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Guest editor
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A Missed Opportunity by the High Court to Use International Law as an Interpretative Aid of Domestic Law in Botswana

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Abstract

*This article critically analyses the Botswana High Court’s decision in *News Company Botswana v Water Utilities Corporation* through the lens of theories of monism and dualism.¹ In dismissing the case, the High Court, among other things, held that Botswana does not have legislation dealing with freedom of information. Moreover, it ruled that the freedom of information treaties relied upon by the applicant were not domesticated in Botswana and therefore not applicable and enforceable. This*

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1 MAHGB-000361-17 (hereinafter referred to as the *News Company* decision).

article argues that the court missed an opportunity to utilise a ratified but undomesticated treaty law as an interpretative aid of municipal law to give effect to freedom of expression, which includes the right to access information. We also argue that this decision is yet another departure from Attorney General v Dow² which relied on ratified but undomesticated treaties as an interpretative aid to protect fundamental human rights and freedoms. The article argues that the High Court in News Company Botswana has not followed the Unity Dow jurisprudence, which appeared to favour a monist interpretative approach compared to the dualist one. In other words, reliance on ratified but undomesticated treaties is applied at the mercy of the courts. To address this legal challenge, we propose that, for legal certainty, Botswana should adopt a hybrid approach to treaty incorporation in the context of its enforcement, the harmonisation theory.

Keywords: interpretation; undomesticated/unincorporated treaty law; domestic law; good faith; harmonisation theory

1 INTRODUCTION AND BACKGROUND

The place of international law or treaty law in domestic law will remain a subject of debate if countries and their courts alike do not adhere to the dictates of constitutional prescripts.³ To ascertain the nature of the relationship between international law and domestic law, the theories of monism and dualism must be relied on.⁴ However, these theories must be approached with caution because they do not adequately reveal the nature of the relationship between international law and domestic law.⁵ Rather, they provide guidance on how international law will have a force of domestic law in a specific country, depending on whether that country follows a dualist or monist approach.⁶

On one hand, those who subscribe to the monist theory view international law and domestic law as a manifestation of a single system, a law that is binding on individuals or states.⁷ Consequently, the act of signing a treaty automatically transforms it into domestic law upon its publication at the domestic level.⁸ The monist theory requires national law to always conform to international law because the two systems are considered as part of a single system.⁹ On the other hand, the proponents of the dualist theory view international law and domestic law as two separate and distinct systems of law that operate in different spheres.¹⁰ Consequently, they contend that for international law to have a force of local law, it must be transformed into

2 [1992] BLR 119 (BCA) (hereinafter referred to as the *Unity Dow* decision).

3 Phooko “Revisiting the Monism and Dualism Dichotomy: What Does the South African Constitution of 1996 and the Practice by the Courts Tell Us about the Reception of SADC Community Law (Treaty Law) in South Africa?” 2021 (29) *AJICL* 169. Okwena “Has the Controversy between the Superiority of International Law and Municipal Law been Resolved in Theory and Practice?” 2015 *JL Pol and Glob* 116.

4 Kelsen *General Theory of Law and State* (2007) 12 and 363; Dugard *International Law: A South African Perspective* 3 edn (2005) 47.

5 Tshosa “The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy” Tshosa 2010 *Nam LJ* 3.

6 Phooko *The SADC Tribunal: Its Jurisdiction, Enforcement of its Judgments and the Sovereignty of its Member States* (2016) 113.

7 Tshosa *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* 3; Quansah “An Examination of the Use of International Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana” in Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 38; and Barnard “Legal Reception in the AU against the Backdrop of the Monist/Dualist Dichotomy” 2015 *CILSA* 154.

8 Phooko 2021 *AJICL* 178.

9 Quansah “International Law as an Interpretative Tool” 38; Cassese *International Law* 1 ed (2005) 213–214.

10 Mutubwa “Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution” 2019 *Journal of CMSD* 27–28.

domestic law through domestic legislative measures, an act of incorporation.¹¹ Failure to do so, international law cannot be directly enforceable at the municipal level due to respect for the separation of powers.¹² These theories of international law are important because they will assist in addressing the question of whether Botswana has been following the monist theory or dualist theory, or both in the interpretation and application of ratified but not domesticated treaties. Alternatively, Botswana should resort to the harmonisation theory. The harmonisation theory entails that where the applicants seek to “enforce the provisions of an undomesticated treaty, the courts shall apply the harmonisation theory by bringing the challenged provisions of domestic law into harmony with international law.”¹³ It is argued that this may nonetheless be seen as judicial activism and attempts to enforce undomesticated law in the domestic sphere.

The Constitution of a given country is generally the first point of contact that will spell out the nature of the relationship between international law and domestic law.¹⁴ However, at times a Constitution of a particular country does not expressly state the envisaged relationship between international law and domestic law. Therefore, constitutions do not always reveal state practice with respect to the reception of international law into domestic law.¹⁵ This is the position in Botswana. The Constitution of Botswana, which was adopted on 30 September 1966, is silent on the place of international law within domestic law.¹⁶ In fact, a perusal of the Constitution reveals that there is no provision dealing with the incorporation of international law into municipal law or the relationship between international law and domestic law.

The statute that deals with international law as aid to the construction of domestic law is the Interpretation Act (Interpretation Act).¹⁷ Section 24(1) of the Interpretation Act provides that:

For the purpose of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard ... to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject-matter, but not to the debates in the Assembly.

A plain reading of the above provision reveals that the Interpretation Act does not regulate the incorporation of international law into domestic law. According to Quansah, the provision “does not expressly authorise international law as part of national law.”¹⁸ The author agrees with Quansah in so far as he says that the provision is said not to “expressly” transform international law into domestic law. The Interpretation Act only allows the courts to resort to international law as an interpretative aid to any domestic law whose provisions are being contested. In my view, to interpret local law through the lens of what is contained in a ratified but undomesticated international instrument is tantamount to giving that treaty a force of local law. The basis for this is that if reliance is made on an undomesticated treaty as an interpretative aid, and such reference is found to be useful, the provisions of the undomesticated treaty will be used to construct a provision of domestic law. In this way, the undomesticated treaty is given effect to local law. By so doing, an interpretation derived from an undomesticated treaty will influence

11 Barnard 2015 *CILSA* 155; Quansah “International Law as an Interpretative Tool” 38.

12 Mutubwa 2019 *Journal of CMSD* 27–28.

13 Phooko 2021 *AJICL* 181.

14 *Ibid* 170. In the context of the relationship between international law and Namibian law, see also Tshosa 2010 *Nam LJ* 3.

15 Tshosa *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* (2001) 3. See also Phooko 2021 *AJICL* 175–178.

16 Quansah “International Law as an Interpretative Tool”. See also Phooko *The SADC Tribunal* 122.

17 20 of 1984.

18 Quansah “International Law as an Interpretative Tool” 45.

the decision that is before the domestic court.¹⁹ Consequently, it could be argued that section 24(1) of the Interpretation Act unintentionally approves ratified but undomesticated treaties to be applied into domestic law.

The purpose of this discussion is to critically analyse the decision of the High Court in *News Company* through the lens of theories of international law and the Interpretation Act. The argument presented in this article is that the court missed an opportunity to utilise undomesticated treaty law as an interpretative aid to municipal law to give effect to freedom of expression, which includes the right to access information. It is further contended that the Interpretation Act permitted the court to use undomesticated treaty law as an interpretive aid to give effect to the right of access to information. Consequently, the High Court failed to observe the *Unity Dow* jurisprudence that could be referred to as an earlier monist jurisprudence and favoured a dualist approach. In other words, the High Court changed from an established approach of relying on an undomesticated treaty as an interpretative aid to a domestic. The court has applied a dualist theory of international law, which causes legal uncertainty. This is undesirable for legal certainty. To address this legal inconsistency, the article proposes that Botswana should adopt a hybrid approach of treaty incorporation, the harmonisation theory. In this way, the courts will interpret any treaty in a manner that upholds human rights regardless of whether the court adopts a monist or dualist approach.

The discussion is divided into five parts. Part I is an introduction. Part II deals with the two selected cases, highlighting different jurisprudence on the application of undomesticated treaties at the domestic level. The two cases have been selected because the *Unity Dow* decision dealt with a domestic law that did not expressly contain “sex” as a prohibited ground of unfair discrimination and resort had to be made to undomesticated treaty law. There, the court interpreted an undomesticated treaty into local law, whereas in *News Company* decision, the court declined to do so because such a treaty was not yet incorporated into domestic law. Part III compares the two cases in so far as they relate to the application of undomesticated treaties in Botswana. Part IV is the recommendation, and part V is the conclusion.

2 CONFLICTING JURISPRUDENCE ON APPLICATION OF UNDOMESTICATED TREATIES

Botswana is a former British colony.²⁰ It inherited the dualist theory of international law, which means that ratified treaties do not automatically form part of domestic law.²¹ The Constitution of Botswana is silent about the role, place or status of treaty law within the domestic sphere.²² Despite this, as a dualist state, it means that the power to conclude treaties or incorporating them into the domestic sphere is reserved for the executive branch.²³

The interpretation and application, or non-application, of undomesticated treaties by the High Court and the Court of Appeal has, to a certain extent, been inconsistent. The basis for this is that the High Court, on the one hand, has shown a departure from the Court of Appeal decision, which supported a monist approach compared to the dualist approach.²⁴ This also appears to

19 Maripe “Giving Effect to International Human Rights Law in the Domestic Context of Botswana: Dissonance and Incongruity in Judicial Interpretation” 2014 *Oxford Univ Commonwealth LJ* 263.

20 Mogalakwe “How Britain underdeveloped Bechaunaland Protectorate: A Brief Critique of the Political Economy of Colonial Botswana” 2006 *African Development* 71.

21 Maripe 2014(14) *Oxford Univ Commonwealth LJ* 251.

22 *Ibid* 254.

23 *Ibid* 255.

24 Tshosa *National Law and International Human Rights Law* 201. See also *Good v Attorney-General* [2005] 2 BLR 337; *Bojang v The State* [1994] BLR 146.

be against judicial precedent, wherein a lower court is bound by a decision of a higher court to ensure legal clarity.²⁵ We highlight this conflicting jurisprudence in the discussion of the cases below.

2 1 *Unity Dow* Decision

The respondent in this case is a citizen of Botswana who was married to a non-citizen, and two children were born as a result of the marriage. Ms Dow's two children were denied citizenship in Botswana under the Citizenship Act²⁶ that conferred citizenship on a child born in Botswana on patriarchal grounds. The relevant parts of the Citizenship Act are sections 4 and 5, whose provisions were as follows:

4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth

A (a) his father was a citizen of Botswana; or

(b) ...

(2) ...

5. (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth –

(a) his father was a citizen of Botswana;

Or

(b)

In the High Court, Ms Dow, *inter alia*, contended that she was prejudiced by section 4(1) of the Citizenship Act because she is female and therefore could not pass citizenship to two of her children. The respondent argued that the aforesaid sections of the Citizenship Act violated section 3(a) of the Constitution. Section 3(a) of the Constitution provides as follows:

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-

(a) life, liberty, security of the person and the protection of the law;

Having considered the above provisions, the High Court ruled in favour of the respondent.²⁷ Aggrieved by the ruling, the appellant appealed the decisions of the High Court to the Court of Appeal. The appellant averred that section 3(a) of the Constitution was drafted intentionally to exclude discrimination on sex to preserve the patrilineal structure of the society.²⁸

One of the main issues for determination in the Court of Appeal was whether section 15 of the Constitution allowed discrimination on the grounds of sex. The respondent, in advancing her case, had also argued that the Citizenship Act violated her right not to be discriminated against

25 Brickhull "Precedent and the Constitutional Court" 2010 *Constitutional Court Rev* 83.

26 17 of 1984.

27 *Unity Dow* decision 121.

28 *Ibid* 122.

based on sex as contained in treaty law such as the African Charter on Human and Peoples' Rights²⁹ (African Charter). It is argued that a missed opportunity is that the appellant omitted to argue the case from the perspective of the best interest of the child as contained in treaty law.³⁰

Botswana ratified the African Charter on 17 July 1986, but has, to date, not domesticated it.³¹ Article 2 of the African Charter provides:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The appellant objected to the use and reliance on the African Charter and other treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³² on the grounds that none of the aforesaid treaties had been incorporated into domestic law through enabling legislation and that the said treaties could only be used as an interpretative aid where the language of the statute contested was unclear. According to the appellant, the provisions about the Constitutional provisions which omitted "sex" as a prohibited ground were clear in that the legislature had intended to exclude women.

The Court of Appeal indicated that the court *a quo* was alive to the fact that unincorporated treaties are not binding in Botswana, but that Botswana had to give an interpretation that was in harmony with the Conventions (CEDAW and the African Charter).³³ Furthermore, the appeal court observed that the court *a quo* was clear in that it had "to interpret domestic legislation so as not to conflict with Botswana's obligations under the charter or other international obligations."³⁴ To this end, Amisshah JP (as he was then) said:

Botswana is a signatory to this Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned judge *a quo* made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution. The reference made by the learned judge *a quo* to these materials amounted to nothing more than that. What he had said at p. A 245c was: 'I am strengthened in my view by the fact that Botswana is a signatory to the O.A.U. Convention on Non-Discrimination. I bear in mind that signing the Convention does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent

29 African [Banjul] Charter on Human and Peoples' Rights, adopted 27 Jun 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct 1986.

30 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 Nov 1999, and Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 Sept 1990.

31 State Reports "Concluding Observations and Recommendations – Botswana: 1st Periodic Report, 1986-2007" [https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-botswana-1st-periodic-report-196#:~:text=The%20Republic%20of%20Botswana%20\(Botswana,it%20on%2017%20July%201986](https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-botswana-1st-periodic-report-196#:~:text=The%20Republic%20of%20Botswana%20(Botswana,it%20on%2017%20July%201986) (accessed 17-11-2024).

32 Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 Sept 1981. Botswana ratified CEDAW on 13 Aug 1996 without reservations. See CEDAW "Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women" https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en (accessed 17-11-2024).

33 *Unity Dow* decision 155

34 *Ibid.*

with and in harmony with the Convention must be preferable to a “narrow construction” which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex.’³⁵

Based on the above, Amissah JP then concluded as follows:

I am in agreement that Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex [own emphasis added].³⁶

In light of the above, the majority of the Court of Appeal upheld the High Court’s reliance on undomesticated treaty law as an interpretative aid to domestic legislation to give effect to human rights and the right not to be discriminated against on the grounds of sex. In my view, the Interpretative Act, or using international law as an interpretative aid, essentially empowers the courts of Botswana to interpret and apply ratified but undomesticated treaties in Botswana.³⁷ This is so where such ratified but undomesticated treaties are useful in interpreting domestic legislation, such as the one discussed herein. Therefore, one could argue that even though Botswana is a dualist state, reliance on interpretative aid is somehow a licence for courts to depart from Botswana’s dualist system in preference for the monist theory. This is a clear case where the courts opted for a monist theory by applying international law that was not incorporated, through legislation, into municipal law. We also concede that applying undomesticated treaties that uphold human rights may also depend on a judge who is adjudicating a matter at a given time. One could also argue that judges are guided by law, and the Interpretation Act is sufficient to allow judges to act as such. Therefore, there exists a possibility that another judge who is a proponent of a dualist theory may find him/herself bound to disregard international law because of the separation of powers. All in all, the interpretive aid approach, in my view, permits judicial activism.

The above approach is arguably appropriate because it is approved by section 24(1) of the Interpretation Act. We say so because it has been said that in most instances, Botswana only ratifies treaties but does not incorporate them into domestic law.³⁸ Therefore, it means that where the interpretative approach that favours the application of undomesticated treaties is not resorted to, courts will not protect human rights because a particular right is not provided for in Botswana’s domestic laws, and that those rights that are outlined in ratified treaties can only be invoked if such conventions have been domesticated.

It is difficult to understand the motives for signing and ratifying a treaty with no intentions whatsoever to be bound by its obligations.³⁹ As observed by Nyathi, leaving international

35 *Ibid.*

36 *Ibid.*

37 The application of undomesticated treaty law is a controversial topic and differs from one country to another. For example, South Africa has not hesitated to rely on and apply unincorporated treaty law, whereas Zimbabwe has declined to do so. See *Government of the Republic of Zimbabwe v Fick and Others* 2013 5 SA 325 (CC) and *Gramara (Private) and Others v Government of Zimbabwe and Others* HH 169-2009. See also *Rono v Rono* (2005) AHRLR 107 (KeCA 2005) para 24.

38 Maripe 2014 *Oxford Univ Commonwealth LJ* 256–257 and 262–263. See also Quansah “International Law as an Interpretative Tool” 38.

39 Mangwanda “One Step Forward, Two Steps Back: The Rise and Fall of the SADC Tribunal” 2021 *ESR Rev* 21.

norms “to be enforced at the discretion of member states is not desirable for legal certainty.”⁴⁰ The question is whether Botswana leaders really understand what they bind themselves to when signing and ratifying treaties or whether ratification only serves to appease the global community.⁴¹ Why should a country sign and ratify a treaty that it will eventually deliberately ignore its provisions? The lack of political will to uphold human rights standards in certain countries within the SADC region and the African continent remains a major challenge.⁴²

2.2 News Company Decision

This case is about access to information held by the respondent regarding the reduced water flow into local dams. The applicant is a media house company. The first respondent is Water Utilities Corporation, a parastatal in Botswana, providing water services to Botswana communities. The respondent manages several dams, including the Gaborone dam.⁴³ The second respondent is the Chief Executive Officer of the first respondent.

During 2014, Botswana experienced a reduction in the water levels in its dams, and the Gaborone dam was severely affected.⁴⁴ As a result, a newspaper article was published by the *Sunday Standard* newspaper stating that the respondents had commissioned a study that allegedly revealed that 200 illegal dams were blocking the water flow into the Gaborone dam, which resulted in a reduction of water levels.⁴⁵ The second respondent confirmed the news reports about the illegal dams and the report in question (water report).⁴⁶

On or about 22 June 2017, the applicant requested to access the water report from the first respondent.⁴⁷ However, the first respondent declined the request. Aggrieved by the first respondent’s refusal to provide the water report, the applicant lodged a review application to set aside the decision of such refusal.

The issue to be decided by the court was whether the first respondent was required under section 17 of the Water Utilities Act⁴⁸ to provide a copy of the water report to the applicant.⁴⁹ Section 17 provides as follows:

With a view to facilitating present or future research or planning, the Corporation shall keep full and accurate records of all its operations and shall have power to engage in research, and to assist others to engage in research, in respect of any matter relating to its functions, and to publish such records and the results of any such research.

To advance its case, the applicant argued that the first respondent’s refusal to produce the water report was, *inter alia*, unreasonable and that there were no reasons provided for the refusal.⁵⁰

40 Nyathi “How Accommodative is South Africa of SADC Legal Norms” in Phooko *et al.* (eds) *The Development and Application of SADC Community Law in Member States* (2024) 33. See also Art 18 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 Jan 1980. Art 18 prohibits a state that has signed but not ratified a treaty from performing acts that would defeat the object and purpose of that treaty.

41 Touval “Treaties, Borders, and the Partition of Africa” 1966 *Journal of Africa* 284. See also Chayes and Chayes “On Compliance” 1993 *International Organization* 187-188.

42 Ibrahim “Evaluating a Decade of the African Union’s Protection of Human Rights and Democracy: A Post-Tahrir Assessment” 2012 *AHRJL* 65.

43 *News Company* decision para 1.

44 *Ibid* 9.

45 *Ibid* 10.

46 *Ibid* 11.

47 *Ibid* 13.

48 Cap 74:02.

49 *News Company* decision para 1.

50 *Ibid* 14.

Furthermore, the applicant contended that the first respondent's decision was irrational and that there was no legitimate government purpose served by such a refusal.⁵¹ Relying on section 12 of the Constitution of Botswana, the applicant averred that freedom of expression includes "the dissemination of ideas and information."⁵² Section 12 of the Constitution of Botswana provides that:

Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference 'whether the communication is to the public generally or to any person or class of persons.

In light of the above, the applicant argued that the first respondent's refusal to produce the water report is contrary to section 12 of the Constitution.⁵³ Relying on international instruments that Botswana has signed and ratified such as the International Covenant on Civil and Political Rights (ICCPR), the African Charter and the Universal Declaration on Human Rights (UDHR), the applicant argued that there is a right of access to information under international law which also translates and impacts on the interpretation of section 12(1) of the Constitution.⁵⁴ To this end, the applicant sought the court to seek interpretative guidance from the aforesaid treaties or declaration. Furthermore, the applicant relied on the *Unity Dow* decision in that the court had to interpret domestic law in a manner that does not conflict with Botswana's international obligations as outlined in the treaties referred to above. These arguments were largely in line with the duty of a state to discharge its treaty obligations in good faith and not to use its domestic law provisions to evade its international obligations.⁵⁵

The first respondent argued that freedom of expression under section 12 of the Constitution is not absolute and may be limited. Furthermore, the first respondent argued that section 12 of the Constitution "does not expressly or indirectly confer any freedom of information which the applicant can invoke in its demand for the water report."⁵⁶ Concerning the applicant's international law argument, the first respondent averred that international treaties relied upon by the applicant on freedom of information "are not binding or enforceable unless they have been introduced into our domestic law."⁵⁷

On whether section 12 of the Constitution was infringed, Motumise J observed that "several international instruments and case law on freedom of information were cited to buttress the applicant's case."⁵⁸ He went on to indicate that "Botswana does not have a freedom of information Act."⁵⁹ According to him:

Parliament is yet to enact such a law [Freedom of Information Act]. This is why the applicant has travelled far and wide to quote international instruments. It is trite that, unless such instruments are domesticated in our legislation, they are of no legal force [emphasis added].

51 *Ibid* 15.

52 *Ibid* 17.

53 *Ibid*.

54 Applicant's heads of argument [on file with author].

55 Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

56 *News Company* decision *ibid* para 24.

57 *Ibid*.

58 *Ibid* 47.

59 *Ibid*.

The court then relied on *Ramantele v Mmusi and Others*⁶⁰ where it was held that where it is possible to decide a case without having to decide a constitutional question, the court must follow that approach. It accordingly did not entertain the challenge on section 12 of the Constitution on the grounds that Botswana does not have a Freedom of Information Act. In my view, the court misdirected itself because the applicant's case was primarily based on the Constitution to be interpreted broadly in such a way that freedom of expression includes access to information. It is submitted that had the court handled the matter as a constitutional matter, it might have engaged with the issue of seeking interpretive guidance from the instruments relied upon by the applicant. This is evident where it said that treaties that were relied upon by the applicant were not domesticated in Botswana and therefore do not have any legal force or effect. Notably, the court did not even refer to the *Unity Dow* decision despite the fact that the applicant had relied on it. In addition, the court missed an opportunity to consider the usefulness of international treaties in interpreting human rights, especially socio-economic rights.⁶¹

As will be further shown below, although there was also reliance on ratified, but undomesticated treaty law, the court opted to deal with selective sections of the Interpretation Act. I argue that had the court also considered section 24(1) of the Interpretation Act, which deals with international law as an interpretative aid to construct a provision of local law, it would, in my view, likely have found that the freedom of expression, as argued by the applicant, includes access to information.

Interestingly, whilst the court entertained the interpretation argument, it only limited itself to section 17 of the Water Utilities Act, which gives the first respondent the "power" to conduct research and keep records.⁶² In arriving at its conclusion, the court noted that section 26 of the Interpretation Act provides:

Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.

In light of the above, it proceeded to rely on section 49 of the same Interpretation Act, which defines "power" as including privilege or discretion.⁶³ In the court's words, the section is "permissive and not directive."⁶⁴ The court then found that section 17 of the Water Utilities Act confers discretionary powers on the first respondent as to whether the water report should be published. Consequently, it found that the applicant was wrong to contend that it was "entitled to the report because section 17 mandates it."⁶⁵ It held that the first respondent had chosen not to publish the report because it was for internal use, and that the applicant had not shown how section 17 was contravened.

Respectfully, it is submitted that the court misconstrued the nature of the applicant's case, i.e., the right of access to information held by the first respondent to foster a culture of transparency, good governance and accountability. It is conceded that the right of access to information is not absolute. However, the conclusion reached by the court is not supported by its analysis.

It could be said that whilst this decision is not progressive from a human rights perspective, the court has departed from the *Unity Dow* decision and declined to rely on the provisions of the ICCPR and the African Charter. The basis for this is that the two treaties have not been

60 [2013] 2 BLR 658.

61 See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) paras 26 and 45.

62 *News Company* decision paras 34, 37, and 39.

63 *Ibid* 38.

64 *Ibid*.

65 *Ibid*.

incorporated into the domestic law. Furthermore, the decision highlights that the *Unity Dow* decision was wrong as it departed from Botswana's dualist theory. In other words, the court opted for what may be referred to as reversing the *Unity Dow* decision.

3 COMPARISON BETWEEN THE *UNITY DOW* AND *NEWS COMPANY* DECISIONS

Two observations can be made from the aforesaid decision. First, both cases concerned the interpretation of a domestic law to adopt a liberal approach to protect human rights. On one hand, the applicant in the *Unity Dow* decision sought discrimination on the grounds of sex (unlisted) to be recognised. On the other hand, the applicant in the *News Company* decision sought freedom of expression to be interpreted liberally to include access to information. Second, the *Unity Dow* decision successfully relied on ratified but undomesticated treaties that were used as an interpretative aid to construct a constitutional provision, whereas the applicant in the *News Company* decision unsuccessfully relied on ratified but domesticated cases.

The *Unity Dow* decision is widely celebrated as a progressive decision in advancing women's rights, especially not to be discriminated against on the grounds of sex.⁶⁶ One would have hoped that the courts would build upon the *Unity Dow* decision to uphold and protect fundamental human rights and freedoms that are not entrenched or apparent in domestic law through reliance on ratified treaties that Botswana has voluntarily assented to. The court in *Unity Dow* did not shy away from using the Interpretation Act as an interpretative aid to construct domestic law to protect women against discrimination on the grounds of sex. The court was clear in that the treaties were not domesticated but had merely used them as a guide to give effect to domestic law. Regrettably, many decisions post the *Unity Dow* decision, including the *News Company* decision, are a testimony that the courts are no longer willing to use the Interpretation Act to enforce undomesticated treaty law. In our view, the *Unity Dow* decision was a step ahead. The *News Company* decision is a regression because the court avoided using the Interpretation Act to interpret the right to freedom of expression to include the right of access to information. The court opted to rely on the dualism theory in that international law is not directly enforceable in the domestic sphere.

It is submitted that the Interpretation Act is liberal and could be used to directly apply international law as an interpretative aid. The *News Company* decision is not progressive from a human rights perspective because corporations or other companies may rely on it and shield themselves against a request for access to information on the basis that such a right is not provided for in the domestic laws or that they (may arbitrarily so) have a power to refuse to provide such information.

All in all, it is submitted that this is another missed opportunity to enforce accountability and transparency in matters that concern the public. The discussion has shown that Botswana has no political will to domesticate ratified human rights instruments⁶⁷ or place reliance on undomesticated treaties. Therefore, it will be difficult for litigants to vindicate rights that are not expressly provided for in the domestic laws. Ultimately, it could be said that the two decisions dealt with a similar aspect of reliance on ratified but undomesticated treaties to enforce human rights, but produced different results. There is a need for Botswana to close this legal gap because any judge may decide to either rely on the *Unity Dow* decision or the *News Company* decision. It is hoped that the legislature will give due consideration to this possible legal uncertainty, which

66 See for example, Quansah "*Unity Dow v. Attorney-General of Botswana – One More Relic of a Woman's Servitude Removed*" 1992 *AJICL* 195; Dinokopila "The *Unity Dow* case and the Constitutional Protection of Women in Botswana" 2015 *Africa Nazarene Univ LJ* 35–52.

67 Maripe 2014 *Oxford Univ Commonwealth LJ* 256–257 and 262–263. See also Quansah "International Law as an Interpretative Tool" 38.

is created by the Constitution and the courts alike. In the interim, we propose that Botswana adopt a theory of harmonisation as discussed below.

4 CONCLUSION

The discussion has revealed that the theories of international law do not necessarily provide clear answers about how countries receive international law in their domestic spheres. Instead, the monist and dualist theories provide guidance about the nature of the country's legal system and how international law ought to be received. The constitutions of the countries are the ones that ought to expressly indicate the nature of the relationship between international law and domestic law. In the absence of this, as seen in the case of Botswana, the courts will issue divergent decisions on matters relating to the application of international law in the domestic sphere. Furthermore, the discussion has revealed that the courts are now pro a dualistic approach as compared to earlier decisions that could be said to be based on a monist theory. Ultimately, the discussion has also revealed that using the Interpretation Act as an interpretative aid is, to a certain extent, open and a licence to apply a monist theory as it accommodates a liberal approach to rely on treaty law as an interpretative aid to construct a domestic law. The harmonisation theory in this regard is preferred as a solution given Botswana's reluctance to domesticate ratified treaties.⁶⁸ In any event, by signing and ratifying treaties, Botswana essentially agreed to align its domestic laws with treaty obligations and to do so in good faith. The harmonisation theory will therefore be applied to promote human rights by preferring any approach, either monist or dualist, if it is in the interest of human rights.⁶⁹

5 RECOMMENDATIONS

The current position in Botswana is not desirable, and it does not lead to legal certainty. It has become evident that, depending on who is on the bench, the courts may either decide that they follow the monist or dualistic interpretative approach for reasons that will justify their ruling on a given case. In addition, the courts have somehow assumed the role of the legislature by first applying a monist approach and currently a dualist approach in their ruling. In both instances, the courts have encroached on the legislative arm of the government and, respected the principle of separation of powers.

In the interim, I propose that the courts should neither apply the monist theory or dualist theory. Instead, they should opt for the harmonisation theory.⁷⁰ According to Phooko, through this approach, "international law and municipal law are 'applied with some degree of equality' thereby avoiding conflict between the two legal system[s]."⁷¹

It is conceded that the harmonisation theory may be viewed as contrary to the principle of separation of powers.⁷² However, we argue that it should not be viewed through that lens. The basis for this is that member states, through their undertakings in various treaties, have ceded

68 Maripe 2014 *Oxford Univ Commonwealth LJ* 256 – 257 and 262 – 263. See also Quansah "International Law as an Interpretative Tool" 38.

69 *Government of the Republic of Zimbabwe v Fick and Others* 2013 5 SA 325 (CC). The South African Constitutional Court applied undomesticated treaties essentially harmonising domestic law and international law to uphold human rights.

70 For a detailed exposition on the theory of harmonisation, see Gerald "The General Principles of International Law Considered from the Standpoint of the Rule of Law" 1957 *Human Rights* 5, 70, and 80; Rousseau *Droit International Public* (1979) 4–16.

71 Phooko 2021 *AJICL* 181.

72 Botlhale and Lotshwao "The Uneasy Relationship Between Parliament and the Executive in Botswana" 2013 *Botswana Notes and Records* 45, Magabe *et al.* "Separation of Powers, Checks and Balances and Judicial Exercise of Self-restraint: An Analysis of Case Law" 2021 *Obiter* 548.

away a certain aspect of their state sovereignty to an international legal order that seeks to uphold and protect fundamental freedoms and human rights.⁷³ By doing so, they voluntarily undertook to align their domestic laws with treaty obligations or not defeat the object and purpose of the treaty.⁷⁴ In addition, they undertook to discharge their treaty obligations at the domestic level.⁷⁵ Consequently, it cannot be said that Botswana's narrow interpretation of domestic laws, to exclude certain human rights that are embodied in treaty law, is in line with the principle of good faith. Otherwise, there would be no need for countries to sign and ratify treaties that will not be adhered to. In any event, some scholars have said that there is "no real separation of powers" in Botswana.⁷⁶ In light of this, there is no principle of separation of powers that will be violated but the protection of human rights.

73 About state sovereignty see Phooko *The SADC Tribunal* 200. There, Phooko argued that "by signing and ratifying the Treaty, SADC member states have inevitably limited certain aspects of their sovereignty. They should, therefore, act in a way that does not defeat the purpose and object of the Treaty."

74 See Art 31 of the Vienna Convention.

75 On the principle of good faith, in elaborating on the duty of member states' obligations to discharge their duties under a treaty, the International Court of Justice CJ in *New Zealand v France*, Judgment, 1974 ICJ Reports, 457 at para 49 said that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration...".

76 Madwebe "Constitutionalism in Botswana" 2020 *Univ of Bot LJ* 13.