

ACCESS TO JUSTICE FOR CHILDREN: BOTSWANA

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The Government of Botswana ratified the CRC in 1995, with a reservation in relation to the provisions of Article 1 of the CRC. Botswana states that it is not bound by the definition of a child pursuant to Article 1 in so far as it contradicts definitions used under national laws.¹ Botswana has also ratified the Optional Protocols to the CRC on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography.² Additionally, Botswana acceded to the African Charter on the Rights and Welfare of the Child (the “ACRWC”) in 2001.³ Botswana has a dualist legal tradition, which regards domestic and international laws as separate systems. Thus, ratified international treaties, including the CRC, do not form part of the national law of the country unless they have been incorporated through domestic legislation.⁴

Though neither the CRC nor the ACRWC have been incorporated into domestic legislation, the Children’s Act of 2009 (the “Children’s Act”)⁵ attempts to incorporate provisions under the CRC and other international treaties with regard to children’s rights.⁶ The Children’s Act contains a bill of child rights which incorporates children’s rights under the CRC.⁷ Furthermore, children’s fundamental rights and freedoms are protected by the Constitution of Botswana.⁸ The Government of Botswana is currently setting up the official bodies necessary to implement the Children’s Act, and to review other legislation to ensure its compatibility with the terms of the Act.⁹

¹ United Nations Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en#EndDec.

² United Nations Human Rights, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=BWA&Lang=EN.

³ Ratification Table: African Charter on the Rights and Welfare of the Child, available at: <http://www.achpr.org/instruments/child/ratification/>.

⁴ The African Child Policy Forum, *Harmonisation of Children’s Laws in Botswana*, page 2, available at: <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Botswana-Harmonisation-of-Laws-on-Children.pdf>.

⁵ The Children’s Act 2009, available at: http://www.aclr.info/images/stories/uploader/Publication_files/Acts/Botswana_Children_Act_08_of_2009.pdf.

⁶ The African Child Policy Forum, page 3.

⁷ Children’s Act, Part III Bill of Child Rights, Sections 9-26.

⁸ The Constitution of Botswana, available at: http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf.

⁹ UNICEF, *Child Rights*, available at: <http://www.unicef.org/botswana/children.html>.

B. Does the CRC take precedence over national law?

No, where any national legislation contradicts the CRC, the national law takes precedence over the CRC.¹⁰ However, in adjudicating human rights issues, Botswana's courts have tried to rely on relevant international human rights instruments even where such instruments have not been incorporated into national law.¹¹ Specifically, the Botswana courts have held that "domestic law should be interpreted in light of international conventions, like the CRC".¹²

C. Has the CRC been incorporated into national law?

No, the CRC has not been fully incorporated into national law. However, some courts of Botswana have taken notice of ratified international instruments even though they have not been incorporated into national legislation.¹³ Moreover, as stated above, the Children's Act covers some of the provisions under the CRC and the ACRWC.

D. Can the CRC be directly enforced in the courts?

The CRC is not directly enforceable in the Botswana courts, but is of persuasive value.¹⁴ In *Ndlovu v. Macheme*, the court explained the status of the CRC as follows: "the fact that a Convention has not been incorporated into national law, as is the case with the UN Convention on the Rights of the Child, does not mean that its ratification holds no significance for Botswana law, for its provisions have strong persuasive value on the decisions of this Court".¹⁵ In addition, although the CRC is not directly enforceable, the ACRWC creates a procedure for investigation of violations of any provisions for the protection of children's rights and welfare to assist and support national compliance in the region.¹⁶

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

There are examples of Botswana courts using or considering the CRC and other international human rights instruments. However, their application is not consistent or uniform: some courts have refused to consider international instruments in the absence of domestic legislation implementing the

¹⁰ CRIN, *Botswana National Laws*, available at:

<https://www.crin.org/en/library/publications/botswana-national-laws>.

¹¹ The Pretoria University Law Press, *International Law and Human Rights Litigation in Africa*, page 38, available at: http://www.pulp.up.ac.za/pdf/2010_17/2010_17.pdf.

¹² Representing Children Worldwide, *Summary and Analysis*, available at:

<http://www.law.yale.edu/rcw/rcw/jurisdictions/afs/botswana/frontpage.htm>.

¹³ The African Child Policy Forum, page 2.

¹⁴ Ditshwanelo, *The Botswana Centre for Human Rights: "Human rights not human wrongs"*, available at: <http://www.ditshwanelo.org/bw/botswana.html>.

¹⁵ *Ndlovu v. Macheme*, (MAHLB-000522-07) [2008] BWHC 293, available at:

<https://www.crin.org/en/library/legal-database/ndlovu-v-macheme>.

¹⁶ African Committee of Experts on the Rights and Welfare of the Child, available at:

<http://acerwc.org/the-committees-work/investigations/>.

international instrument,¹⁷ whilst others, including the High Court of Botswana, have noted the strong persuasive value of such instruments notwithstanding their lack of incorporation into domestic law.¹⁸

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Children, through a representative, or any person acting in the best interests of the child concerned can make an application to the courts with regard to any contravention of any of the terms of the Children's Act.¹⁹ Further, the Children's Act provides that any person who alleges that a right under the Act has been infringed or threatened can issue an application to the court for a remedy.²⁰

Additionally, the Constitution provides for any person whose rights under the Constitution have been or are likely to be violated to make an application for redress to the High Court.²¹ Children (or any person under the age of 21 years) are considered persons under disability in Botswana, and can only initiate or defend proceedings through a guardian ad litem, who must act through a lawyer.²² A guardian ad litem for a child is appointed by the court, or through the filing with the court of a written consent by the proposed guardian ad litem confirming their agreement to act as the child's guardian ad litem, and their knowledge or belief that the individual they seek to represent is a person under disability (below the age of 21), and the grounds for such knowledge or belief.²³

Complaints regarding violations of children's rights can also be lodged with the Ombudsman's office under the the Ombudsman Act of 1995 which has power to investigate violations of human rights, in addition to complaints by members of the public of injustice or maladministration in government bodies.²⁴

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

¹⁷ *Bojang v. State* [1994] BLR 146, available at: <http://www.elaws.gov.bw/displaylrpage.php?id=2800&dsp=2>; *Good v. Attorney-General* [2005] 2 BLR 337, available at: <http://www.elaws.gov.bw/displaylrpage.php?id=427&dsp=2>.

¹⁸ *Attorney-General v. Dow* [1992] BLR 119 at 154, available at: <http://www.elaws.gov.bw/displaylrpage.php?id=2692&dsp=2>; *Ndlovu v. Macheme*.

¹⁹ Children's Act, Section 94.

²⁰ *Ibid.*, Section 115.

²¹ The Constitution of Botswana, Section 18.

²² Rules of the High Court, Section 7(1)-7(3), available at: <http://www.elaws.gov.bw/default.php?UID=602>.

²³ Rules of the High Court, Section 7(4).

²⁴ The Ombudsman Act of 1995, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127938.pdf.

Any person under the age of 21 years cannot bring cases by themselves,²⁵ but can do so only through a guardian ad litem as stated above in section II.A. The law requires that the case is brought by legal counsel acting on behalf of the guardian ad litem. It is not clear from the research undertaken whether the proceedings would be brought in the child's own name, or in the name of their guardian ad litem.

- C. In the case of infants and young children, how would cases typically be brought?

The laws of Botswana do not feature any special provisions with regard to cases brought on behalf of small children. All persons under the age of 21 years are defined as being under disability, and would require a guardian ad litem for the purposes of participation in any court proceedings.²⁶

- D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

The Children's Act states that any person before the Children's Court who cannot afford the costs of their legal representation shall be provided with legal counsel by the State.²⁷ However, according to the Botswana Centre for Human Rights, affordable legal advice and support is scarce in Botswana impacting on people's abilities to access justice.²⁸ As a result, people seek assistance from Customary Courts, rather than legal courts, to avoid incurring costs. In addition to affordability, Customary Courts are more accessible by the people due to shortages of legal courts in isolated areas, a lack of information, and delays in the administration of justice.²⁹

In order to address the challenges with access to justice for people on low incomes, UNDP in partnership with the Government of Botswana piloted a project designed to provide legal aid to those who are unable to obtain legal representation.³⁰ Legal Aid Botswana has thus been set up to provide legal services to people who cannot fund their legal expenses and whose cases have a reasonable prospect of success.³¹ The research undertaken has not found updated information on the success or otherwise of Legal Aid Botswana in facilitating access to justice for the indigent, children, and on its future generally.

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

²⁵ Ibid., Section 7(2)(1).

²⁶ Ibid., Sections 7(1) and 7(2)(1).

²⁷ Children's Act, Section 95(2)

²⁸ Ditshwanelo, *Botswana Context*, available at: <http://www.ditshwanelo.org/bw/botswana.html#pov>.

²⁹ Ibid.

³⁰ UNDP, *UNDP initiative helps vulnerable groups access justice in Botswana*, available at: http://www.bw.undp.org/content/botswana/en/home/ourwork/democraticgovernance/successstories/Access_to_justice_botswana.html.

³¹ Legal Aid Botswana, available at: <http://www.livekerala.com/lab/>.

The law requires that a person, who acts as a child's or a young person's guardian ad litem must not have any interest in the proceedings that is adverse to the interests of the child or young person.³² Further, the law requires that any compromise, payment or agreement for settlement of a money claim on behalf of a child, or young person may only be entered into with the court's approval.³³ It is also a requirement for the proposed guardian ad litem to act through a legal professional.³⁴

III. How can children's rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Legal actions based on violations of the Children's Act may be brought before the Magistrate Courts (Children's Court),³⁵ if the matter falls within the jurisdiction of a Children's Court.³⁶ Any violation or threatened violation of children's rights under the Constitution,³⁷ or any other law requiring interpretation, whether concerning a civil or a criminal matter, is made to the High Court.³⁸ An application for redress for any violation of a constitutional right is made on notice of motion supported by an affidavit setting out the circumstances of the case, and grounds relied upon,³⁹ with copies delivered to the Attorney General.⁴⁰ Subject to any specific requirements under the relevant law being invoked, the High Court rules require that the complainant file with the court the relief and orders sought from the court.⁴¹

The Children's Act also mandates every magistrate in a Children's Court, and where there are no magistrates, the district officer of the administrative district, to act as a Commissioner of Child Welfare ("Commissioner").⁴² A Commissioner may receive, from any person, complaints with regard to the neglect, ill-treatment or exploitation of any child. The Commissioner shall then take any such action they consider appropriate.⁴³

Judicial review is available in Botswana to any individual that wishes to claim the illegality or unconstitutionality of the actions of the legislative, executive or administrative bodies. However, the judge can then only rule upon the interpretation of the provision.⁴⁴

³² Rules of the High Court, Section 7(4)(b)(iii).

³³ Ibid., Section 7(9) and 7(10).

³⁴ Ibid., Section 7(2)(3).

³⁵ Children's Act, Section 36(1) ("For the purposes of this Act, every magistrate's court shall be a children's court").

³⁶ Ibid., Section 94.

³⁷ Constitution of Botswana, Section 18.

³⁸ Ibid., Section 95(1).

³⁹ Rules of the High Court, Section 70(1); 70(2).

⁴⁰ Ibid., Section 70(3)(2).

⁴¹ Ibid., Section 12(1), 12(3).

⁴² Children's Act, Section 41(1); 41(2).

⁴³ Ibid., Section 41(2); 41(6).

⁴⁴ Hauser Global Law School Program, *Botswana's Legal System and Legal Research*, available at: <http://www.nyulawglobal.org/globalex/Botswana.htm>.

Furthermore, under the the Ombudsman Act,⁴⁵ Botswana has an independent Ombudsman's Office which has the power to investigate on its own initiative violations of human rights, in addition to complaints by members of the public of injustice or maladministration in government bodies. Based on their findings, the Ombudsman makes recommendations to the appropriate public authority for compliance with the relevant law. In the event of non-compliance the Ombudsman is required to make a special report to the National Assembly.⁴⁶

Regional mechanisms

Individuals, including child victims, his/her parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as "communications") to the African Committee of Experts on the Rights and Welfare of the Child ("African Committee") about violations of the African Charter on the Rights and Welfare of the Child ("African Children's Charter").⁴⁷ All available domestic remedies must have been exhausted before bringing a case to the African Committee.⁴⁸ The complaint must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.⁴⁹ The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁵⁰

Individuals, groups or NGOs may also submit complaints (known as "communications") to the African Commission on Human and Peoples' Rights ("African Commission") about violations of the African Charter on Human and Peoples' Rights ("African Charter").⁵¹ All available domestic remedies must have been exhausted before bringing a case to the African Commission.⁵² The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal

⁴⁵ Ombudsman Act of 1995.

⁴⁶ Division for Public Administration and Development Management (DPADM) Department of Economic and Social Affairs (DESA) United Nations, *Republic of Botswana Public Administration Country Profile*, July 2004, page 7, available at: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023251.pdf>.

⁴⁷ African Charter on the Rights and Welfare of the Child ("African Children's Charter"), Article 44, available at: <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acerwc/acerwc-charter-full-text/>. For more information about communications, see: <http://acerwc.org/the-committees-work/communications/>.

⁴⁸ African Committee of Experts on the Rights and Welfare of the Child, *Communications*, available at: <http://acerwc.org/the-committees-work/communications/>.

⁴⁹ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, *African Committee of Experts on the Rights and Welfare of the Child: communication procedure*, 2012, available at: <http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

⁵⁰ Ibid.

⁵¹ African Charter on Human and Peoples' Rights ("African Charter"), Article 55, available at: <http://www.achpr.org/instruments/achpr>.

⁵² Ibid., Article 56(5).

representative; whether or not the complainant wishes to remain anonymous and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.⁵³ The African Commission will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁵⁴ If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples' Rights.⁵⁵

B. What powers would courts have to review these violations, and what remedies could they offer?

The Children's Act sets out specific monetary fines and imprisonment sentences for violations of its provisions and offences against children carry different sanctions than offences against adults.⁵⁶ In addition, the remedy for any violation under the Children's Act for which a specific remedy is not provided, may include a fine of between P5 000 to P10 000 (approximately between US\$500 and US\$1,000) and/or six to twelve months of imprisonment.⁵⁷

Where proceedings are issued in the High Court, the High Court may make such orders, issue such writs and give such directions as it considers appropriate to enforce or secure the enforcement the protection of the human rights and freedom of the complainant under the Constitution.⁵⁸

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Judicial Review applications do not require the naming of individual victims, as it is the legislative, executive, and administrative bodies of the government that the court investigates.⁵⁹ Botswana's legal system includes judicial review, however, judicial review is limited to matters of interpretation of the law, and does not include contraventions of the law.⁶⁰

⁵³ Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, Rule 93, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

⁵⁴ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, *African Commission on Human and Peoples' Rights: communication procedure*, 2012, available at: <http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

⁵⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5, available at: <http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, Rules 84(2) and 118, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010>; A list of non-child specific cases brought against Botswana in front the African Commission on Human and Peoples' Rights is available at: <http://caselaw.ihrda.org/country/botswana/>.

⁵⁶ Children's Act, different sections e.g. Section 62(5).

⁵⁷ *Ibid.*, Section 116.

⁵⁸ Constitution of Botswana, Section 18(2)(b).

⁵⁹ See: <http://www.britannica.com/EBchecked/topic/307542/judicial-review>.

⁶⁰ Hauser Global Law School Program, *Botswana's Legal System and Legal Research*, available at:

- D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The Children's Act permits applications to the Children's Court by any person acting as a member of, or in the interest of, a group or class of persons, or by any person acting in the public interest.⁶¹ Further, the Civil Procedure Rules provide that a group of persons associated for a common purpose may initiate proceedings in front of a Magistrate Court through a member nominated by it for the purpose of conducting the proceedings.⁶² Similarly, the High Court allows a group of complainants to be joined in one action arising from the same or a series of incidences, or where the cause of action raises any common question of law or facts.⁶³

- E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

The Children's Act provides for any person acting in the public interest, who is concerned that a right under the Act has been infringed or threatened, to issue an application to the court for a remedy.⁶⁴ Thus, it may be possible for NGOs to make an application to the Children's Court for a violation any of the rights contained in the Bill of Child Rights of the Children's Act.

IV. Practical considerations.

- A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Cases can be filed in the Magistrate Courts and the High Court. The Children's Act provides that every Magistrate Court shall be a Children's Court which shall adjudicate matters arising under the Act, and it also reaffirms the inherent jurisdiction of the High Court as upper custodian of all children.⁶⁵

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

The Children's Act and Constitution of Botswana do not set out any special provisions with regard to legal aid or free legal services for child

http://www.nyulawglobal.org/globalex/Botswana.htm#_Judicial_Precedent.

⁶¹ Children's Act, Section 94(c), 94(d).

⁶² Civil Procedure Rules, Section 4(3), available at:

http://www.justice.gov.bw/sites/default/files/Court%20Rules/SI_0013_1_03_11_Magi_md1.pdf.

⁶³ Rules of the High Court, Section 16(1).

⁶⁴ Children's Act, Sections 94(d); 115.

⁶⁵ Ibid., Section 36(1), 36(3).

complainants or their representatives. The Children's Act states that a party before a Children's Court may obtain legal representation of their own choice at their own expense,⁶⁶ unless the person was unable to finance their legal representation, in which case the State would appoint counsel to represent them.⁶⁷

Legal Aid Botswana exists to provide legal services to persons who cannot fund their legal expenses and the programme is said to be reaching many people.⁶⁸ However, the research undertaken has not found independent information on how Legal Aid Botswana has fared since its establishment. Historically, access to justice has been a challenge in Botswana for those who lack the financial means to instruct a lawyer.⁶⁹

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Legal Aid Botswana co-ordinates the provision of pro bono services by private practices. However, only a limited number of private practitioners are said to be registered with Legal Aid Botswana to provide legal assistance to persons in need.⁷⁰

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The Children's Act states that any application for a protection order for a child in need should be heard as soon as possible taking into account the principle that it is in the best interests of the child.⁷¹ However, the research undertaken has not found information with regard to time limitations of cases involving violations of the Children's Act.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The Children's Act requires that a Children's Court has an informal setting, that proceedings take place in private, and in designated rooms where the Magistrate Court does not ordinarily sit.⁷² The Children's Act, the Rules of

⁶⁶ Ibid., Section 95(1).

⁶⁷ Ibid., Section 95(2).

⁶⁸ Thamani Shabani, *Legal aid bill to be presented in Parliament*, 8 February 2013, available at: <http://www.dailynews.gov.bw/news-details.php?nid=880>.

⁶⁹ Ditshwanelo, *Botswana Context*.

⁷⁰ The Law Society of Botswana, *Quarterly Report January to May 2012*, 7 June 2012, available at: <http://www.lawsociety.org.bw/news/Quarterly%20Report%20January%20to%20%20May%202012%20%20JUNE.pdf>.

⁷¹ Children's Act, Section 45(1); 45(3).

⁷² Children's Act, Section 39.

the High Court or the Civil Procedure Act do not further address the issue of evidence presented by children.

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

The research undertaken did not find any specific indication as to the length of legal proceedings in Botswana. It may take some time to get a decision from the court as Botswana's legal system is reportedly affected by staffing shortages and a large backlog of cases.⁷³

It might also take a considerable amount of time to receive a decision by the Ombudsman's office as it has reportedly been lacking the necessary human and financial resources to function properly.⁷⁴ The UN Committee on the Rights of the Child has also voiced concern at the lack of awareness of the role of the Ombudsman among people, especially children.⁷⁵

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

An appeal against the decision of the Children's Court may be made to the High Court in accordance with the rules applicable to appeals.⁷⁶ A decision is appealed by filing notice of appeal with the Magistrate Court within 21 days after the date of the judgment.⁷⁷ The Magistrate Court will then transfer the matter to the High Court within 30 days of receipt of the appeal notice and payment of the prescribed fees. Appeals against any decisions of the High Court are heard in the Court of Appeal. The Court of Appeal is a superior court of record.⁷⁸ As a final step, a person aggrieved by the decision of the Court of Appeal may appeal to the President, who shall either dismiss the appeal or order its reconsideration by a tribunal appointed by the President.⁷⁹

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Botswana adopts the doctrine of judicial precedent, thus a lower court is bound by the decision of a higher court. This can help achieve predictability in terms of the application and development of laws.⁸⁰ However, it also means that an unfavourable decision of a higher court could impact the outcome of future cases for many years.

⁷³ Freedom House, *Freedom in the World 2014: Botswana*, available at:

<https://freedomhouse.org/report/freedom-world/2014/botswana#.VUNrQNZcpKQ>.

⁷⁴ UN Committee on the Rights of the Child, *Concluding observations on the initial report of Botswana*, CRC/C/15/Add.242, 23 November 2004, para. 16, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.242&Lang=en.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, Section 96.

⁷⁷ Civil Procedure Rules, Section 38(1), 38(2).

⁷⁸ Constitution of Botswana, Section 99(4).

⁷⁹ *Ibid.*, Section 111(1), 111(4).

⁸⁰ Hauser Global Law School Program, *Botswana's Legal System and Legal Research*.

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

The Constitution guarantees the independence of the judiciary, and there are legal provisions enabling individuals to bring legal action against the government or government officials.⁸¹ While the legal system is affected by staffing shortages and a large backlog of cases,⁸² the courts in Botswana are generally regarded as independent, and there have been cases brought against government bodies. There is general respect for the rule of law.⁸³ The government is considered to operate with minimal concerns of corruption, and individuals' fundamental rights are mostly respected.⁸⁴ Therefore, positive decisions are likely to be respected and enforced.

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

There are concerns that Botswana's customary laws and the Customary Court system discriminate against children since traditionally children are not seen as rights bearers. Given that 90% of civil and 85% of criminal law cases are said to be dealt with by Customary Courts,⁸⁵ children may be denied justice.

Furthermore, traditionally children are expected to be obedient to their parents and other adults. Consequently, their right to participation is regularly violated due to local customs that forbid them to speak at community gatherings. There is believed to be widespread violation of children's rights due to the persisting principles of customary law, and Botswana society's perception that 'children's rights' damage its culture.⁸⁶

Discrimination against certain certain groups of children persists, particularly with respect to the San tribal community, many of whom have been relocated by the government from their land, who tend to be marginalized in education and employment opportunities and restricted in their freedom of travel and internal movement.⁸⁷

This report is provided for educational and informational purposes only and should not be construed as legal advice.

⁸¹ Ditshwanelo, *Botswana Context*.

⁸² Freedom House, *Freedom in the World 2014: Botswana*.

⁸³ Rule of Law, *The rule of law in Botswana*, August 2003, available at: <http://www.sabar.co.za/law-journals/2003/august/2003-august-vol016-no2-pp34-35.pdf>; Democracy Web: *Accountability and Transparency: Country Studies - Botswana*, available at: <http://www.democracyweb.org/accountability/botswana.php>.

⁸⁴ The World Justice Project, *Rule of Law Index*, 2014, page 55, available at:

http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

⁸⁵ Ditshwanelo, *Children's Rights*, available at: http://www.ditshwanelo.org/bw/child_rights.html.

⁸⁶ Ibid.

⁸⁷ Freedom House, *Freedom in the World 2014: Botswana*.