana, 1992.
[79] See section 31(9)(a) – (b).
[80] Section 16(1).

Constitutions of other countries cast this principle of proportionality in slightly different phraseologies but communicate the same idea. The Draft Constitution of Zimbabwe[81] states that any limitation or derogation from fundamental freedoms and liberties resulting from an emergency must not 'be greater than is strictly required by the emergency.'[82] The South African Constitution also enacts the principle of proportionality in emergency situations.[83] Section 21(1) of the Constitution of Lesotho[84] requires that derogation measures taken under a state of emergency must be 'necessary in a practical sense in a democratic society for dealing with the situation that exists in Lesotho during that period.' The proportionality clause of the Constitution of Swaziland[85] is worded in exactly the same manner as that of Botswana save that, it has excluded the words 'the purpose of'.

Under section 17(1) of the Constitution of Botswana, the President of the Republic may at any time declare a state of emergency by virtue of proclamation published in the Gazette. This is in line with the principle of proclamation discussed above. In terms of the South African State of Emergency Act,[86] the President is required to declare a state of emergency by way of proclamation in the Gazette.[87] The purpose of the requirement that a declaration of emergency be published is the Gazette is to inform the public about the existence of a state of emergency in the country. The public is fully entitled to be informed about the existence of an emergency in a state and measures deployed to address it.[88] Informing the public in this regard fosters openness and accountability in the manner in which the state deals with the situation of emergency. Explaining the purpose of the Government Gazette in the Botswana case of *Tsayang Express Services (PTY) Ltd v Chairman, Transport Appeal Tribunal*, [89] Kirby J (as he then was) stated that:

> I take publication in the Government Gazette to be general notice to the public and to all interested groups and persons of the matters so published. Indeed that is the whole purpose of the Government Gazette. It is in the Government Gazette that Statutory Instruments, Acts of Parliament, Government Notices, Public Appointments, Notice

[81] Draft Constitution of 2013.
[82] Section 87(3).
[83] Section 37(4)(a).
[84] Constitution of Lesotho, 2009.
[85] Section 37(1).
[86] Act no. 64 of 1997.
[87] See section 1 thereof.
[88] See for instance sections 2(1)(b) of the South African State of Emergency Act and section 37(4)(iii) of the Constitution of South Africa.
[89] 2001(2) BLR 18.

> of Trade Licence Applications and most other notifications intended for the general public are published.[90]

While acknowledging the usefulness of a Government Gazette in this regard, it is submitted that communication of an emergency situation to the public through the use of the Government Gazette alone is inadequate in that in Botswana, the circulation of the Government Gazette is literally limited to urban and peri-urban areas and no further. This, coupled with the illiteracy of many Batswana, creates a possible impediment to the accessibility of information relating to a state of emergency. It is recommended that in addition to proclamation of the emergency in the Gazette, the government must, in addition thereto, broadcast this information on national radio stations and televisions and also publish it in newspapers of national circulation to increase spread and accessibility of information relating to a state of emergency. Although the Constitution of Botswana requires that proclamation be made and published in the Gazette, it is silent on notification and this is in conflict with article 4 of the ICCPR which requires notification to be made through the Secretary General of the United Nations.

The Constitution of Botswana does not require that derogation measures undertaken under its power must be consistent with obligations incurred by Botswana under international law. This is out of sync with the principle of consistency adumbrated above. In this regard, the South African Constitution requires that laws enacted or measures undertaken in pursuance of state of emergence must comport with South Africa's obligations under international law.[91] Botswana is not alone in this. Save for South Africa, Constitutions of other African nations surveyed during the preparation of this article are also silent on the principle of consistency.[92]

Further, the Constitution of Botswana is silent on the principle of non-derogability. It only deals with the right to fair trial of persons detained under a state of emergency.[93] This silence is not in synchrony with the principle of non-derogability under international law referred to above. Under South African law, the list of non-derogable rights and the extent to which they may not be derogated from is articulated under section 37(5) of the Constitution. The named non-derogable rights include equality, human dignity, life, freedom and security of the

[90] *Ibid.* 28.
[91] See section 37(4)(a)(i).
[92] For instance, see the Constitutions of Tanzania and Uganda.
[93] See section 16(2(a) – (d) and section 16(3).

person, and freedom from slavery, servitude and forced labour. Further, the Constitution of Botswana also does not contain a provision specifically dealing with the principle of non-discrimination under state of emergencies.[94] The South African Constitution is also silent on this principle. However, it has been argued in the case of South Africa that the principle of non-discrimination is implicitly articulated through its placement in the list of non-derogable rights.[95] An analogous argument cannot be made in the case of Botswana because its Constitution does not even have a provision dealing with non-derogable rights. However, it must be indicated that the Constitution of Botswana contains a general non-discrimination clause which prohibits discrimination on the basis of 'race, tribe, place of origin, political opinions, colour or creed …'[96] The prohibited grounds of discrimination under this clause are non-exhaustive. The courts can add more grounds to these ones through dynamic and creative interpretation techniques on a case-by-case basis.[97] Since the said general non-discrimination clause is a provision of general application, it is argued that this provision can be teleologically or liberally interpreted to make it applicable in emergency situations in Botswana. To this end, it can be profitably argued that the Constitution of Botswana embodies the principle of non-discrimination through its general non-discrimination clause.

In contrast to the position in Botswana, the Constitution of Namibia provides an expansive list of non-derogable rights in a situation of emergency.[98] They include the rights to life, liberty, dignity, slavery and forced labour, equality and freedom from discrimination, fair trial, family, children's rights, administrative justice, culture, freedom of speech and expression, which includes freedom of the press and other media, freedom of thought, conscience and belief, which includes academic freedom in institutions of higher learning, freedom to practise any religion and to manifest such practice and access by any persons to legal practitioners or a Court of law. The extensiveness of the non-derogable rights under the Namibian Constitution ensures that the basic rights of dignity and decency of human beings in the country are safeguarded even in the face of a state of emergency.

[94] The Constitution of Botswana contains a general non-discrimination clause: see section
[95] See Baimu 2002 *East African J of Peace and Human Rights* 261.
[96] Section (15(3).
[97] See Attorney *General v Dow 1992 BLR* 119 [per Amissah P].
[98] See section 24(3) thereof.

4 MISCELLANEOUS ASPECTS OF EMERGENCY LAWS IN BOTSWANA

Unlike South Africa, Botswana does not have a clear legislation dealing with emergency situations. Only the two provisions (sections 16 and 17 of the Constitution) have been enacted to deal with emergencies. Given the technical niceties and nuanced dynamics of a state of emergency, it is submitted that the two provisions of the Constitution dedicated to situations of emergency are woefully inadequate. The Constitution of a state is usually an organic compact canvassing its themes in general and broad strokes, and deliberately excluding from its scheme, minute details. Wheare reminds us that a Constitution should only express 'the very minimum, and that minimum [should] be rules of law.'[99] In the watershed case of *McCulloch v Maryland*,[100] Chief Justice Marshall of the Supreme Court of the United States trenchantly stated that by its very nature, a constitution requires that only its 'great outlines' be expressed and its 'important objects' articulated so that it does not get relegated to the 'prolixity of a legal code'. It is the function of statutory law to fill the gaps found in the language of the Constitution to create a mosaic of laws. It is therefore submitted that the absence of a statute specifically enacted do deal with emergency situations in Botswana leaves a yawning gap in Botswana's scheme of laws.

Furthermore, the Constitution of South Africa empowers courts of that country to enquire into the validity of the declaration of a state of emergency, its extension and measures taken in pursuance to it.[101] This position is in line with the Paris principles one which requires that the power to declare a state emergency must be subject to 'judicial or other review …' and must be 'exercised in terms of the constitution and legal tradition of the state concerned.'[102] The Constitution of Botswana contains no equivalent provision. The powers of the President to declare a state of emergency have been left unchecked in Botswana. The President alone decides at his unfettered discretion as to when and how to invoke his overwhelming emergency powers to any situation as he deems fit and he is not accountable to any entity. There is no oversight body to determine its validity, extension(s) and the legality of measures taken under it. It appears that the Constitution of Botswana treats the issue of state of emergency as a political question, and thus non-justiciable. This makes emergency laws in the country manipullable and susceptible to abuse. Thus, Justice Jackson emphatically jettisoned the Truman Administration's invocation of untrammelled executive powers in

[99] Wheare *Modern Constitutions* (1966) 33-34.
[100] Wheat (1819) 407.
[101] Section 37(3).
[102] Article 7.

times of emergency and reasoned that, '[such] power has no beginning [and] … has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straight into dictatorship, but it is at least a step in that wrong direction.'[103] Justice Jackson further opined that given the fact that the Constitution of the US does not delineate the true scope of the executive's power during public emergencies, but rather reposed 'vast accretions' of power in the President, it was incumbent upon the President to exercise restraint in declaring a state of emergency. He concluded that given the overwhelming powers that the President commands in times of emergencies, 'I cannot be brought to believe that this country will suffer if the court refuses to further aggrandise the presidential office, already so potent and so relatively immune from judicial review.'[104]

Another observation is that under the Constitution of South Africa, the law may not be used to indemnify the state or any person or agency in respect of any unlawful act.[105] Section 87(4) of the Draft Constitution of Zimbabwe is to the same effect. It states that '[n]o law that provides for a declaration of a state of emergency, and no legislative or other measure taken in consequence of such a declaration, may … indemnify, or permit or authorise an indemnity for, the State or any institution or agency of the government at any level, or any other person, in respect of any unlawful act'. Botswana has no equivalent clause in its laws. At a general level, it can be argued that the inadequacies of the Botswana Constitution is a problem associated with old African independence constitutions which were being parcelled to dependent territories by departing colonial administrators.

5 SUGGESTIONS FOR REFORM

The preceding discussion demonstrates that Botswana emergency laws fall foul of numerous tenets that govern public emergencies under international law. For instance, the Constitution of Botswana is silent on the principles of notification, non-derogable rights, consistency with international obligations, and to some extent exceptional threat, given that section 17(1) of the Constitution empowers the President to declare an emergency without setting out circumstances under which such emergency must be declared. This means that out of the seven principles that are enunciated by the ICCPR, Botswana complies comprehensively with only two of them, namely those of proportionality and non-discrimination. The ineluctable

[103] *Youngstown Sheet & Tube Co. v Sawyer* 343 US 579, 652-3.
[104] *Ibid.* 654.
[105] Section 37(5)(a).

conclusion in this regard is that Botswana's laws dealing with emergency situations are not sensitive to human rights. It is suggested in this regard that Botswana must amend it Constitution and incorporate the ICCPR into its municipal law, especially article 4 that gives expression to the seven principles of international law dealing with emergency situations. I am however mindful of the words of Ebrahim who argues that:

> ... no matter how wonderful the Constitution may be, unless it is respected by all – government and citizens alike – it will not be of much value. Laws do not make a better society, people do. Law can only be of assistance in empowering people to achieve their aspirations.[106]

However, it is important to note that although the adoption of a 'good' Constitution cannot be viewed as an end in itself, it is a proper starting point towards the establishment of a comprehensive human rights protection regime in a country.[107] In this connection, Fombad adds:

> a constitution is only as good as the mechanism provided within it for ensuring that its provisions are properly implemented and that any violations of it are promptly sanctioned. Without this, the constitution is often not worth the paper on which it is written and is probably as good as being non-existent.[108]

Further, as argued above, Botswana must abolish the second regime of state of emergency provided under section 17(1) of its Constitution where the President is empowered to declare a state of emergency where there is no calamity. This will go a long way in minimising potential abuse or manipulation that that provision is exposed to. Furthermore, the Parliament of Botswana must take a cue from South Africa and enact a legislation intended for dealing with states of emergency. This legislation should also be consistent with international law. Properly drafted, this enactment will help bridge gaps that the Constitution has naturally left out. In addition, the Constitution must empower courts of law, particularly the High Court, to exercise jurisdiction to inquire into the validity of the proclamation of a state of emergency, its extension(s) and the legality of measures undertaken under it. The purpose of placing a state of emergency matter under the jurisdiction of courts is to ensure that the courts

[106] Ebrahim *The soul of a nation* (1998) 259.
[107] See Jonas "Reflections on the practices and experiences and experiences of American state in the African Peer Review Mechanism (APRM) and the Universal Periodic Review Mechanism (UPR) A Human Rights Perspective" 2012 *CILSA* 442.
[108] Fombad 2007 *SAJHR* 108.

discipline and provide oversight services to the Executive. Courts of law will help place constraints on the Executive from arbitrarily invoking emergency powers by ensuring that constitutional requirements are met at all times, before, during and after the emergency. The Constitution of Botswana must also contain a provision that clearly states that the jurisdiction of the High Court may not be ousted during a public emergency.[109]

In line with the *Greek* decision above, the Constitution of Botswana must also provide that in cases of localised violent exigencies, a state of emergency cannot be declared because in such cases, it can never reasonably be said that the life of a nation is under imminent peril. This will work to limit in no small measure instances in which a state of emergency can be declared thereby ensuring that fundamental rights are protected at all times. Lastly, the Constitution of Botswana must set out a list of non-derogable rights and the extent to which these rights are non-derogable. At the minimum level, in this regard, the Constitution must reflect those non-derogable rights identified by the ICCPR, namely, the right to life, freedom from torture or cruelty, inhuman or degrading treatment or punishment, freedom from slavery, freedom from retroactive criminal legislation, the right of recognition of a person before the law and freedom of thought, *conscience* and religion. However, Parliament may go further as it sees fit and include in this list some of the non-derogable rights enshrined in Constitutions of countries such as that of Namibia, which gives a broad panoply of non-derogable rights in emergency situations.

6 CONCLUSION

This article has attempted to show that the emergency laws of Botswana present a constitutional anomaly in that they are not consistent with international law. They are susceptible to manipulation, abuse and may be misused to entrench dictatorship and eliminate dissent from the political space of the country. Baimu has argued in relation to the emergency laws of Tanzania, which was are also as anachronistic as those of Botswana, that their real threat does not reside much in their use *per se*, as their abuse.[110] This observation applies to the emergency laws of Botswana with equal measure and force. The fact that Botswana has not applied these laws to limit dissent yet, as it occurs in some other parts of the continent, does not make the question of law reform in this area less urgent. The constitutional guarantees of fundamental human rights and freedoms must be iron-clad, visible and

[109] See de Waal *The Bill of Rights Handbook* (2000) 578.
[110] Baimu 2002 *East African J of Peace and Human Rights* 267.

permanent and not merely guests of convenience.[111] The question whether these rights and liberties of individuals are sufficiently guaranteed 'must never be determined by conclusions of research; it must be palpable, visible and agreeable to all human senses.'[112] As Baimu further observes, the protection of rights of individuals in the face of a national calamity must not be based on the 'shallow foundation of the benevolence of political leaders' but rather must be deeply engraved in the Constitution of the Republic and this Constitution must clearly spell out the relational balance of power between the pressing needs of the state on the one hand and the fundamental rights and freedoms of individuals on the other.[113] This, the Constitution of Botswana woefully fails to do. Human rights are not extended to subjects as favours from the rulers. As Buergenthal observes:

> At no time in the history of mankind have human beings believed that they are entitled to the enjoyment of human rights than today. The yearning for a society in which human rights are respected has become a universal phenomenon of our times [...] People may suffer today as much or more than at other times in history, and they may have to tolerate their suffering, but they view it as illegal and unjust. [114]

In addition, in revising its Constitution in this area, the parliament of Botswana must ensure that the declaration of a state of emergency and its management are not exclusive powers of the President but that these powers must be shared by the President and other oversight institutions like parliament and courts of law. It is only when there is sufficient room for oversight services in the declaration and management of states of emergency that human rights and liberties of individuals will be guaranteed.

[111] Zvobgo "An Agenda for Democracy, Peace and Sustainable Development in the SADC Region" *Legal Forum* (1996) 10.
[112] *Ibid.*
[113] Baimu 2002 *East African J of Peace and Human Rights* 267.
[114] Buergenthal "International human rights law and institutions: accomplishments and prospects" 1982 *Washington LR* 2.