Giving effect to the human right to a clean environment in Botswana.

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1. INTRODUCTION

Environmental deterioration remains a concern in Botswana. To this end, there is continued land degradation, loss of biodiversity, the fragmentation of ecosystems, uncontrolled pollution coupled with poor waste management practices, illegal mining, unfriendly environmental construction practices, and unsustainable extraction of natural resources.[1] Despite all the efforts being made to address these issues by the state, even by the state's own admission, more needs to be done in this regard.[2] This is a particularly interesting concession in the light of reports that the country is looking to draft a new constitution. It is not unreasonable to consider then that consideration will be given to include a right to a clean environment in the new constitution.

Against this backdrop, the main objective of the paper is to consider the extent to which including the environmental right in the constitution would hold value in Botswana's pursuit of environmental protection objectives. In order to do so, the paper begins by relying on the expansive body of experiences of states around the world with vibrant jurisprudence around environmental rights with environmental rights to identify critical issues in environmental rights discourse and from this, build a tool which can be relied on to measure the extent to which the turn to environmental rights holds value in a given jurisdiction. Following this, the paper relies on this tool to measure the extent to which the state and non-governmental organisations have made inroads into establishing environmental rights in Botswana as a useful way in which to advance the pursuit of environmental protection objectives in the country. The paper concludes by considering the best way in which to advance environmental protection in the Botswana context as constitutional reform is contemplated.

2. ENVIRONMENTAL RIGHTS

[1] Ministry of Finance and Development Planning 'Republic of Botswana, National Development Plan 11 (April 2017 – March 2023)' (2016) part 7.54.

[2] Statistic Botswana, Botswana Environmental Statistics 2016 (Revised Version), 2017, available at: https://unstats.un.org/unsd/environment/Compendia/Botswana%20Environment%20Statistics%20Revised%20Version,%202016.pdf.

In order to understand the extent to which including the environmental right in the constitution would hold value in Botswana's pursuit of environmental protection objectives, it is useful to begin by briefly exploring the greater rights discourse as a precursor to identifying what these rights are.

To this end, it is paramount to note that rights are generally regarded as falling into three categories, or, generations. The category of first generation rights is comprised of civil and political rights. In addition to this, there is a category of second generation rights, which includes socioeconomic rights such as rights to health, and education. The latter category has generally not inspired action. This is largely because they impose a burden on the state. Even Article 2 of the International Covenant on Economic Social and Cultural Rights makes provision of these rights conditional upon the availability of resources. In addition to the two categories of rights noted above, there has also developed, over time, a category of what have been called third generation rights. These include the rights to self-determination, protection of minorities, and development.[3]

Importantly for the present purpose, environmental rights fall in the broader body of second generation rights. The term environmental rights refers in the one sense, to the substantive right to a clean environment. This has been provided for in different terms by different states across the world.[4] Some states provide it as a right to a clean environment while others record it as a right to a healthy environment. It has also been regarded as a people's right under the African Charter.[5] Based on the fact that enjoying these rights depends on an ability to enforce them, it has long been accepted that the term environmental rights also includes procedural rights necessary to enjoy this right such as rights of access to information and access to justice. Without the procedural rights, the substantive right to a clean environment holds little value. Based on the experiences in other jurisdictions, it is worth noting that, the turn to a justiciable environmental right always promises to invigorate enforcement of environmental

[3] T. van Boven, 'Chapter 7: Categories of Rights' in D. Moeckli, S. Shah and S. Sivakumuran (eds), International Human Rights Law (Oxford University Press: Oxford, 2017).
[4] See detailed discussion on experiences in several states in, D Shelton, 'A background paper for the World Health Organisation' (2002) http://www.who.int/hhr/information/en/Series_1%20%20Human_Rights_Health_Environmental%20Protection_Shelton.pdf. D. Shelton, ' Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' 35 *Denver Journal of International Law and Policy* 129; D. Shelton, 'Human Rights, Environmental Rights, and the Right to the Environment' (1991) 28 *Stanford Journal of International Law* 103.
[5]See, Article 24 of the African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

protection efforts.[6] Perhaps the most interesting example of the impact of this turn to justiciable rights can be found in the approach to rights-based litigation in the European Union where, despite the fact that the European Convention on Human Rights does not feature a dedicated right to a clean environment, it has been recognised, nonetheless, that human rights protected by the Convention may be directly affected by adverse environmental factors.[7] To this end, 'toxic smells from a factory or rubbish tip might have a negative impact on the health of individuals. As such, public authorities may be obliged to take measures to ensure that human rights are not seriously affected by adverse environmental factors.'[8] If these authorities should not do so, they face the threat of civil litigation.[9] As such, these positive obligations ensure that states act in, at the very least, a manner consistent with environmental law. Separately, the stature of fundamental rights has been leveraged as a means of deterring perpetrators from noncompliance with the law.[10] This all plays a role in enforcing laws through limiting state violations of environmental law.[11] Indeed, it has previously been noted that inclusion of such rights in constitutions, 'elevates the entire spectrum of environmental issues to a place as a fundamental value of society, to a level equal to other rights and superior to ordinary legislation. In the absence of guaranteed environmental rights, constitutionally protected property rights may be given automatic priority instead of balanced against...and environmental concerns. Other rights may similarly be invoked to strike down environmental and health measures that are not themselves rights-based.'[12] Lastly, the turn to rights in constitutions has the value that it raises awareness. Awareness of rights and duties has always been low in environmental protection. It is the reason why most offences are strict liability offences. Despite lack of awareness though, environmental rights always exist, in the common law and in statute. Often, they are even exercised unknowingly by people in delict, nuisance, or

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[6]See, L.A. Feris and D. Tladi, 'Environmental Rights' in D. Brand and C. Heyns, (eds), Socioeconomic Rights in South Africa (Pretoria University Law Press: Pretoria, 2005) 252. See also, S. Budlender, G. Marcus and N. Ferreira, 'Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons' (Juta: Cape Town, 2014), <www.atlanticphilanthropies.org/sites/default/files/uploads/Public-interest-litigation-and-social-changein-South-Africa.pdf>. Also, for a discussion on the approach in Argentina, Colombia, and Costa Rica, see Shelton (n 4) 23.

[7]See generally, A. Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613. A.E. Boyle and M.R. Anderson, (eds), *Human Rights Approaches to Environmental Protection* (1996) Chapters 2-4.

[8]See Council of Europe Publishing 'Manual on Human Rights and the Environment' (2012) <www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Manual_Env_2012_nocover_Eng.pdf>.

[9]See, for example, *Lopez Ostra v Spain* 20 EHRR (1994) 277; *Guerra v Italy* 26 EHRR (1998) 357; *Fadeyeva v Russia* 45 EHRR (2007) 10; *Öneryildiz v Turkey* 41 EHRR (2005) 20.

[10]Shelton, above n. 4 at 24.

[11]Boyle, above n. 7 at 615; Shelton, above n. 4 at 23.

[12]Shelton, above n. 4 at 24.

statutory law based litigation. And so, because rights are not used due to lack of awareness building awareness, which is inevitable with the inclusion of environmental rights in the constitution, will lead to greater knowledge of the rights and pave the way for people to turn to these rights to protect their interests or the environment.

2.1 Scepticism on environmental rights

As part of the broader body of socioeconomic rights, it is not surprising that there has always been scepticism surrounding the body of environmental rights. While the existence of environmental rights is now well accepted, this has not always been the case. A generic international environmental entitlement was once regarded as a highly questionable proposition for at least three reasons.[13]

First, it was considered that while there was a direct functional relationship between the protection of the environment and the promotion of human rights, conceptualising environmental protection as stemming from a generic and inalienable environmental right was unnecessary. This was because this would require re-arranging socio-economic priorities and accommodating, or adjusting, public policy objectives in ways that could not be realised while simultaneously pursuing socio-economic development.[14] Alternatively, conceptualising the right as a generic and inalienable right was also considered unnecessary because the more established civil and political rights and even some socio-economic rights could not survive without an underlying right to a clean environment.[15] Separately, conceptualising the right as a generic and inalienable right was also considered unnecessary because environmental rights were created by statute laws of several states through national legislation protecting such environmental media as air and water. In addition, it was also considered that in several common law states, environmental rights were also provided for in terms of the common law

[13] Shelton, above n. 4 at 130. G. Handl, 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' Point of View,' in A.A. Cançado Trindade, (ed), *Human Rights, Sustainable Development and the Environment* (1992) 119-22.
[14]Handl, above n. 13, at 122.
[15] M.A. Fitzmaurice, 'Human Rights and the Environment Right to a Clean Environment' (2002) 293 International Protection of the Environment (RecueildesCours / Collected Courses) 305, https://www.corteidh.or.cr/tablas/25284.pdf. P. Pevato, 'A Right to Environment in International Law: Current Status and Future Outlook' (1999) 8 *Review of European and International Environmental Law*309, 312. S. Weber, 'Environmental Information and the European Convention on Human Rights' (1991) 12 *Human Rights Journal*177 at 177. A. Boyle, 'Human Rights and the Environment,' in B. Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press: Oxford, 2015) 221.

through established concepts such as the law of delict and the law of nuisance, which bodies of law regulated conduct that infringed environmental rights.[16] Not only that, it was also considered that structures were already in place which allowed people, who would be the rights holders if the turn to environmental rights was made, to seek redress when their environmental rights were violated.[17]

Second, the aversion to the turn to environmental rights was based on the idea that the rights-based approach could not yield the sort of environmental protection necessary to protect the environment because it was anthropocentric with rights bestowed on humans who mostly accrued the right to act once their rights were infringed. This was problematic because it meant rights were not really useful when harm occurred which humans were not aware of or were not moved to act on.[18] Alternatively, while this has increasingly been challenged, with the environmental rights of non-sentient beings being recognised, the fact that environmental rights were bestowed on humans traditionally meant that these rights were not useful to the protection of aspects of the environment such as particular species which were of 'no present and potential interest to humankind.'[19] Also, the rights approach was problematic because it was backward-looking and reactive to the occurrence of catastrophic events rather than preventative, a more preferable approach in environmental protection.[20]

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[16] M. Kidd *Environmental law* (Juta: Cape Town, 2008) 76, 130-33.

[17] See however, Kidd, above n. 16 at 134.

[18] See the enlightening discussion on anthropocentricism and ecocentrism, albeit with reference to the principle of intergenerational equity in D. Tladi, 'Of Course for Humans: A Contextual Defence of Intergenerational Equity' (2002) 9 *South African Journal of Environmental Law and Policy*177, 182-85. See also, Feris, above n. 6, 252, who note that 'ecocentrists reject anthropocentrism (and by necessity any human rights approach) as flawed, because under such approaches the environment is protected, not because it has intrinsic value, but only for the sake of man.' A.S. Timoshenko, 'Ecological security: Global Change Paradigm' (1990) 1 *Colorado Journal of International Environmental* 127, 127-131. M. Dixon, *Textbook on International Law* (Oxford University Press: Oxford, 2003) 466. E. Louka, *International Environmental Law: Fairness, Effectiveness and World Order* (Cambridge University Press: Cambridge, 2006) 16-7. D. Bodansky*et al*, 'International Environmental Law: Mapping the Field,' in D. Bodansky*et al*, *The Oxford Handbook of International Environmental Law* (Oxford University Press: Oxford, 2007) 15-16. P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (Oxford University Press: Oxford, 2009) 7.

[19] D. Bilchitz 'Can the Environmental Rights in the South African Constitution Offer Protection for the Interests of Animals?' https://www.uj.ac.za/faculties/law/saifac/PublishingImages/Pages/default/The%20Environmental%20Rights%20and%20Animal%20Interests.pdf.

[20]Feris, above n. 6, at 251. T. Crossen, 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 473. M. Mason, 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Public in International Environmental Law' (2006) 12 *Global Governance* 283, 283, 288. B.K. Bucholtz, 'Coase and the Control of Transboundary Pollution: The Sale of Hydroelectricity Under the United States-Canada Free Trade Agreement of 1988' (1991) 18 *Boston College Environmental Affairs Law Review* 279. G. Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, 3,

Third, it was argued that even if environmental rights were known and people were motivated to act upon the rights, it was difficult to conceptualise the right as a generic and inalienable right because reaping the benefits of doing so depended on citizens' capacity to pursue redress based on these rights.[21] Because such capacity could not be assumed to exist, once the right was conceptualised as a generic and inalienable right, this needed to be accompanied by a real obligation on states to ensure people were capacitated to act in protection of the environment.[22] Asking this of states was not easy given their preoccupation with pursuing socioeconomic development.

2.2 Acceptance of the human rights approach

Over time it has become apparent, at both the international and national levels,that a rights-based approach to environmental protection would be useful to the pursuit of environmental protection objectives.

2.2.1. The international level

Over time, it became apparent at the global level that, as much as relying on statute law and common law to protect environmental rights seemingly made sense, environmental issues and problems were far-reaching, interconnected, and best addressed holistically at the central level. And, because 'human beings are at the centre of concerns for sustainable development, and... are entitled to a healthy and productive life in harmony with nature,'[23] this meant that there was value in turning to the rights as part of a centralised regulatory framework which empowered people to participate in the regulation of environmental protection in a most direct way through

4. C.D. Stone, 'Defending the Global Commons,' in P. Sands (ed.), Greening International Law (Earthscan Publications Ltd.: New York, 1993) 35.

[21] On willing and able plaintiffs see, B.J. Preston, 'Environmental Public Interest Litigation: Conditions for Success' (2013), http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721754/preston_environmental%20public%20interest%20litigation.pdf.

[22] See T. Murombo, 'Balancing interests through framework environmental legislation in Zimbabwe,' in M. Faure & W. du Plessis, (eds), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Law Press: Pretoria, 2011) 576.

[23] Rio Declaration UN Doc. A/CONF.151/26 (vol. I) Principle 1.

exercising their rights.[24] As a consequence, in 1972 when the world looked to transition toward a coherent holistic and centralised environmental protection regulatory framework during the Stockholm Conference, states recognised the nexus between human rights and the environment. Indeed, Principle 1 of the Stockholm Declaration provided, in part, that humanity had the 'fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'[25] Despite this, it was only in August 1994 that the United Nations adopted the final report on the study of Human Rights and the Environment.[26] This report recommended the recognition of a right to a healthy environment as a human right, and the adoption of a draft declaration on human rights and the environment. It also marked the official beginning of a long and on-going process of identifying, conceptualising and setting standards for a human right to environment. While this has not resulted in a global human rights treaty proclaiming a right to environment, several modern pieces of international law such as the African Charter on Human and Peoples' Rights (African Charter)[27] and the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights[28] incorporate a right to a clean environment. The form that these rights assume varies.[29] And, in some instances, as with European law, the European Court has highlighted that even though the European Convention on Human Rights may not carry a dedicated environmental right, the right to a clean environment is protected by the rights that are provided in the Convention.[30]

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[24] C. McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 335-340. A.E. Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *The European Journal of International Law* 613, 613-614.

[25] Stockholm Declaration UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972) Principle 1.

[26] Analytical Study on the Relationship Between Human Rights and the Environment UN Doc E/CN.4/Sub.2/1994/9, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-34_en.pdf.

[27] Art 24 African Charter, above n. 5.

[28] Art 11 Additional Protocol to the American Convention in the Area of Economic Social and Cultural Rights, A-52, of 17 November 1988, , available at: https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20(Protocol%20of%20San%20Salvador).pdf. Handl, above n. 13 at 124. See, for instance, Communication 155/96, *Social and Economic Rights Action Center SERAC*) *& Another & Center for Economic and Social Rights* (CESR) *v Nigeria* (2001) AHRLR 60 (ACHPR 2001). *Advisory,* Fifteenth Annual Activity Report and *Opinion Addressing the Scope of Articles 1(1) (Obligation to Respect Rights), 4(1) (Right to Life), and 5(1) (Right to Humane Treatment/Personal Integrity) of the American Convention on Human Rights and the interpretation of Articles 4(1) and 5(1) in relation to Article 1(1)*,) *and in light of international environmental law* (26 February 2018) Inter-American Court of Human Rights OC-23/17.

[29] Shelton, above n. 4 at 130.

[30] K. Cook, 'Environmental Rights as Human Rights' (2002) *European Human Rights Law Review* 196, 197.

Importantly, while there may be no consistency in how environmental rights are formulated at the international level, there is clear provision for, and protection of, an anthropocentric right to a clean environment which, simply stated, ensures that people live in clean or healthy environments that do not pose a threat to life, or, infringe upon privacy rights.[31]

2.2.2. National perspective

At the national level the turn to the formal recognition of environmental rights as part of national regulatory frameworks has largely been motivated by international developments. The turn to such rights has also been motivated by the realisation of the fact that, while the statute law and common law applied in several states offer some protections to people where their environmental rights are violated, entrenching these rights in constitutions would offer better protection to people and the environment. This is based on the logic that turning to environmental rights can contribute to regulatory efforts and improve them by empowering people to enforce environmental protection laws directly without waiting on the traditional framework to address the offending conduct. This is because the rights would empower people to bring, or threaten to bring, litigation against anyone posing a threat to the environment.[32] In addition, constitutional rights create measurable positive obligations on the state to ensure that citizens exercise the rights and enjoy the benefits they bestow. The rights also mean that the state would be obliged to regulate environmental protection so that environmental rights cannot be violated. Therefore, the inclusion of environmental rights in the constitution would create measurable positive obligations on the state to ensure that citizens enjoyed the right to live in a clean environment.[33]

Largely for these reasons, over 125 states across the world have incorporated the right in their constitutions.[34] Certainly, the form assumed by the rights differs, with some rights being people's rights and protecting people as a collective. Other rights are couched as

[31] *Fadeyeva v Russia* (2007) 45 EHRR 10. *Guerra v Italy* (1998) 26 EHRR 357.*Lopez Ostra v Spain* (1995) 20 EHRR 277.*Oneryildiz v Turkey*(2004) 39 EHRR 12. *Hatton v United Kingdom* (2003) 37 EHRR 28.
[32] Shelton, above n. 4 at 103. Handl (n 13) 117. Anderson, above n. 7. F. Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 *European Journal of International Law* 41, 44, 54-55.
[33] Shelton, above n. 103. Handl, above n. 13 at 117. Anderson, above n. 7. Francioni, above n. 32 a 41, 44, 54-55.
[34] C. Jeffords, 'Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions,' in L. Minkler, (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press: Cambridge, 2013) 329. C. Jeffords and J.C. Gellers, 'Constitutionalizing Environmental Rights: A Practical Guide' (2017) 9 *Journal of Human Rights Practice* 136.

individual rights to a clean, sometimes framed as healthy, environment.[35] Importantly for the present purpose though, there is clear recognition across the regulatory frameworks in several states that environmental rights exist and it falls to the state to ensure that people live in a clean environment which does not pose a threat to life, or, infringe upon privacy rights.

3. THE ANALYTICAL FRAMEWORK

Following from these developments which have seen environmental rights established at the international in regional instruments such as the African Charter on Human and Peoples' Rights (African Charter)[36] and the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights[37] and in several national laws, it is now possible to draw from experience and design an analytical tool which can be relied on to measure the extent to which the turn to environmental rights holds value in a given jurisdiction, such as Botswana. In looking to formulate such tool it is useful to be guided by the fact that experience drawn from years of recourse to environmental rights internationally and within states has established quite clearly that the turn to environmental rights, only brings value where three conditions are satisfied.

First, a rights-based approach works best where rights holders have the capacity to exercise rights and enjoy the benefits these rights bestow on them. Such capacity can assume the form of citizens being educated on their rights and how to exercise them. Indeed, in some cases, effective education might even motivate citizens to familiarise themselves with the state of the environment in which they live. As a result, the citizens would rely on their procedural rights to access information which may put them in a position to undertake action which might pre-empt the occurrence of environmental harm. Driesen has argued that public opinion has always driven environmental improvement, so dissemination of good and understandable

[35] See for example, *M.C Mehta (Kanpur Tanneries) v. Union of India* 1988 SCR (2) 530. *Vellore Citizens Welfare Forum v Union of India AIR* 1996 SC 2715.
[36]See African Charter, above n. 5, Art 24.
[37] American Convention on Human Rights. Treaty Series, No. 36. San Jose: Organization of American States. Art 11. Handl. above n. 13 at 124. See too, Communication 155/96, *Social and Economic Rights Action Center SERAC) & Another & Center for Economic and Social Rights (CESR) v Nigeria* (2001) AHRLR 60 (ACHPR 2001). *Advisory,* Fifteenth Annual Activity Report and *Opinion addressing the scope of Articles 1(1) (Obligation to Respect Rights), 4(1) (Right to Life), and 5(1) (Right to Humane Treatment/Personal Integrity) of the American Convention on Human Rights and the Interpretation of Articles 4(1) and 5(1) in relation to Article 1(1)*,) *and in Light of International Environmental Law* (26 February 2018) Inter-American Court of Human Rights OC-23/17. African Charter, above n. 5 at Art 24.

information and opportunities to act on that information and formulate opinions are extremely important.[38] However, environmental rights are not easily known to people. This is for several reasons. For instance, environmental protection often concerns itself with technical and scientific matters. As such, these matters may not be accessible to the average person. A person whose rights are prejudiced may, therefore, not understand this with the result that the person cannot exercise the right. In this context, the rights will not work. To this end, ensuring that people know about the rights and can use them is best done when states put in place institutional measures to ensure that the public are educated on the existence of environmental rights and the manner in which to exercise them so that they may derive the benefits these rights bestow.[39] As McGrath appositely notes, albeit with reference to the value of educating people on public interest litigation, education is important because: 'Knowledge...is crucial for effective...litigation to protect the environment. The environmental legal system is often complex, convoluted and illogically structured with multiple legislative schemes and government administrators. Complex issues of law and fact commonly arise with which ordinary members of the community are unfamiliar.'[40] Thus, it is only once people are sufficiently educated on environmental rights, their function, and value that they can realise and appreciate the importance of such complementary procedural rights as access to information, participation, and access to justice to the enjoyment of the benefits that environmental rights bestow on them.[41] This ultimately culminates in effective utilization of the rights.

Second, even when people are educated on environmental rights it is important to consider that bringing, or threatening to bring, litigation as part of exercising any rights, including environmental rights, can be expensive.[42] Without the financial resources to bring litigation, it is difficult to bring, or threaten to bring, environmental rights-based litigation. In order to counteract this, it becomes important at the state level to remove all manner of barriers which could limit people's exercise, and enjoyment, of their environmental rights, most notably, restrictive access to information. In addition, it is also important for the state to

[38]D.M. Driesen, 'Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration' (2003) 30 *Syracuse Journal of International Law and Commerce* 353, 366.
[39] S. Leckie and A. Gallagher, *Economic, Social, and Cultural Rights: A Legal Resource Guide* (Penn Press: Philadelphia, 2006).
[40] McGrath, above n. 24 at 334.
[41] S. Kravchenko, 'Environmental Rights in International Law: Explicitly Recognised or Creatively Interpreted' (2015) 7 *Florida A & M University Law Review* 165.
[42] McGrath, above n. 24 at 324.

proactively ensure people get access to justice by putting in place institutional measures to assist litigants and potential litigants in bringing rights-based matters to court.

Third, because of the need to counteract the fact that where they are individualistic, rights can lead to an approach to environmental protection which is reactive and victim-centred, rights also need to be collective.[43] Being collective as the term is used here refers to environmental rights which are provided for in concert with a generous approach to legal standing which allows the rights to be exercised by an individual who forms part of a directly prejudiced group or does not, or, by a group acting collectively whether they are prejudiced or not, allowing individuals or groups to act in the public interest even without suffering direct harm. These rights are attainable through adopting a generous approach to legal standing which would allow any individual or group to act in furtherance of environmental protection objectives on his or her own behalf, the group's behalf, or in the public interest. Significantly, being collective means that the rights can be relied to work reactively and proactively, as needed, to protect the environment for present and future generations.[44]

4. BOTSWANA

Botswana's constitution recognises a litany of civil and political rights, together with socio-economic rights.[45] Importantly, it does not provide for environmental rights. However, there is still an effort to protect environmental rights in two ways.

First, courts have taken cognisance of the fact that while there are no environmental rights in the constitution, some of the provisions contained in the Constitution such as the right to life;[46] the right to privacy;[47] the right to information[48] and; the right to protection from deprivation of property,[49]cover environmental concerns. Based on this, courts have often interpreted civil and political rights in an expansive manner with the effect that they protect environmental rights. For instance, a most notable example of the approach taken by courts can

[43] J.C. Mubangizi, 'Towards a new approach to the classification of human rights with specific reference to the African context' (2004) 4 *African Human Rights Law Journal* 93, 96.
[44]Mubangizi, above n. 43 at 96.
[45]Chapter 11 of the Constitution of Botswana.
[46]Section 4 of the Constitution of Botswana.
[47]Section 9 of the Constitution of Botswana.
[48]Section 12 of the Constitution of Botswana
[49] Section 8 of the Constitution of Botswana

be found in the *Sesana* case wherein the court had an opportunity to extend the right to life to canvass environmental rights.[50] The applicants were part of an indigenous group (Basarwa) residing in the Central Kalahari Game Reserve (CKGR) since time-immemorial. They were predominantly surviving on hunting and gathering, but, received supplementary services from the government in the form of food rations, transportation for children to and from school, and mobile health services. However, from 1997, the government began to implement a scheme encouraging the applicants to relocate from the CKGR to neighbouring settlements outside the Reserve. In April 2001, the government announced its intentions to terminate the provision of all services to the CKGR residents. The Director of the Department of Wildlife and National Parks, also announced that he would be withdrawing all special game licences from CKGR residents which allowed them to hunt legally, and would refuse to issue such licences in future. Their future access to the hunting grounds would, henceforth, only be sanctioned on the basis of a permit system. It was following these developments that, in February 2000, the applicant filed an application challenging the government's decision. Amongst the issues was a claim that the government's refusal to issue special game licenses to the Basarwa and/or the refusal to allow them to enter into the CKGR, unless they were issued with such a permit was unlawful and unconstitutional. The Court held that the refusal to issue special game licences to the Basarwa living in the CKGR was unlawful. Two of the judges, found that the simultaneous stoppage of the supply of food rations and the issuing of special game licenses to be unconstitutional and was tantamount to condemning the remaining residents of the CKGR to death by starvation, resulting in a violation of the right to life set out in section 4(1) of the Botswana Constitution.[51] Importantly, the court shied away from considering that the right to life incorporated environmental rights in the form of rights of access to natural resources and wildlife.

A similar approach was adopted in the *Mosetlhanyane* case, an offshoot of the *Sesana* case, which dealt with the right to water in Botswana. The appellant was one of the applicants in Sesana case. Following the relocation of Basarwa form the CKGR and the High Court decision that the government was not obliged to provide essential services to the Basarwa who opted to remain in the CKGR, government dismantled and sealed a borehole which the applicant had access to. It was uncontested that the appellant lacked access to water since the existing borehole had been dismantled. The absence of water had made them weak and pliable

[50]*Sesana and others v the Attorney General* (2000) 2 BLR 33.
[51]*Sesana and others v the Attorney General* per Phumaphi J, para 137-138 andper Dow J, para 12.

to sickness such as headaches, constipations and bouts of dizziness.[52]In short, the appellants were suffering, and the refusal by the government to use the existing borehole, which had been lying idle for several years, violated their constitutional right not to be subjected to inhuman or degrading treatment enshrined in section 7 of the Constitution.[53] The applicant approached the High Court, seeking an order declaring that they had a right to abstract water without a permit by virtue of section 6 of the Water Act. The High Court ruled against the applicant.[54] Discontented with this decision, the applicants appealed to the Court of Appeal. Amongst other things, they sought an order declaring that the refusal or failure by the government to confirm that they had the right to sink a borehole or wells at their own expense in CKGR and use water therefrom for domestic purposes in accordance with section 6 of the Water Act, was unlawful and unconstitutional.[55] The court considered that the right contained in section 7 was absolute and unqualified. The learned judge indicated that he would approach the matter "on the basis of the fundamental principle that, whether a person has been subjected to inhuman or degrading treatment, involves a value judgment."[56] To that end, the judge made reference to United Nations Committee on Economic, Social and Cultural Rights Report on Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, paragraph 16 (d), which emphasised on the need for States to ensure that indigenous people have access to water resources on their ancestral lands.[57] The court also considered United Nations Resolution A/RES/64/292 on the Human Right to Water and Sanitation. Ultimately, the Court found that the conditions to which the appellant were subjected to violated the right not to be subjected to inhumane and degrading treatment. As with the court in the *Sesana* case however, the court shied away from considering that the right to be protected from inhumane and degrading treatment encompassed environmental rights, and in this case, the right to live in a clean environment with clean water.[58]

Second, other sources of law protect environmental rights indirectly. So, while there may not be provision of environmental rights in the constitution, there are various statues

[52] *MatsipaneMosetlhanyane & Others v The Attorney-General of Botswana*, Court of Appeal, CALB–074-10, para 8.
[53] B.R. Dinokopila 'The Right to Water in Botswana: A Review of the Matsipane Mosetlhanyane case' (2011) 11 *African Human Rights Law Journal* 285.
[54]*Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana*, High Court Civil Case No. MAHLB-000393-09.
[55] para 1.
[56] para 19.
[57] para 19.
[58] See B.R. Dinokopila, 'The Justiciability of Socio-economic Rights in Botswana' (2013) 57 *Journal of African Law* 108.

governing natural resources in Botswana such as the Wildlife Conservation and National Parks Act,[59] the Atmospheric Pollution (Prevention) Act,[60] and the Water Act.[61] In addition, some provisions of the common law of delict and nuisance certainly protect environmental rights. The law found in these statutes and the common law can also be relied on to directly and indirectly protect environmental rights.

Importantly though, this creative approach to protecting environmental rights necessitated by the absence of a constitutionally entrenched right has expected weaknesses. In a most basic sense, it means that litigation becomes a tedious and more expensive process with creative interpretation needed to expand the coverage of civil and political rights entrenched in the constitution and statute to secure protection of environmental rights. In the courts, the success of the approach also depends on the willingness of the bench in a given case to adopt a creative approach as well as on judges being adequately knowledgeable about environmental rights and their importance.[62] Outside of the court, this approach often means that environmentally deleterious behaviour is not always seen as, itself, morally reprehensible in a manner that would facilitate greater environmental protection. The indirect approach also has the problem that it is difficult for anyone whose environmental rights are adversely affected, or, anyone who wishes to act in the public interest, to litigate to advance environmental protection objectives as it becomes difficult to show necessary standing to appear in court.

And so, in this context it has become apparent that the turn to explicit recognition of rights may yield positive results insofar as, facilitating easier access to court for those directly affected by environmental rights, or, those not directly harmed but looking to act in the public interest, and, enabling courts to rule on environmental matters, is concerned. This would lead to greater protection of environmental rights which comes with the benefits detailed above. However, and following from the preceding discussion, whether the benefits of a turn to environmental rights can be realised in the Botswana context comes down to three main considerations, that is: whether people are knowledgeable about the role of environmental rights in the environmental protection endeavour; whether the state has removed barriers for litigants, such as restrictive access to information and instead puts in place structures to enhance

[59] Cap 38:01.
[60] Cap 65:03.
[61] Cap 34:01.
[62] M. Faure and A.V. Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21 *Fordham Environmental Law Review* 239.

to justice by supporting litigants in bringing litigation; and whether the law recognises and protects both individual and collective rights.

4.1. Knowledge of rights

Knowledge of environmental rights in Botswana is poor, most probably because, there has not ever been explicit provision of environmental rights in Botswana's constitution. The closest the country has come to making provision for such rights was when it made the decision to ratify the African Charter which protects environmental rights in Article 24. However, the country is a dualist state. This means that the international law, and the environmental rights, has no direct application until it is given effect to in domestic law. Indeed, the court noted in *Attorney General v Unity Dow*[63] noted that until they are given effect to, international conventions are merely aids to be used by the courts in interpreting the law in instances of ambiguity in the domestic laws. This is in line with the provisions of the Interpretation Act which provides that international conventions and treaties as far as they have not been incorporated into domestic law, may be used as an aid to construction of the constitution and of statutes.[64] Where it is possible to do so without doing violence to the language used, an interpretation consonant with Botswana's international obligations subscribed to in conventions with other states should prevail.[65] Following from this, environmental rights stemming from the African Charter have not been domesticated. And so, while the rights may be known to courts, it is difficult to accept that they will generally be known to lay people merely.

In complement to this, while it is not unreasonable to consider that the provision for environmental rights, under the statute law and the common law, could have built knowledge around environmental rights, the reality is that the state has not looked to educate people on environmental rights. Consequently, it is only those who are skilled in interpretation that can be assumed to have capacity to infer the existence of the rights from available sources of law. The general public simply does not have the sort of knowledge about the rights which would

[63] (1992) BLR 119. B. Maripe, 'Giving Effect to International Human Rights Law in the Domestic Context of Botswana: Dissonance and Incongruity in Judicial Interpretation' (2014) 14 *Oxford University Commonwealth Law Journal* 251. *Republic of Angola v Springbok Investments (Pty) Ltd* [2005] 2 BLR 159 (HC). E. Quansah, 'An Examination of the use of International Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana,' in M. Killander, (ed.), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press: Pretoria, 2010) 37.
[64] Section 24 (1) of the Interpretation Act (Cap1:04).
[65] *Attorney General v Unity Dow* (1992) BLR 119 154D. *Good v Attorney General* (2) 2005 (2) BLR 337 (CA).

meet the threshold of knowledge required to make the turn to the right valuable based on the idea that value is realised when everyone knows the right and everyone understands how to use the right to bring, or threaten to bring, litigation in protection of the right and the environment.

4.2.State support

Litigation is quite expensive in Botswana. As such, an important state supportive function generally is litigation support. This is particularly true when people look to litigate in environmental matters which very often deal with issues in which the public has an interest. Importantly, such support is possible in two ways.

First, state support is attained when the state removes all manner of barriers which could limit people's exercise, and enjoyment, of their environmental rights most notably, through limiting restrictive access to information. Here, it is noteworthy that in Botswana, the state has not looked to encourage litigation by making access to information easier. Indeed. while the constitution guarantees the freedom to receive ideas and information and the freedom to communicate ideas and information without interference, whether to the general public or individuals,[66] it falls short in indicating whether this right also entails an obligation on the state to provide information. In this context then, there is no real access to the sort of environmental information in Botswana law that is needed in order for the right to a clean environment to be exercised effectively. Importantly though, there are references to the idea of transmitting information to parties who might be affected by any decision-making. For instance, the Environmental Assessment Act[67] mandates the publication of an environmental impact assessment statement on proposed developments. The publication has to run for four consecutive weeks, inviting comments or objections from those persons most likely to be affected by the proposed activity, and other interested persons.[68] However, the drawback is that transmission of information only occurs in restricted circumstances, that is, when there is a proposed development or proposed legislation. Of note, dissemination of environmental information outside these circumstances is not provided at law. Separately, section 85 of the Mines and Minerals Act[69] has long imposed a duty on the Minister to maintain records of all

[66] Sec 12 (1) of the Constitution of Botswana.
[67] Cap 65:07.
[68]Sec 10 (2) (a) of the Environmental Assessment Act (Cap 65:07).
[69]Cap 66:01.

mineral concessions issued under the Act and ensure that these are open to inspection by members of the public, who will be permitted to take copies thereof, during normal Government office hours. However, there is nothing done to empower the public to seek and receive information at a reasonable cost. It is quite telling that one of the ways in which information may be disclosed is as part of court proceedings and even that may not yield information in an accessible or comprehensible form. By the same token, the state has not looked to encourage litigation by making access to justice easier. This is because the state has not looked to adopt a generous position on legal standing, generally. If anything, the restrictive approach to standing is a significant barrier to access to justice in Botswana.

Second, litigation support occurs where the state proactively puts in place institutional measures to assist litigants, and potential litigants, in bringing rights-based matters to court and in realising their access to justice right. Importantly though, it is clear, in Botswana, that the state is not looking to assist litigants through tools to encourage litigants to realise their access to justice right. This is apparent from the fact that there are several tools that could be adopted to assist litigants, and potential litigants, in bringing rights-based matters to court and in realising their access to justice right, but are not. An example would be statutorily prescribed payment tariffs for actions brought in the public interest and similar techniques which would ensure that costs are not prohibitive. The best that Botswana has done has been putting in place the legal aid system. However, that system is fraught with deficiencies which compromise this avenue's value as a tool for encouraging access to court. The key problem is quality representation.[70] Further, considering the fact that legal aid staff is often overburdened with work, it is not reasonable to expect them to be as conversant in the knowledge of such specialist areas as environmental law.

4.3. Individual and collective rights

As argued above, there is value in adopting a liberal approach to standing with respect to environmental rights as this would allow individual and collective action in protection of rights. Importantly, Botswana law does not adopt such a liberal approach to standing generally and this is apparent in two ways.

[70] R.J.V. Cole, 'The Right to Legal Representation and Equality Before the Law in Criminal Proceedings in Botswana' (2011) 1 *Stellenbosch Law Review* 94, 109.

First, the judiciary in Botswana appears to have flirted with the idea of a liberal approach to standing.[71] This can be inferred from the Court of Appeal's approach to legal standing in the 1989 *Tsogang Investments (Pty) Ltd v Phoenix Investments (Pty) Ltd* case, where it was held that it was not only the applicant for a licence or any objector before the licensing authority who could appeal a decision but anyone who had a right which might be infringed by a wrong decision of the licensing authority. This turn to a seemingly liberal approach to legal standing can also be inferred from the approach adopted by the same Court of Appeal in the 1992 *Attorney General v Unity Dow*[72] case, where the respondent applied for an order declaring section 4 of the Citizenship Act *ultra vires* the Constitution because it precluded female citizens from passing citizenship to their children with the result that her two children were aliens in her own land and the land of their birth. The court accepted the argument that she had standing because the respondent had substantiated her allegation that the Citizenship Act circumscribed her freedom of movement given by section 14 of the Constitution. Importantly, the court accepted her argument that she had legal standing to bring the matter because, as a mother of young children, her movements were determined by what happened to her children. If her children were liable to be barred from entry into or thrown out of her own native country as aliens, her right to live in Botswana would be limited because she would have to follow them. Since then however, the Judiciary has gravitated toward a more restrictive approach to standing. Perhaps this is best exemplified in the 1994 *Botswana National Front v The Attorney General*[73] case where the nation's High Court, despite being an inferior court to the Court of Appeal, relied on the law to deviate from the seemingly liberal approach to standing adopted in *Tsogang Investments* and *Unity Dow* and instead, reaffirmed the general rule, which still stands to this day, that 'everyone has a right to be heard in his or her own cause and no one, save a qualified practitioner, has a right to be heard in the cause of another.' The court also noted that this rule was qualified by the principle that an individual has no status or standing to challenge the validity of anything done under an Act of Parliament unless she or he is specially affected or exceptionally prejudiced by such action. Based on this position, the court accepted the standing of the Botswana National Front Party to bring an action seeking an order declaring the election roll null and void based on the fact that it had a vested interest in the smooth running and the proper administration and application of the

[71] A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (Pearson Education Limited: London, 2007) 104-105, 419.
[72] (1992) BLR 119.
[73] 1994 BLR 385 (HC).

Constitution and the Electoral Act and related legislation. So, the party was specially and directly affected by the electoral process and as such, had standing to the Constitution, the Electoral Act and all other legislative enactments which would impact the electoral process. The court also denied standing to respondents who wished to be allowed to vote despite being outside the country on the basis of the fact that they had not established that they had been personally, specifically adversely affected over and above other members of the Botswana community in order to warrant the court affording them standing. Essentially, Botswana does not have a liberal approach to standing.[74]

Second, Botswana's reticence to accept the exercise of collective rights is apparent in two ways. First, class actions are frowned upon in Botswana law. In principle, class actions are permitted in terms of Order 16 rule 8 of the Rules of the High Court. This Order provide that: 'where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend such cause or matter on behalf of or for the benefit of all persons so interested.' Importantly though, to benefit from this rule, victims must go through a cumbersome process of constituting a class and providing evidence that they have a common interest.[75] In addition, once a class is constituted, contingency fees are acceptable. However, there are no legislative provisions guiding the fees, and including security of costs payable in class actions and who bears these costs. Practically then, the only time litigants would not bear the cost involved in litigation is when they would have been granted legal aid by Legal Aid Botswana[76] otherwise, they bear the cost of litigation.[77] Second, public interest litigation, which is relied on in numerous countries as a means of allowing people to assert collective rights and seek to protect them, is not a recognised option when bringing litigation in Botswana law.[78]

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[74] M. Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 *Netherlands International Law Review* 259. A. Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 *Human Rights Law Review* 557.

[75] *Score Supermarket Employees v Score Supermarket* 2010 BLR (2) 143 (IC).

[76] Section 31 of the Legal Aid Act No. 18 of 2013.

[77] For a contrasting example from the region, see however, sec 32 (2) of the South African National Environment Management Act No. 107 of 1998 and the case of *Silvermine Valley Coalition v Sybrand van der SpuyBoerderye and Others* 2002 (1) SA 478 (C).

[78] C. Konkes, 'Green Lawfare: Environmental Public Interest Litigation and Mediatized Environmental Conflict' (2018) 12 *Environmental Communication* 191. L. Krämer, 'Public Interest Litigation in Environmental Matters before European Courts' (1996) 8 *Journal of Environmental Law*1. For a contrast with similarly placed states, see: sec 38 of the South African Constitution of 1996 and sec 32 (1) of the South African National Environment Management Act; Art 26 (2) of the Tanzanian Constitution and the case of *Rev. Christopher Mtikila v. the Attorney General,* Civil Case No. 5 of 1993 (High Court of Tanzania) (Ruling) (unreported); sec 85 of the Zimbabwean Constitution and the case of *Firinne Trust Operating As Veritas and Others v Zimbabwe Broadcasting Authority and Others* Case No HC230/18; Art 50 (2) of the Ugandan Constitution and the case of *Advocates Coalition for*

4.4. The role of environmental non-governmental organisations

Non-governmental organisations (NGOs) are organizations which are not part of government though they could be funded by the government. Importantly in environmental protection, and with respect to environmental rights, the primary objective of these organizations is public service.[79]Across most states NGOs are the champions of environmental rights for several reasons.

Most notably, NGOs often play a primary role in raising awareness to pertinent issues environmental protection and environmental rights issues by supporting particular 'test cases' through relevant courts, offering direct assistance to those whose rights have been violated.[80] Unfortunately, the extent to which they do so depends on the regulatory framework in a given state. However, regardless of that, even in states which do not allow them to be proactive through the courts, NGOs still remain influential in raising awareness to pertinent issues environmental protection and environmental rights issues by lobbying for changes to national, regional or international law, helping to develop the substance of those laws and promoting knowledge of, and respect for, environmental rights among the population.[81]

Importantly for the present purpose, the regulatory framework in Botswana, particularly the extensive restrictions on *locus standi* noted above, is such that NGOs cannot litigate for the protection of environmental rights through public interest litigation. However, they can still support 'test cases' through the courts where there is a motivated and directly affected litigant. The restrictions on access to court have compromised these organisations' capacity to do that. Despite this hurdle insofar as that function is concerned however, NGOs still remain invaluable. This is largely because, in response to the long-standing need for environmental awareness in Botswana,[82] which partly accounts for people's lack of insistence on a more liberal approach to *locus standi*, they have worked tirelessly to raise relevant awareness. To this end,

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Development and Environment v Attorney- General (Miscellaneous Cause No. 0100 of 2004) and; *British American Tobacco Ltd v The Environmental Action Network* High Court Civil Application No. 27/2003.

[79] S.T. Badruddin, 'Role of NGOs in the Protection of Environment' (2015) 9 *Journal of Environmental Research And Development* 705.

[80] Council of Europe, Human Rights Activism and the Role of NGOs,' available at: https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos. UNESCAP, 'Introduction Role of NGOs and Major Groups' available at: https://www.unescap.org/sites/default/files/CH14.PDF.

[81] Council of Europe (n 80). UNESCAP (n 80).

[82] K. Mogome-Ntsatsi and O.A. Adeola, 'Promoting Environmental Awareness in Botswana: the Role of Community Education' (1995) 15 *Environmentalist* 281. A. Thomas, 'Non-Governmental Organisations and Environmental Policy in Botswana-Opposition or Collaboration?' (1996) 10 *Pula: Journal of African Studies* 47.

NGOs like Kalahari Conservation Society, the Forest Association of Botswana and the Botswana Society have been involved in natural resource conversation and utilisation as well public awareness on environmental issues. They also provide *fora* for discussion on environmental issues.

These efforts have proven to be valuable in advancing the environmental protection cause and in ensuring that environmental rights of individuals and communities are taken into account at the policy making level. Most notably perhaps, these efforts played a pivotal role in the turn to the Community Based Natural Resource Management Policy[83] which advanced environmental protection efforts and the protection of environmental rights by recognising that members of communities share an interest in improving their livelihoods through sustainable management and equitable utilization of natural resources in their environs. This placed an obligation, albeit in policy which is non-binding, to account for people's environmental rights in decision making. The Policy also raised communities' awareness of their rights and motivated communities them to protect the environment through prompting them to look for ways to benefit from sustainable utilisation of the environment.[84]This turn to Community Based Natural Resource Management is continuing, and trending in a positive direction, as there are ongoing efforts to formulate and promulgate Community Based Natural Resources Management legislation.

And so, NGOs have played a not insignificant role in raising people's awareness about environmental protection and their rights. Importantly for the present purpose however, their inability to acquire standing to adjudicate on the basis of environmental protection and the protection of environmental rights over the years serves as a reminder of the lack of political willpower to recognise the validity of environmental rights in Botswana. And even their successes, headlined by their role in the progression to the Community Based Natural Resource Management Policy, which in itself is not binding and can be overturned by the state,[85] simply reaffirms this the lack of political willpower to recognise the validity of environmental rights in Botswana.

[83] Government of Botswana, Community Based Natural Resource Management Policy Government Paper 2 of 2007.
[84]See too, Republic of Botswana, Government Paper: Ministry of Environment, Wildlife and Tourism, Wildlife Policy, 2013.
[85]J. Mbaiwa, quoted by K. Kgosikebatho, 'Enclave Tourism Kills Community Trusts,' *The Patriot on Sunday* (2017), http://www.thepatriot.co.bw/news/item/3749-enclave-tourism-kills-community-trusts.html.

5. CONCLUSION

There is talk of a new constitution in Botswana. It is likely that when the process commences, there will be some consideration of the inclusion of an environmental right. Drawing on experience with these rights, this paper formulated a test to measure the extent to which including such a right in the constitution would enhance environmental protection efforts in the country.

There is certainly value in incorporating environmental rights in any constitution that emerges. However, experience with these rights in Botswana to this point highlights that the conditions necessary for these rights to hold value do not subsist in Botswana. An essential part of incorporating these rights into a constitution therefore, is building knowledge about the rights, enhancing state support for those looking to exercise these rights, and efforts to ensure that the rights can be exercised collectively. Only where this is done, will incorporating rights in a constitution be worthwhile.