

**SECURITY OF EMPLOYMENT
IN THE PUBLIC SERVICE IN BOTSWANA**

A Study of public service law and ethics

BY

KHOLISANI SOLO

Thesis submitted for the Degree of Doctor of Philosophy (PhD)

to the

Faculty of Law

at the

University of Cape Town

November, 2000

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LIST OF ABBREVIATIONS

AC	Appellate Cases
AD	Appellate Division
All ER	All England Reports
Cmmd	Command Papers (United Kingdom)
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IMF	International Monetary Fund
No.	Number
pg	Page
SA	South Africa
THRHR	Journal of Contemporary Roman-Dutch Law
UK	United Kingdom

ABSTRACT

The main concern of this study is the law relating to the public servant in Botswana. It assesses the efficacy of both statutory legislation and common law principles in promoting tenure for public servants. The employment relationship between the servant and the state is considered starting from his/her entry into the service. Some "public" servants like the Attorney-General, Auditor-General, judges and magistrates have protected tenure. This tenure is constitutionally guaranteed. The Supervisor of Elections who has now been superseded by the Independent Electoral Commission also had such tenure, which was passed on to the Secretary to the Commission and the other members. The processes that follow appointment into the public service are considered. These processes are probation, promotion, suspension, discipline and dismissal. There are also other factors, which come into play once a public servant has been appointed. These factors include conventions and traditions governing his/her position as a public servant. In this regard, the study discusses the principle of political neutrality, permanency, anonymity, accountability and autonomy.

These principles were passed on to the Botswana public service by the British who for some time ruled Bechuanaland Protectorate, as Botswana was then called. These principles are important in that as elections come and pass, the public service is expected to remain, surviving changes of government. Public service labour relations in Botswana are discussed within the context of International Labour Organisation standards. The relevance of Conventions no.87 and no.98 of the ILO on the right to form and belong to unions and within that union to bargain collectively and to strike are examined in the study. It is argued in the thesis that there is more security of tenure if there is a right to form and to belong to a trade union organisation, and within that union to bargain collectively and to strike. Other legacies of colonial rule in Anglophone African countries in the form of Public Service and Judicial Service Commissions are examined and their effect on tenure highlighted. Last but not least is the question of discipline and dismissal in the public service which is largely a matter of law. The study concludes that by and large the protection offered to public servants in Botswana is comparable to one enjoyed by private sector employees in Botswana.

CHAPTER 1

1.1 Introduction

This study examines security of employment in the public service in Botswana. In this chapter the scope of the study will be defined and a justification provided as to why the study has been undertaken. Information will be provided on the methods used to collect the materials.

This chapter is divided into six sections. The first section contains the statement of the problem for investigation. This is followed by the framework of approach and main justification of the study. Section 3 contains the objectives of the study. The section defining the main terms of the study is section 4. Section 5 contains the research methodology, analysis of primary and secondary materials, discussion interviews and limitations of the research method used. The last section reveals the plan and logic of the study.

1.2 Statement of the problem for investigation

The state has often been looked upon by individuals, private sector employers and employees alike as a model employer. The Employment Act¹ governs most employment relationships in Botswana yet the state is to a large extent excluded from the purview of the Act. The majority of public servants employed by the State are not covered by the Employment Act in spite of the fact that it is the biggest or one of the biggest employers. The definition of employee in the Act only extends to manual workers engaged by the State. Whether the problems that the Employment Act was geared to address were regarded as matters that only arise between the private sector employee and employer is debatable.

The trend in Africa at present is that the public service is being trimmed down especially in those countries where the International Monetary Fund is involved, through programmes of structural adjustment. The basic problem in public service employment is that wages are relatively low and employment is high. This results in a wage bill which the government cannot afford with people being paid so little that they cannot afford to do their jobs properly.² Government therefore ends

up with a large civil service which delivers very few government services, because civil servants are often occupied during working hours in the informal sector.³ In addition it is not unusual for government resources such as offices, telephones and transport to be used to support the private business activities of civil servants, adding to the government expense without adding to the supply of government services.⁴

Countries which have down-sized or are in the process of downsizing the public service include Zambia. The Zambian government announced plans to reduce the civil service from 80 000 to 60 000 in early 1986. This was to be done by a combination of reducing the retirement age by five years and by redundancy.⁵ Many women whose husbands lost their jobs have resorted to brewing and selling illicit beer.⁶ A document prepared by Zambia's Ministry of Labour and Social Security admits that while substantial progress has been made in implementing economic reforms, progress in addressing the social dimensions has been lagging.⁷ The Zambian government plans to encourage jobless workers to go into farming but years of neglect have caused a near-collapse of social services and infrastructure in rural areas and it is unlikely that many of the urban unemployed will jump at the resettlement option.⁸

On January 31, 1997 the Tanzanian government announced the release of 10 000 civil servants in accordance with conditions tied to a November 1996 International Monetary Fund loan of U.S. \$234 million.⁹ The loan was expected to be followed by about U.S. \$1 billion to Tanzania from various donors by the end of 1997.¹⁰ Tanzania has shed about 50 000 employees in the past two years while in Zambia structural adjustment has cost about 130 000 jobs in the public and private sectors.¹¹ In some cases workers have not received their terminal benefits in Tanzania and this has also happened in Zambia, where scores of workers demonstrated outside State House against the non-payment of severance pay.

Official statistics show that Nigeria had about 500 000 state workers up to 1986. Since then the public service has been depleted by more than 40 per cent, according to the Nigeria Labour Congress.¹² In 1990, this West African nation was four years into a home-grown structural adjustment program patterned after those prescribed by the World Bank. Many people lost their jobs including journalists.¹³ According to the Nigerian Labour Congress, whilst most workers are

retrenched with terminal benefits, in most cases such benefits are not enough especially with the current rate of inflation.¹⁴ Nigeria has not come out with programs to accommodate former public servants who are now jobless.

In Niger, twenty trade unionists, including the deputy leader of the national centre of trade unions were arrested for organising civil service strikes. Thanks to the adjustment programme, most had not been paid their salary for several months. More recently in Uganda, the civil service has been cut in numbers by one third. The savings have been used to increase the pay of those remaining, and additional funds have been provided so that the government wage bill has gone up and not down.¹⁵ Similarly, the civil service in Sierra Leone is reported to have been cut by one third but salaries remain inadequate.¹⁶

In order to cushion the structural adjustment blow, Zimbabwe provides training in small-scale entrepreneurship and soft start-up loans of up to \$1,750 (Zimbabwean dollars). Critics point out that retrenched can seldom raise the ten percent contribution in cash of assets needed to secure a loan.¹⁷

Even though Botswana is not undergoing a process of structural adjustment, because of world recession it is slowly but carefully moving in that direction though not at the behest of the International Monetary Fund. There is a need to cut down on spending. Along with the cutting down in expenditure is the solution that goes with it; the downsizing of the public service to reduce the wage bill. That being so, it is quite important to look at the question of security of employment in the public service. Perhaps the whole idea of trimming the public service is to promote productivity and efficiency in the workplace and in the process get rid of those public servants who are deficient in this regard. This research seeks to consider the security offered by the state in the event of the down-sizing of the public service. Very limited research, if any, has been done and it is this state of affairs that this research seeks to address.

1.3 Framework of approach and justification for the study

The framework of approach is historical and comparative. The former approach has been used

mainly to illustrate and explain how it came about that Botswana found itself with institutions like the Public Service Commission and Judicial Service Commission amongst others, peculiar structures in the public service mainly geared towards the promotion of security of employment. An historical approach will help understand current problems through the examination of what happened in the past.

This study is principally centred on Botswana. Nevertheless, the comparative element comes in when the position in South Africa is looked at alongside that of Botswana in relation to some of the topics which are considered. It is appropriate to embark on a comparative approach with South Africa on historic, geo-political and economic grounds. The Histories of the peoples of Botswana and South Africa are similar. Even the major language spoken in Botswana is also largely spoken in South Africa. Politically, Botswana, Lesotho and Swaziland which were High Commission Territories were ruled by the Governor stationed in the then Cape Colony. Furthermore, South Africa is Botswana's major trading partner. The two countries are not only signatories to the Customs Union Agreement (which is a customs agreement) but also belong to the Southern Africa Development Community which is a major trading block. Useful solutions and ideas can be derived from looking at what other jurisdictions in the region have done in similar situations hence the comparative aspect of this study. While the position in South Africa will be considered here and there in the course of this study, the comparative element does not begin and end there. The experiences of other countries, particularly a number of African countries, will where necessary be drawn upon from time to time in the course of this study.

The main justification for the study is that the question of protection of security of employment is widely seen as a major social issue requiring the attention of policy-makers at the governmental level as well as that of the industry or enterprise.¹⁸ Loss of employment jeopardises the very basis of the livelihood of the workers concerned and their families, and because dismissals perceived as arbitrary often give rise to serious labour disputes which can undermine the labour relations environment.¹⁹

Consequently the general trend in many countries has been the movement towards the protection of the worker. The exercise by the worker of his/her right to terminate the contract of

employment was at most an inconvenience for the employer, who generally could readily replace the worker from a pool of unemployed persons with the exception perhaps of certain skilled workers.²⁰ On the other hand, the consequences to workers of the exercise by the employer of his/her right to terminate the contract were of an entirely different order, since the loss of employment could reduce workers and their families to a state of misery, particularly in conditions of mass unemployment.²¹

In Botswana in recognition of the above state of affairs, the government has adopted measures geared towards promoting security of employment for workers in the private sector through legislation, that is to say, the Employment Act. The government in 1992 established the Industrial Court which has since ruled that in order for a dismissal to be fair, there had to be a valid reason or reasons which are in line with International Labour Organisation Conventions.²² The Industrial Court has further in its jurisprudence developed principles of substantive and procedural fairness in discipline and dismissal cases which have greatly enhanced security of employment in the private sector. It is partly against such a private sector background that the security offered by the state in the public service will be looked at.

A matter of recent origin which is compounded by the world recession leading to self imposed structural adjustment is the inefficiency of public servants. In the past little or nothing was said or done about them but now because of the bad shape of the economy, government has plans to weed them out of the public service. This is an issue which has caused so much public debate because of its far reaching implications that what had hitherto been regarded as a secure place to work is fast becoming a very insecure place for others in the public service.

The issue of the removal from the public service of the so-called "dead wood" or those no longer productive or efficient re-surfaced in 1995. The Permanent Secretary in the Office of the President who is the head of civil service came up with this idea years ago in order to promote productivity in the public service. Those public servants who were no longer performing efficiently were to be removed from the service. In order to achieve this, Permanent Secretaries who head the various ministries were required by the Permanent Secretary in the Office of the

President to submit names of those public servants who were “dead wood”. It was not until 1996 that some names started cropping up as being among the list of those who were to be removed from the public service of Botswana.²³ This leaked to the private press and eventually gained momentum towards the beginning of 1996. The private press carried articles and commentaries related to the issue of “dead wood”.²⁴ Commentaries on the subject projected the idea that those public servants who had lost favour with government would be vulnerable even though they might be efficient in the service. Others argued that the ‘dead wood’ concept would be abused, that it would be used to effectively weed out political opponents in the service and those who are not political opponents as such but were sympathetic to the causes of other opposition parties.

The weeding out process or the downsizing of the public service would have to be done in accordance with the laws of the land. In the case of personnel appointed in accordance with the constitution of the country, those provisions of the constitution regarding removal from office would have to be adhered to. It is that phenomenon that this study seeks to address. What constitutional protection is there for public servants in the event of either the downsizing of the service or weeding out of “dead wood”? There are some who do not have constitutional protection. These are protected by ordinary statute. This study will seek to find out that category of public servants protected by ordinary statute and the extent of that protection. The weeding out process for whatever reason is the first of its kind in the history of the public service in Botswana and that underscores the justification for this study. The role and function of the Public Service Commission in Botswana, its independence and impartiality have never been critically scrutinised before in a major work of this kind. The exercise of removing “dead wood” from the public service will test the independence and impartiality of both the Public Service Commission and the Judicial Service Commission. These are the appellate bodies to which public servants are allowed constitutionally and statutorily to appeal. Whilst these bodies will be stretched to their limits, the decisions they make are bound to be taken on appeal to the courts. It will be interesting to see how the courts will respond to the challenge.

Recently a member of the Botswana National Front, an opposition party in Botswana, tabled a motion in parliament calling for the suspension on the retirement of “dead wood”. The member of parliament also called on the government to appoint a team of personnel consultants to

investigate and review the exercise to ascertain that the government had acted professionally and without prejudice. The member of parliament was not opposed to unproductive public officers being removed from the public service. He was worried about the improprieties associated with the exercise that are inevitable in an exercise of that magnitude. The motion was rejected in parliament after it was revealed that about 26 officers in one ministry had been listed as "dead wood".

There have been calls for the expansion of the Judicial Service Commission which presently is composed of the Chief Justice as chairman, the chairman of the Public Service Commission or a member thereof and any person appointed by both of them acting jointly. This was prompted by the removal from office of a magistrate by the Commission thus raising concerns about security of tenure.²⁵

The second justification for this study is that very few people have written on labour policy and labour relations law in Botswana, particularly security of employment. Andrew Briscoe²⁶ produced a book entitled, "Labour Law in Botswana". This is one of the latest books published concerning labour relations in the country but its main focus is the private sector. It discusses *inter alia*, the Employment Act,²⁷ which regulates the employment relationship between the private employer and employee. It should be noted that the term "employee" in the Employment Act in so far as it relates to government employees only refers to manual workers. The remaining public servants are not covered by the Employment Act. Briscoe also discusses the Trade Disputes Act, in particular the creation of the Botswana Industrial Court and its jurisdiction, among other issues. This newly created Industrial Court does not have jurisdiction to hear matters concerning government employees except manual workers engaged by government. Although the book is very important within the context of private sector industrial relations in the country, it has marginal bearing on security of employment in the public service. The jurisprudence of the Industrial Court discussed therein is however useful in comparing substantive and procedural fairness in private and public sector labour relations.

Frimpong has also written an article on the subject.²⁸ Entitled, "The protection of security of employment in Botswana", the article was entirely devoted to security of-tenure in the private

sector. In this article he discusses the employer's right to employ those persons he/she chooses to work with, his/her right to dismiss his/her employees and his/her right to reduce the size of his labour force for various reasons. He also discusses the employee's right against the termination of his contract and the social consequences attendant on the employee's dismissal. The article also devotes some space to the development of labour laws in Botswana, protection against unjustified dismissal and the various contracts of employment.

In 1985, Frimpong and Olsen jointly produced a monograph entitled, "Labour relations in Botswana."²⁹ Amongst the issues discussed in it are the partners to labour relations: trade unions and employers organisations, and their relationship with the state. Collective bargaining, collective agreements, labour disputes and the projected future trends are some of the issues canvassed. These are clearly issues which are pertinent in the private sector. The relevance of these publications may not readily be discernible but their relative importance comes to the fore when a comparison is made between security of tenure in the private sector and the public service. This comparison is however inevitable in a major study of this nature. There have been some writings on security of employment, but these writings were based on other countries. In Lesotho, for instance, Seeng Letele wrote on the topic and like the others concentrated on the private sector.³⁰ Tadashi Hanami in his article in the *Industrial Law Journal* submits that in Japan, employment security is provided for regular employees through the system of life-time employment.³¹ The employment security of these regular employees is achieved through various devices including regular transfer, change of jobs, promotion from within, training and retraining and temporary assignment to jobs outside the company. The article analyses these personnel devices which make employment security possible throughout the career of regular employees to non-regular employees. He also discusses the security of employees outside the life-time employment system in so far as the courts have extended with certain modifications the protection against dismissal established for regular employees to non-regular employees. This article sheds some light on how foreign jurisdictions like Japan have tackled the issue of security of tenure and could constitute useful recommendation material.

Ada ver Loren van Themaat, has written in the *Industrial Law Journal* about security of tenure in South Africa³² and Britain.³³ Her article was basically concerned with the reinstatement as a

remedy for breach of contract of employment in Britain and South Africa. The scope of her article was restricted to reinstatement of individual employees after dismissal for misconduct. The article analysed some of the arguments for employment security.

There has been some International Labour Organisation material generated on the subject. These materials include, "Protection against unjustified dismissal", a handbook which has several international texts applicable all over the world.³⁴ It is against some of these international texts that the extent to which a country's public service is protected from unjustified dismissal and consequently has enhanced security of tenure, is measured. These International Labour Organisation texts are general norms and practices to which municipal law and labour relations should aspire and conform. Examples of these texts are "Termination of Employment Convention" and "Termination of Employment Recommendation, 1982."³⁵

Articles on some topics under scrutiny are fragmented and scattered in various journals. What follows is the only major study so far which focuses on security of tenure in the public service in Botswana. The above therefore constitutes the framework of approach and justification for the study. In the light of the above, the major objectives of this study may therefore be summarised below.

1.4 Major objectives of the Study

- (i) To study generally the law relating to the public servant in Botswana.
- (ii) To assess specifically the efficacy of statutory legislation and the degree to which it promotes security of tenure for public servants.
- (iii) To find out how institutions like the Public Service Commission and Judicial Service Commission can contribute towards employment security in the public service.
- (iv) To examine the present appointment process and its effect on job security in the public service.

- (v) To consider how factors like probation and transfer can possibly affect continued employment if mishandled.
- (vi) To examine the efficacy of the present ministerial consultative machinery and the joint staff consultative machinery.
- (vii) To consider whether in a democratic country like Botswana, collective bargaining and strike action should be extended to public servants except those engaged in essential services.
- (viii) To discuss the applicability of administrative law principles of natural justice, legitimate expectation and substantive and procedural fairness.
- (ix) To find out how public service traditions and ethics affected public service tenure.
- (x) To find out generally how the above objectives when taken cumulatively have contributed to the promotion of security of employment in Botswana.
- (xi) To make recommendations based on the study that could be implemented to enhance job security in the public service.

1.5 Definition of main terms in the study

The terms; security of employment, public sector, public enterprise, public service and civil service require clarification in order to indicate the meaning which we assign to them in this study.

1.5.1 Security of employment and its importance

Security of employment describes not only the keeping or loss of a job, but also the realisation of

those terms of employment contract favourable to the employee as well as the fruition of those expectations of employees as to future improvement in those terms.³⁶ The plain meaning of this phrase is job security. As aptly put by an International Labour Organisation Official,... "ways in which workers may be provided with some security in the employment that is the very basis on which their livelihood depends."³⁷ Better still, it has also been referred to as the control of termination of employment at the initiative of the employer.³⁸

"Unemployment, which may be the direct result of an employer's exercise of his rights, has untold social consequences; principal among these are poverty, broken homes, and even in extreme cases, may result in drastic political upheavals which have been witnessed not only in Africa but also in many other parts of the world".³⁹

"...Equally, this situation calls for serious and urgent attention particularly for us in Africa; problems like unemployment and retrenchment can create conditions for instability".⁴⁰

According to the United Nations, poverty remains one of the losing battles being fought on the African continent.

Sub-Saharan Africa has the highest proportion of people in ... and the fastest growth in ... human poverty says the report. Some 220 million people in the region are income poor ... and it is estimated that by 2000, half the people in Sub-Saharan Africa will be in income poverty.⁴¹

The United Nations report continues to say that;

This is the only continent in the world that will become poorer in the 21st century than it was in the 20th century.⁴²

The World Bank predicts that by the year 2000, 300 million Africans will be living below the poverty line, a 50 percent increase over the 200 million figure for 1994.⁴³ Between 1984 and 1990, the net outflow of financial resources from Africa to the World Bank and the IMF totalled about \$5 billion.⁴⁴ Africa's GNP fell by 2.2 percent in the 1980's and by 1990, its estimated per

capita income was at the same level it had been in 1960.⁴⁵

It is noteworthy that the World Bank is currently renovating its headquarters for \$314 million - more than \$100 million above the original estimate. About \$300 million of this comes from the \$2.7 billion loan repayment of Uganda, Ghana and Zambia in 1994. These are countries pursuing International Monetary Fund structural adjustment programs.⁴⁶

From 1990 to 1993, Zambia spent \$37 million for primary school education while giving \$1.3 billion to international bankers.⁴⁷ Annually, Ghana spends about \$75 million on all social programs, less than 20 percent of its payments to foreign creditors. Uganda spends less than \$1 per capita on primary health as opposed to \$9 per person for debt repayment.⁴⁸ These are countries carrying out austerity programs of the IMF which included public service reforms. Their public service reforms resulted in thousands of public servants being unemployed.

"Unemployment is associated with a variety of undesirable social consequences such as poverty and deprivation, social disintegration and adverse psychological problems".⁴⁹

It has been argued that the more important factors determining the security of employment of a worker are economic and political.⁵⁰ Economically, the general state of that country's economy as well as the extent to which that worker is skilled or qualified. The less skilled he is the more tenuous is his employment. Politically, the extent to which workers are organised and the existence or non-existence of legal rules protecting their job security.⁵¹ The restriction of the employer's freedom to terminate a contract of employment and the provision of procedural safeguards for the dismissal of an employee protects the employee's interest in the security of his employment.⁵²

The traditional rules governing the contract of employment included a prohibition of engagement for life as a protection against a return to conditions of servitude.⁵³ They were characterised by a formal symmetry of rights of the parties.⁵⁴ The employer could terminate the employment relationship by giving notice and the employee could do the same, exercising his fundamental right to protect his freedom of work. The consequences for the employer could range from mere

inconvenience to loss of production and profits. The termination of the contract of employment by the employer could result in insecurity and poverty for the worker and his family, particularly during periods of massive unemployment.⁵⁵ This disparity of the consequences for each party exercising its discretionary power to terminate the employment relationship led in many countries to a movement towards workers' protection⁵⁶ or security of employment for the employee.

Initially, in the private sector, the movement towards the worker's protection took the form of an extension of the notice period, sometimes for both the employer and employee but more frequently for the employer.⁵⁷ Next, it was obligatory for the employer to pay severance allowance on termination of employment, in recognition of past service.⁵⁸ Eventually, it was followed by efforts to limit the discretionary power of the employer to dismiss a worker for any reason or action.⁵⁹ At that stage one could only speak of a symmetry of rights skewed in favour of the worker. This is true especially when one speaks of the private sector. It therefore now remains to be seen whether the same can be said in relation to the public service which is our concern.

One writer on the subject has expressed doubts on the achievement of "security of employment". According to him, a discussion of the notion of "security of employment" appears to be unrealistic, utopian and impractical in the context of modern capitalist market economies⁶⁰; not only has the individual no guarantee of employment and no "right to work" which can be enforced against the state but a "right to work" which can be enforced against an employer is very restricted.⁶¹ Aspects of this right include the right to retain work and be reinstated in the event of unjustified termination. The same writer argues that "security of employment" can never be guaranteed in an absolute sense since there always has to be some sort of trade-off between protection of jobs and the business interest of the employer. Some types of misconduct he argues may cause a worker to lose his job.⁶²

The concerns raised above are genuine. The elaborate fundamental rights of the individual enshrined in the constitution of Botswana do not include the right to employment.⁶³ The absence of such a right in the statutes of a country such as Botswana does not necessarily limit the capacity of the authorities to ensure job security through existing policy and legal measures, and

thus to safeguard the improvement of living conditions for the worker and his or her family.⁶⁴ It is within the context of the relativity of "security of employment" that the various topics in this study are considered.

1.5.2 Public Service

The term public service is not capable of easy definition. What may constitute public service in one context may not necessarily be so in another context. According to an International Labour Organisation manual on the public service, the concept of the public service varies in different countries in terms of the employing authorities and the services covered on the one hand and the personnel covered on the other.⁶⁵ According to that source, the concept and scope are determined by the overall constitutional, political and social systems on which the organisation of each state is based.⁶⁶ Accordingly, public service may cover all levels of government—central and local, whether regulated by a common or separate regimes and special branches of the public administration or agencies concerned with such things as health, education, postal services, railways, to some extent police and security agencies.⁶⁷ Public undertakings of an industrial, commercial, agricultural or similar nature have in general been excluded from the definition.

Given the above, in the context of Botswana, her public service will therefore be determined by the overall constitutional, political and social system on which it is based. The Interpretation Act of Botswana provides that "public officer" and "public service" have the same meanings as in the constitution. According to the constitution, "public officer" means a person holding or acting in any public office. The "public service" means the civil service of government. The common distinction between public service and civil service does not come out clearly within the definition provided by the constitution. Indeed the constitution seems to suggest that the two terms mean the same thing, or at any rate that the term civil service is subsumed under public service. In order to further clarify the meaning of the term public service and to delineate the parameters or frontiers within which this thesis will be based, it is important to set out the definitions of other similar concepts such as public enterprise, public sector and civil service. These are set out below.

1.5.3 Public Enterprise

These are undertakings (agriculture, commerce and industry) producing goods and supplying services which are totally or partially owned by the state.⁶⁸ Excluded are the civil service (central, regional and local administration of the state) and the private sector. Public enterprises play a key role in national economic and social development and have gained increasing prominence because of the employment opportunities they create. They are to be found in many African countries including Botswana. In Botswana they are found under various names some of which include 'corporation', 'company' and 'commission'. Examples are: Water Utilities Corporation, Power Corporation and Botswana Development Corporation. As indicated in the definition of public service, enterprises of an industrial, commercial, agricultural or similar nature that is to say, public enterprises are not part of the public service. Consequently the main focus of this study will be concerned with the latter.

1.5.4 Public Sector

This is a term which is very wide, combining both public service and public enterprises. In its wide meaning the expression 'public sector' includes the offices of a government department, municipal employees, publicly owned hospitals and schools, employees (not members of a parliament) the courts, the police force, fire brigades, government owned airlines and railways, postal services, garbage collectors...⁶⁹ In order to avoid any confusion and in an endeavour to maintain clarity of concepts, the term public sector will only be used to mean as indicated above unless the contrary is expressed.

1.5.5 Civil Service

In the context of monarchy, civil servants have been defined as "those servants of the crown other than holders of political or judicial offices, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of money voted by parliament."⁷⁰ For purposes of the present study civil servants will be taken to fall under the wider term defined earlier in the study called public service. In order to avoid any doubt our working definition will be that

contained in the constitution of Botswana reproduced above, namely the civil service of government.

1.6 Research Methods

Research methods are chosen on the basis that they allow the research question to be answered. The research methods below have been considered appropriate for purposes of answering our research question.

1.6.1 Documentary Analysis

The documentary analysis method has been adopted in this study. The essence of the method was to analyse documentary data. Such data took the form of government reports, acts of Parliament, draft bills, hansard debates, law reports, speeches and policy documents, government documents, archival documents, historical books and documents. Other data included unreported cases, conference reports, workshop and symposia documents, similar papers, journal articles, books and texts on public law. These documents were then utilized within a historical and comparative framework.

(a) Analysis of primary and secondary materials

This was by far be the main technique of research used in this study. Primary materials will come in the form of government reports, Acts of parliament and draft bills, parliamentary debates, court case reports, speeches and policy documents. Most will be materials on Botswana and South Africa. Secondary materials will come from textbooks, symposia, seminar papers, conference papers, research reports and newspaper reports.

(b) Discussion interviews (purposive sampling)

In discussion interviews the purposive sampling method was used. Discussion interviews were conducted mainly in those areas that impact upon security of employment. People chosen for

interviews were identified on the basis of proximity and accessibility. The selection was purposive. An interview guide was prepared to guide the researcher and the flow of the interview. Open-ended questions were used as guides.

Some judges and magistrates in Botswana were interviewed in relation to the operation of the Judicial Service Commission in order to inform the researcher on how it works in practice. Some of the answers were weaved into the thesis on aspects of relating to recommendations. Personnel in the Directorate of Personnel Management in Botswana were also interviewed and their responses were weaved into the thesis on aspects related to appointments, probation, promotion, suspension and dismissals. The interviews were selective and purposive in nature. The questionnaires are attached in Appendix VIII.

(c) Limitations of the Research

This research has relied mostly on historical and comparative materials. To the extent that financial resources and time allowed, it was supplemented by discussion interviews. While those research techniques are most appropriate in gathering the information required, it is both recognised and appreciated that the techniques may be susceptible to bias, distortion and inaccuracy. Great care has been taken to ensure that bias, distortion and inaccuracy do not filter into the selected data.

The comparative element of the research is thin in the specific aspects of the topics considered mainly due to the unavailability of materials. Secondly most of the countries with which Botswana could be compared share a commonwealth experience with her. Institutions like the Judicial and Public Service Commissions are found for example in Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Swaziland, Tanzania, Uganda and Zambia. What these countries could offer is not significantly different from the position in Botswana.

1.7 Plan and logic of the study

Chapter two gives the profile of Botswana as a country. It introduces the geography and

environment, constitutional framework and the main economic and legal developments in the country. It focuses on the growth, structure and development of the public service in Botswana. Materials in this chapter constitute background upon which the present public service is constructed. Alteration in basic structure inherited from the colonial power is focused upon to the extent that it affected the question of security of tenure in the public service.

Chapter three addresses the genesis of the employment relationship; appointment, to accentuate the contention that some officers in public employment perform certain fundamental and executive functions to the extent that they require guaranteed tenure. Probation, to which public servants are subjected on first appointment, is examined. The applicable principles and considerations which affect tenure at that stage of the employment relationship are considered. Issues of promotion and its implications on tenure are addressed in this chapter. Transfers and postings are also considered.

Governments come and go. The public service is expected to remain. It is to have certain unique features: neutrality, impartiality, permanency, anonymity, accountability and autonomy amongst other principles. This is the focus of chapter 4. It examines the traditions inherited by the Botswana public service at independence from British colonial rule and how they have impacted on tenure in the public services. On appointment, public employees become subject to these conventions and traditions.

Chapter five considers public service labour relations. It underscores the contention that there is security in employment where an employee is allowed to join a trade union and within that union bargain collectively with others. While the main focus is on labour relations in Botswana, the position of public servants in South Africa is considered briefly for comparative purposes. In this chapter, the special and peculiar nature of the public service is appreciated with the study advocating an indivisible labour law regime for both public and private employment.

The role and impact of the Public and Judicial Service Commissions on employment security in both Botswana and South Africa are considered in chapter 6. In both countries, the Service Commissions were constitutionally entrenched in order to guarantee tenure to various categories

of public service personnel to which they apply. The extent to which the two bodies are insulated from political and executive influence is examined together with the hierarchy of the appellate structure within the public service.

Chapter seven considers issues of discipline and dismissals in the service. It is here that administrative law and labour law overlap and consequently have implications for employment security. This chapter probes the extent to which principles of substantive and procedural fairness impact on tenure in public employment. The broader concept of natural justice and the doctrine of legitimate expectations are examined.

Chapter eight is the concluding chapter. It brings the various strands of the study together in the form of summaries and main findings.

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BOTSWANA: COUNTRY PROFILE, DEVELOPMENT AND STRUCTURE OF ITS PUBLIC SERVICES

2.1 Introduction

The above topics provide the context within which the theme of our study will be located. This chapter will generally introduce Botswana as a country. It will introduce the geography and environment, constitutional framework and the economic and legal developments in the country. The chapter will also focus on the growth, structure and development of the public services in Botswana.

2.2 Geography and Political Economy

Botswana is a territory of 220 000 square miles (570 000 square kilometres) and straddles the Tropic of Capricorn in the centre of the Southern African Plateau. It is about the size of France, Kenya or the State of Texas in the United States, and is one of fourteen landlocked countries in Africa. The mean altitude above sea level is approximately 1000 metres. It is bordered by South Africa on the east and south, Namibia on the west and north, and Zimbabwe on the north-east. In addition, it touches Zambia at one point along the Zambezi river. Until Zimbabwe's independence in 1980, the border with Zambia was Botswana's only physical link with the then majority-ruled states, and thus it was an important psychological link with the independent countries to the north.¹

Botswana's location creates problems of access to the outside world, which are compounded by the fact that the country mainly depends on South Africa for trade and access. The bulk of Botswana's external trade goes through South Africa, as do most travellers to and from Botswana. The country's long border with South Africa posed a problem before South Africa became a democratic polity in that South Africa sent commandos across into Botswana allegedly to bully and destabilize the country.

Prior to that Rhodesia (now Zimbabwe) did the same under the leadership of Ian Douglas Smith. Refugees from Southern Africa fled to Botswana from Rhodesia, South West Africa and South Africa before these countries became democracies.

Botswana is flat, with undulations and occasional rocky outcrops. In the North-West, the Okavango River drains inland from Angola to form the Okavango Delta; in the central north-east is a large area of calcrete plains bordering the Makgadikgadi pans. In the east adjacent to the Limpopo drainage system, the land rises 1200 metres, and the Limpopo valley gradually descends from 900 metres in the South to 500 metres at its confluence with the Shashe river. This eastern region which straddles the north-south railway line, has a somewhat less harsh climate and more fertile soils than elsewhere and it is here that most Botswana live. The rest of Botswana is covered with the thick sand layers of the Kgalagadi Desert. This accounts for more than two-thirds of Botswana's land area. The sand cover is up to 120 metres deep. The Kgalagadi supports a vegetation of scrub and grasses, but there is almost a complete absence of surface water.²

2.3 Constitutional and Legal Framework

Botswana achieved self government in 1966 after 80 years of British rule as a Protectorate. Sir Seretse Khama was elected the country's first President and was re-elected in 1969, 1974 and 1979; and served until his death in 1980. His successor, both as President and as leader of the ruling Botswana Democratic Party was Sir Ketumile Joni Masire until 1998 when he retired. Mr Festus Mogae is the new President. The constitution established a non-racial democracy which maintains freedom of speech, freedom of conscience, freedom of assembly and association, freedom of movement, the right to life, property and personal liberty among others. Essentially the fundamental rights and freedoms of the individual are protected.

The constitution provides for a unicameral legislature, the National Assembly. All citizens are eligible to vote from the age of eighteen. Members are directly elected from forty constituencies and themselves elect four specially elected members and a speaker. The presidential candidate whose declared supporters form the majority of directly elected members of parliament takes

office as president and selects his ministers from among the members of the National Assembly.³

The president is head of the executive branch and presides over Cabinet. He summons, prorogues and dissolves parliament and must call a general election every five years or sooner. In Botswana, national elections have been held in 1965, 1969, 1974, 1979, 1984, 1989 and 1994. The Botswana Democratic Party has been returned to power on each occasion. In addition to the National Assembly, there is a House of Chiefs with fifteen members which advises on matters affecting custom and tradition.

There is an independent judiciary with a High Court presided over by a Chief Justice. Some cases are heard by customary courts headed by local chiefs and headmen or their representatives and decided in accordance with customary law, while others are dealt with in the magistrate's court.

2.4 Economic Situation

According to a World Bank Staff Working Paper, when Botswana began its nationhood in 1966 it was suffering from the effects of eighty years of colonial neglect and one of the severest droughts in its history. Its Gross Domestic Product per capita was one of the lowest in the world, and the country was grouped among the least developed countries. It is a common belief in Botswana that the drought and poverty which prevailed at the time of independence still continue to weigh heavily in the minds of the country's leaders and they provide a constant incentive and drive for the efficient marshalling of national resources and a brake against ostentatious or irresponsible spending of public resources.⁴

“With Independence, the government immediately set off on a course of economic and social development initiated earlier by the Khamas. The new government assumed not only the powers of the British administrators but most of those of the Chiefs. It created an infrastructure which included a new capital, roads, electric power plants, public schools, hospitals, a civil service, a police force and some years later a defence force. In 1975, the Bank of Botswana was established to overcome some of the disadvantages from Botswana's continued

use of the South African Rand as its currency. While that avoided balance of payment problems and gave Botswana a stable and internationally recognised currency, it left the country at the mercies of South Africa's monetary policies. In 1976 Botswana left the Rand Monetary Area and issued its own currency. The outcome of all these initiatives has been to create a new separate cash-fuelled, private sector which has dealt serious blows to an already weakening traditional economic society. At the same time the Youth Brigade System was created to provide craft and artisan training to the young for employment within and outside the formal sector".⁵

Botswana's development policy objectives were rapid economic growth, economic independence, sustained development and social justice. Great strides have been made in terms of economic growth as the country shifted from a traditional economy based on cattle rearing to a dualistic one led by a small but vigorous modern sector. Shifts in the pattern of domestic production, and in the sources and levels of income since independence, have been dramatic even though domestic production is strongly dominated by minerals and the economy is heavily dependent on trade.⁶

On the 30th September 1885 the British declared present day Botswana a Protectorate. The consequences of this status were that the colonial power was to exercise full control over the external affairs of the territory but allow the government of the territory to control its internal affairs. The practical reality turned out differently, for since there was no formal government having effective control of the territory, the British assumed control of both external and internal affairs of the then Bechuanaland Protectorate.⁷

In 1891 the Bechuanaland Protectorate General Administration Order in Council was proclaimed and empowered a High Commissioner to exercise on behalf of her majesty, Queen Victoria of England, all the powers and jurisdiction which Her Majesty had, subject to such instructions as he might from time to time receive from her Majesty. The High Commissioner was given powers to appoint fit persons as in the interest of Her Majesty's service he may think necessary to be judges, magistrates, or other officers and to define the districts within which such officers should discharge their functions.⁸ This laid down the foundation of the present legal system in Botswana. Proclamation No. 36 of 1909 provided:

“... the laws in force in the colony of the Cape of Good Hope on the 10th day of June, 1891 shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said Protectorate”.

This proclamation amongst others imported wholesale the common law and statutes of general application existing on the stipulated date in the Cape into Bechuanaland. Consequently, the Roman-Dutch common law operating in the Cape became part of the Botswana legal system.

A High Court was established in 1939. The High Commissioner had power to appoint its judges including the Chief Justice. Under the 1960 Order in Council No. 3, the judges could be removed from office after a lengthy and difficult procedure involving the creation of a tribunal comprising independent persons, whose report had to be submitted for consideration by the Judicial Committee of the Privy Council in London. This was in future to be one of the first constitutional guarantees of the independence of the judiciary.⁹ In 1966, the independence Constitution created a Judicial Service Commission which was made responsible for advising the President of the country on matters relating to the appointment, discipline and removal of judges, magistrates and other officers holding judicial office.¹⁰ A Court of Appeal was subsequently established for the High Commission Territories (Botswana, Lesotho and Swaziland) and the High Commissioner was empowered to appoint qualified persons from time to time to the bench. The Subordinate Courts Proclamation no.51 of 1938 saw the creation of three grades of subordinate courts. These were the Court of the District Officer (subordinate court 1st class), the Court of the Assistant District Officer (subordinate court 2nd class) and the Court of a Cadet (subordinate court 3rd class). The jurisdiction of these courts were maximum claims of 500, 200 and 10 respectively. Since these courts were primarily designed to serve European interests together with the High Court, the substantive jurisdictions were limited to claims where both parties were European.¹¹ With regard to the High Court, section 4 of the High Court Proclamation (No. 50 of 1938) provided:

“No civil cause or action to which natives only are parties and no civil cause or action to which either party is a European and in which the amount claimed or value of the subject matter in dispute does not exceed five hundred pounds shall

be instructed in or removed into the High Court save with the leave of the judge upon application made to him in Chambers”.

According to Quansah, this meant that the local inhabitants were precluded from access to the High Court of their country only because they were natives except when a judge gave them permission to do so.¹²

The recognition of Customary Courts which administered justice between natives only came as late as the early 1940's, but prior to then trials before them were unregulated by statutory enactments and the Chiefs administered justice in their areas of influence as their fore-fathers had done from time immemorial. The Native Courts Proclamation No.33 of 1943 contained provisions for the recognition, constitution and jurisdiction of these courts and generally for the administration of justice in them.¹³

“These Courts were given limited jurisdiction in both criminal and civil cases. They were confined to applying (1) native law and custom prevailing in their areas of jurisdiction (2) the provisions of all rules and orders made by the Resident Commissioner, etc. under the Native Administration Proclamation; and (3) the provisions of any proclamation or any other laws which they were specially authorised to administer”.¹⁴

In 1961 the African Courts Proclamation no.19 was passed. It substituted the Native Courts Proclamation which was repealed. Customary Courts (in terms of the legislative scheme of the country) were created specifically for Africans and had no jurisdiction over non-Africans. This laid the basis of a dual legal system which has since found its way into the post-independence period. Customary law came to exist side by side with the received law, with the latter regime dominating, especially in areas of constitutional, administrative, criminal and labour laws.¹⁵

“The indigenous law served the native society well when it functioned at a subsistence level, and Roman Dutch law made, perhaps, its greatest contribution during the colonial period in the moneyed sector and in a laissez-faire economy. At independence, only the prophetic would guess the accommodation which the

received and inherited institutions would have to make, and the new structures which would have to be built in the evolution of Botswana sovereignty".¹⁶

The dual legal system created during the colonial era was retained after independence and the two systems of law co-exist to this day. Their various spheres of application have been clearly defined and without any doubt, the received law is the dominant regime. The dual court system created during the colonial period was also retained but the various grades of court were renamed. Once again, in relation to the courts of general jurisdiction, the customary courts are subordinate.¹⁷

2.5 The development of the public services in Botswana

Botswana had a colonial government from 1885 to 1966. Unlike other former British colonies, it inherited virtually nothing at independence in terms of economic, social and even institutional infrastructure.¹⁸ Consequently, the public service in Botswana has a short history. Britain had no intention of developing the Bechuanaland Protectorate as it was then called. This has found expression in the words of the British High Commissioner to South Africa, Sir Henry Loch:

"As to the country north of the Molopo river, it appears that we have no interest in it, except as a road to the interior. I suggest therefore that we should confine ourselves to preventing that part of the Protectorate from being occupied by either filibusters or foreign powers, doing as little as possible in the way of administration or settlement".¹⁹

The establishment of the protectorate was basically to prevent the Boers in the Transvaal and Germans in South West Africa from interfering with the route from the Cape Colony to territories in Central Africa under British influence and control.²⁰ Very little was done in terms of infrastructural development and settlement except for purposes of maintaining the road to the interior. As put by a political scientist:

"Until just before independence, therefore, the country had no capital city, nor even the benefits of the small spending power of the colonial administration.

Another symbol of neglect was that the Bechuanaland Protectorate never had its own governor like other colonies; the governor was the British High Commissioner to the Cape Colony, and later to the Union of South Africa".²¹

In view of their interests the British had to establish a civil service that incurred a minimum of expense and a maximum of profitability.²² What was required therefore was that the territory had to be stable, secure and self-supporting. In addition, the economy had to be organised in a way that would complement British interests in the entire Southern African region.²³ That laid the basis for the emergence of the Bechuanaland Protectorate Civil Service.

"The most important development... is the fact that a modest administrative machinery was set up primarily to maintain law and order. The territory was administered from Mafikeng outside its borders where the resident governor was based. It is not an exaggeration to note that the expenditure pattern of the colonial administration then illustrates the lack of commitment to the territory. It is evident that the bulk of the colonial administration's expenditure went to routine administrative services".²⁴

In line with the practical concern of minimising expense and maximising profit the Protectorate's capital was left at Mafikeng for some time. Later on it was moved to Gaborone.

"...The move to Gaborone, coinciding with the acquisition of self governing status, triggered a sudden expansion of the central government. Where the central administration in Mafikeng had consisted of no more than 25 officers under the Resident Commissioner, there were, by 1967, some 275 equivalent Ministerial posts in the seven ministries which were created".²⁵

Other than for the various small units and programmes, the actual departments appear to have been: Police, Prisons, Administration of Justice, Education, Posts and Telegraphs, Medical or Hospitals, Public Works and Native Affairs.²⁶ The main programmes though falling short of being departments, but having independent votes for financial estimates provision were; Land Revenue, Hut Tax, Licences and Finances, Sale of unclaimed stock and Miscellaneous.

As early as 1910, the British kept the Protectorate's administration at the barest minimum. This was reflected in the staffing pattern of the Protectorate's administration where heavy emphasis was placed on Police, District Administration and the Justice department. Below is a breakdown of the Protectorate Civil Service in 1910.

Protectorate Civil Service 1910²⁷

Table 1

<u>Department</u>	<u>Europeans</u>	<u>Africans</u>
Resident Commissioner	4	3
District Administration	8	2
Police	65	147
Justice	4	6
Public works	-	-
Medical	3	2
Education	1	-
Veterinary	2	-

The administrative structure inherited at independence in 1966, was too modest and not equipped to carry out the new functions of ensuring socio-economic development. At that time there were only seven ministries plus the office of the President, Attorney General, Public Service Commission and the National Development Bank.²⁸ So that:

"In the first decade of independence, from 1966/1967 to about 1977/1978, there were dramatic changes in the structure and function of the administrative system. Twenty-six new major institutions were created as well as a number of limited-function ministries, including the ministries of Finance and Development Planning (1970/1971), Local Government and Lands (1967/1968), Education (1969/1970), Health (1975/1976) and Commerce and Industry and Mineral Resources and Water Affairs (both in 1973/1974). Expansion and specialization also took place on the department level. An Auditor-General's Department was created in 1969/1970, and the Department of Income Tax (1968/1969), Customs and Excise (1971/1972) and Central Transport Organisation (1971/1972) are other examples of this expansion".²⁹

The civil service grew and changed in shape and structure to conform to the changing social, political and economic circumstances of the country.³⁰ These changes occurred even into the 1980's depending on the needs and priorities of government.³¹ The growth and proliferation of ministries and parastatals resulted in considerable expansion of public sector personnel. Several financial institutions, public utility corporations, commercially-oriented parastatals, sectoral policy implementation agencies and training and research institutions were set up mainly in the 1970's and some in the 1980's and 90's. By the year 1982, the following financial institutions had been set up; Bank of Botswana, Botswana Development Corporation, National Development Bank, Botswana Building Society and Botswana Saving Bank. Public utility corporations already set up by the year 1987 were; Botswana Power Corporation, Botswana Railways, Botswana Telecommunications Corporation and Water Utilities Corporation. The Botswana Agricultural Marketing Board and Botswana Livestock Development Corporation being sectoral policy implementation agencies were set up in 1974 and 1973 respectively. Other commercially-oriented parastatals which were set up include Air Botswana, Botswana Housing Corporation, Botswana Meat Commission, Botswana Postal Services and Botswana Vaccine Institute. Training and research institutions which were set up are; University of Botswana, Rural Industries Promotion, Institute for Development Management, Botswana Technology Centre, Food Technology Research Centre and the Botswana College of Agriculture.

“...public sector employment grew rapidly: reaching 13,550 in 1972, increasing to 1,675 in 1976, and constituting 28.3 percent of total employment in 1972 and 30.4 percent in 1976. The number of central government public service posts grew to 1,238 in 1972 and more than doubled to 2,611 in 1977. This growth continued so that total government employment, including education, reached 30,800 in 1980 (or 36.9 percent of all recorded employment)”³²

Pre-independence higher level staffing: Central Government³³

Table 2

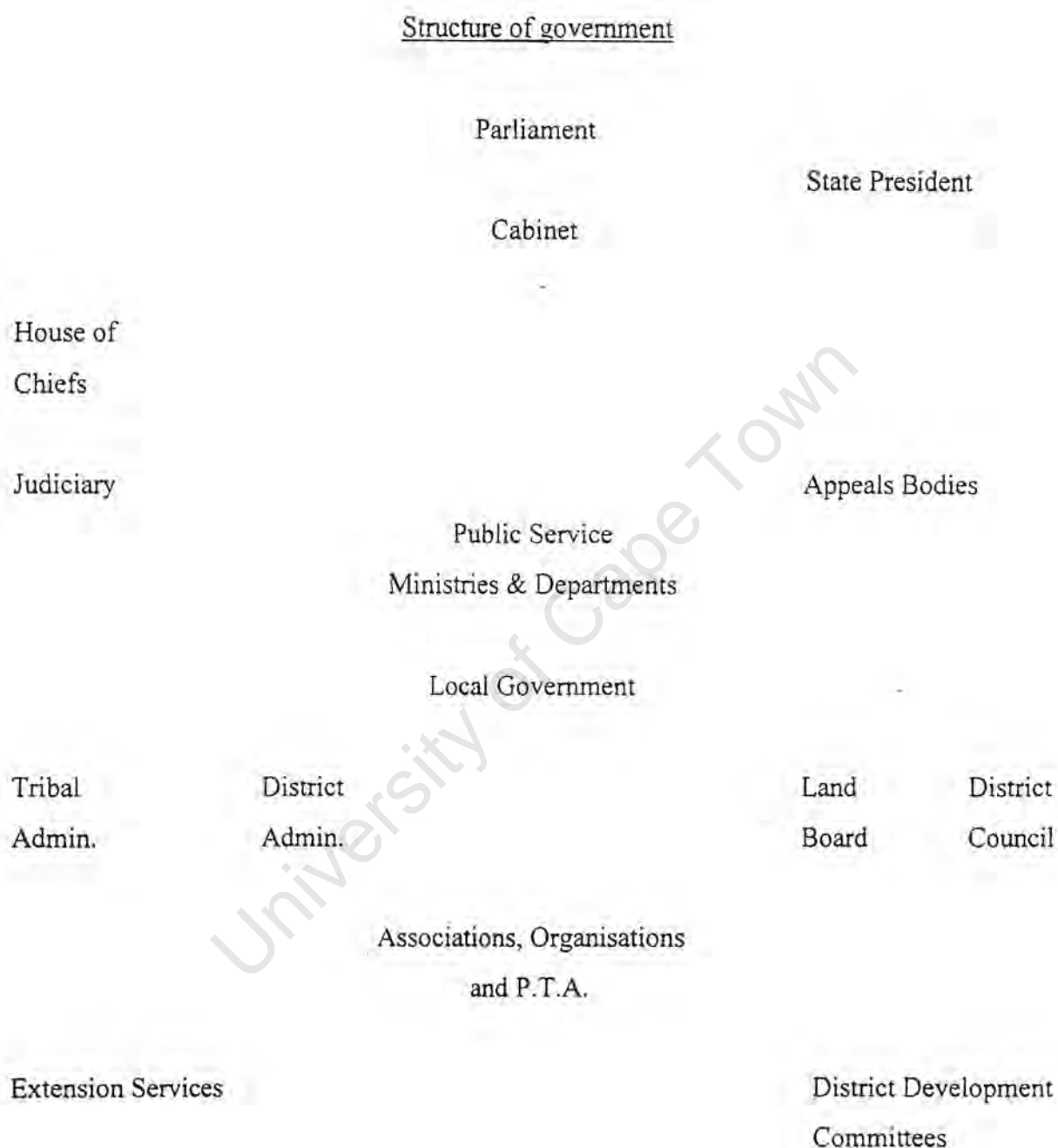
<u>Grade</u>	<u>Local</u>	<u>Expatriate</u>		<u>Vacancies</u>
<u>Number of</u>	<u>Posts</u>	<u>Staff (%)</u>	<u>Staff (%)</u>	<u>(%)</u>
Senior (Superscale)	33	1 (3)	31 (94)	1 (3)
Professional and Executive	149	20 (13.5)	100 (67)	29 (19.5)
Technical	535	114 (21.5)	307 (57)	114 (21.5)
	717	135 (19)	438 (61)	144 (20)

Source: World Bank (1984) p.38

(Reproduced from South African Journal of African Affairs Vol.1, 1971 by W.J.O. Jeppe at pg 118)

The structure of the public service in Botswana

Table 3



Source: B.K. Temane, the evolution and development of the public service in Botswana 1990 – 1990 (UNPUBLISHED)

Presently, the various ministries that constitute central government are nine. What follows below is an outline form of the various ministries in order to underscore the importance of the structure of central government in relation to security of employment in the public service. In this context, central government ministries employ various public servants whose security of tenure is the subject of this study.

2.6 Structure of Ministries

2.6.1 Ministry of Finance and Development Planning

This consists of its headquarters, Accountant General, Department of Taxes, Department of Supplies, Statistics Department, Customs and Excise, Computer Bureau and Savings Bank.

The ministry covers the government's institutional framework for national development planning, budget administration and financial management. The departments that fall under the ministry are designed to provide effective overall management of the nation's financial and economic affairs.

2.6.2 Ministry of Labour and Home Affairs

It consists of its headquarters, Immigration and Citizenship, Prisons and Rehabilitation, Labour and Social Security, Library Services, Museum and Art Gallery, Culture, Registration and Social Welfare. This Ministry like other ministries is headed by a Minister assisted by the Permanent Secretary. The ministry has the responsibility for government's policies on youth, women's affairs, sport and rehabilitation of offenders amongst others.

2.6.3 Ministry of Agriculture

It comprises of headquarters, Animal Health and Production, Crop Production and Forestry, Agricultural Research, Co-operative Development and Botswana College of Agriculture. At the top there is the minister who is assisted by the Permanent Secretary. The ministry is responsible for formulating, co-ordinating and executing all agricultural related policies and objectives. It

has overall supervision of policies related to agricultural activity in the country.

2.6.4 Ministry of Education

This ministry is divided into; headquarters, Technical Education, Bursaries, Non-Formal Education, Curriculum Development and Evaluation, Unified Teaching Service, Primary Education, Secondary Education and Teacher Education. All aspects of educationally related activity fall into any one of the above-mentioned departments. A Minister of Education assisted by a Permanent Secretary over-see the Ministry's activities.

2.6.5 Ministry of Commerce and Industry

It has headquarters, Wildlife and National Parks, Commerce and Consumer Affairs, Industrial Affairs and Trade and Investment Promotion. All commercial and industrial related activity of national significance fall under this ministry.

2.6.6 Ministry of Local Government, Lands and Housing

Tribal Administration, Unified Local Government Service, Town and Regional Planning, Food Resources, Local Government Audit, District Administration fall under this ministry. The ministry is basically in charge of housing, lands and local government policies and activities. It co-ordinates, formulates and directs national policies on housing and settlement.

2.6.7 Ministry of Works, Transport and Communications

This ministry is divided into its headquarters, Architecture and Building Services, National Transport and Communications, Roads, Civil Aviation, Meteorological Services, Central Transport Organisation and Electrical and Mechanical Services.

2.6.8 Ministry of Mineral Resources and Water Affairs

It has its headquarters, Geological Survey, Water Affairs and Mines constituting the ministry. It

is headed by a minister assisted by a Permanent Secretary as all the other ministries.

The department of Geological Survey is responsible for ground water resource investigation. Water Affairs department is responsible for water supplies, surface water resource investigation and the protection of ground and surface water resources from pollution. The Mines Department on the other hand evaluates all mining lease applications, monitors extractive and mineral processing industries and administers the relevant portions of the Mines and Minerals Act.

2.6.9 Ministry of Health

This comprises of its headquarters in Gaborone like all other ministries, Health Manpower Department, Hospital Services, Primary Health Care Services and Technical Support Services. The Minister and Permanent Secretary provide leadership and professional supervision to the Ministry.

The above are the principal ministries employing numerous public servants country-wide in Botswana. There are however other components of these institutions forming background material, some whose role is to ensure and to some extent guarantee tenure of public servants. These will be identified and specific mention will be made of them at an introductory level for purposes of completeness of the context within which the study itself is located. There are also officers specified in the constitution whose importance and role though reserved for later chapters cannot be left untouched.

2.7 Officers Specified in the constitution

(a) Attorney - General

The Attorney-General is one of the three principal officers specified in the constitution. Like other executive officers of the State, he exercises executive functions entrusted to him in terms of the constitution. Other officers exercising executive functions peculiar to their offices are; the President, Vice President, Ministers, Assistant Ministers and Permanent Secretaries. Section 51, which creates the office of Attorney-General enjoins him to be the principal legal adviser to the

Government of Botswana. He exercises executive functions in relation to the institution of criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person³⁴. He has power to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority, and to discontinue at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.³⁵ In the exercise of his executive functions, the Attorney-General is not subject to the direction or control of any other person or authority.³⁶

As the principal legal adviser to the Government of Botswana, the Attorney-General remains a key player in any critical inquiry relating to security of tenure in public service employment. The various ministries in outline form above obtain advice from his office on questions relating to the discipline, suspension, removal and reinstatement of officers in public employment.³⁷ Whilst he himself enjoys security of tenure, his advice to the ministries strikes at the very core of the present enquiry. Public officers aggrieved by decisions affecting them relating to discipline and dismissal from the service, sue the state as their employer, citing the Attorney-General as the respondent. That underscores the importance of the Attorney General's office in relation to our enquiry. His security of tenure has been omitted since it forms part of the subject matter of our next chapter. What suffices here is the role he plays within the context of public service employment law.

(b) Auditor - General

The office of the Auditor-General is also one of the specified offices in the Constitution. It ranks alongside that of the Attorney-General and Supervisor of elections. The functions of the Auditor-General are spelt out in the constitution.³⁸ He has power to audit the accounts of Botswana and of all offices, courts and authorities of the Government of Botswana. Like the Attorney-General, in the exercise of his functions, he is not subject to the direction or control of any other person or authority.³⁹ The tenure of this designated officer will be further explored in the next chapter.⁴⁰

(c) Supervisor of Elections

The Supervisor of Elections used to be an officer specified in the constitution. He was appointed to the post by the President. According to the Constitution, he had to be a citizen of Botswana and must have held senior office in or outside the public service in any country⁴¹. His duty was to exercise jurisdiction over the registration of voters for elections of the elected Members of the National Assembly and over the conduct of such elections.

The above officer's position has been abolished and has been superseded by the Independent Electoral Commission. This new Commission basically performs the functions hitherto performed by the Supervisor of Elections. Five members constitute the Commission, which is chaired by a High Court judge. The Commission's powers composition and functions will be considered in the next chapter on appointments.

The importance of these constitutionally designated officers lies not only in the functions they perform at the national level but also specially for purposes of our enquiry, the manner of their appointment, discipline, suspension and removal. It is in that context that these three specific offices are mentioned at this introductory level. A full discussion of their respective tenures will be made in the next chapter.

2.8 The Judicature

The role played by the judicature is central to employment security, which is our theme. The decisions of both the High Court and the Court of Appeal have significant effect on security of tenure in the public service. When public servants have exhausted their internal remedies and are still dissatisfied with the outcome superior courts are their next and final ports of entry. Jurisprudence developed by the superior courts both within and outside our jurisdiction has tended to lean towards the protection of the public servant's employment rights. Indeed the concept of natural justice has been allowed by the superior courts to permeate a considerable spectrum of public service employment law; from warnings, suspensions, interdictions, dismissals and retrenchments to transfers and relocations. Botswana and South African courts have rejected old and irrelevant notions and classifications of administrative acts into "pure",

"quasi-judicial" and "judicial" acts which had hitherto affected the applicability of the rules of natural justice.⁴¹ In the same vein, the courts have held that the categorisation of powers into "executive" and "legislative" does not in all cases provide a criterion for observing the rules of natural justice.⁴² Furthermore, the same courts have created an additional basis for relief through the doctrine of legitimate expectation, consequently extending the existing grounds on relief. This underscores the impact of this particular arm of government on the subject matter of our enquiry. Last, but not least important for purposes of our enquiry are Service Commissions.

2.9 Service Commissions

The relevant Service Commissions in this study are the Public Service and Judicial Service Commissions. The Public Service Commission was initially created to recruit, appoint, promote and discipline public servants.

This was provided for in the 1960 independence constitution. In 1973 the constitution was amended and a Directorate of Public Service Management was created to perform the functions performed by the Public Service Commission before then. The Commission was only retained as an appeals body for public servants. The Commission enjoyed security of tenure and in turn heard appeals from public servants dispassionately and objectively. It still does this today. There is no doubt that the functions it performs have a significant impact on the tenure of public servants, a matter reserved for discussion in the subsequent chapters.

Its counterpart in the judiciary is the Judicial Service Commission. It recommends the appointment of magistrates and judges and other court personnel to the President. Its tenure is protected and it in turn guarantees its subject's tenure. It is supposed to conduct its deliberations dispassionately and objectively. It also has power to recommend to the president for removal from judicial service, magistrates and judges as well as other court personnel. In the exercise of its functions, it is not subject to the direction or control of any person or authority.

2.10 Conclusion

All the above are part of the public service in Botswana. The public service in Botswana has

grown from being a modest and ill-equipped administrative framework at independence, to a fairly modern and sophisticated administrative framework that is capable of ensuring effective and efficient government. In addition to the ministries described above co-ordinating the various activities of government, are the national Assembly, Directorate of Public Service Management and Office of the President. This study is primarily intended to concentrate on the employment security of personnel in the administrative structure outlined above. The Judicial and Public Service Commissions have received special attention in that a whole chapter has been devoted to the role they play in facilitating security of tenure in the public services. What follows in the following chapters is the genesis of our enquiry when considered as a process, from recruitment, probation and appointment to relocation.

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ENDNOTES

1. Botswana. *Liberal Democracy and the Labour Reserve in Southern Africa*. Jack Parson. 1984. Westview Press pg 2.
2. Note 1 above.
3. National Development Plan 7. 1991 - 1997 *Country and People*. Chapter 1 pg 3.
4. *World Bank Staff Working Paper No. 709 (1984)* by Nimrod Raphael. Pg 14 - 15.
5. See Note 4 above pg 15.
6. See Note 4 above pg 15.
7. *Introduction to the Botswana Legal System* by E.K. Quansah. 1993.
8. See Note 7 above pg 2.
9. *Legal Development in Botswana 1885 - 1966* by Akinola Aguda in Vol. 5 Botswana Notes and Records at pg 58.
10. See Note 9 above pg 4.
11. Quansah and Aguda above (Note 7 and 9)
12. Note 7 above pg 4.
13. Note 9 above.
14. Note 9 above.
15. Molokomme, A and Otlhogile, B *Legal Development in Botswana Since Independence* 6 Pula: Botswana Journal of African Studies 17. See E.K. Quansah Note 7 above.
16. Note 15 above pg 18.
17. Note 15 above pg 18.
18. *A brief history of the Botswana Public Service* by G. Somolekae (unpublished paper) 1997.
19. *The evolution of the Bechuanaland Protectorate African Civil Service in a Colonial Context: 1895 - 1965*. A dissertation submitted in partial fulfilment of the requirements of the BA (History) Programme at the University of Botswana and Swaziland, Gaborone, George Katsande, 1992. pg 2.
20. *Policy choice and development performance in Botswana*, Charles Harvey and Stephen R. Lewis, Jr. Macmillan 1990. pg 15.

21. Note 18 above pg 1. See also Note 20 above at pg 15.
22. Note 19 above pg 2.
23. Note 18 pg 1.
24. Note 15 pg 4.
25. *Comparative development of the public service in Botswana and the Western (Bantu) areas*. South African Journal of African Affairs, Vol. 1, 1971. W.J.O. Jeppe pg 113.
26. *The evolution and development of the public service in Botswana (1890 - 1990)* pg 10. B.K. Temane.
27. Note 19 above pg 4. See further G. Gunderson, *Nation Building and the Administrative State: The case of Botswana*, Ann Arbor, (University Microfilms, 1971) p.142.
28. Note 18 above pg 7.
29. *Botswana: Liberal Democracy and the Labour Reserve in Southern Africa*. Chapter 3 pg 41. Jack Parson, Westview Press. 1984.
30. Note 26 above pg 57.
31. Note 18 above pg 7.
32. Note 29 above pg 42.
33. Note 18 above pg 9.
34. Section 51 (3) constitution of Botswana Cap 01:01
35. Section 51 (3) (b) and 8 Constitution of Botswana Cap 01:01
36. This is the subject of discussion in subsequent chapters
37. This is the subject of discussion in subsequent chapters.
38. Section 124, constitution of Botswana Cap 01:01

This power is necessary if the officers are to execute their duties without fear or favor.
40. His inclusion here was to furnish background information so as to facilitate a further discussion in the following chapter on his tenure of office.
41. General Orders, 1996 Section 12 page 19.
42. Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A)
43. South Africa Roads Board v Johannesburg City Council 1991 (4) SA 1 A

CHAPTER 3

THE IMPACT OF APPOINTMENT, PROBATION, PROMOTION AND TRANSFER ON TENURE IN THE PUBLIC SERVICE

3.1 Introduction

In this Chapter, we address the question of appointment, to accentuate the contention that some officers in public employment perform certain fundamental and executive functions such that in the performance of those functions, they require protection. We address the situation of these officers, their strategic importance in the public service and the contention made that the method used to protect them in the due performance of their duties was to accord them employment security. Other officers, whose functions may fall short of the above category but who nevertheless have also been accorded protection will be considered. Occasionally, a comparison will be made with similar institutions in South Africa.

The issue of probation, to which public servants are subjected on first appointment will be considered. The applicable principles and considerations and the extent to which they impact on tenure at this stage of the employment relationship will also be canvassed. An area which also has a bearing on tenure, which may or may not follow shortly after the completion of the probation period is promotion. Its implications on employment security will be addressed.

Finally, we will address the question of relocation. This may either be in the form of a transfer or posting. In most of the above areas, there is an almost complete absence of local cases. Consequently, reliance will be placed on South African case law. There is no danger in that approach since the systems of both countries belong to the same family or legal system. This system, Roman-Dutch law, is the received system in Botswana, Lesotho and Swaziland. To this extent South African cases in these countries are highly persuasive.

3.2 Appointment of Specified Officers

The positions of the three specified officers in the constitution, of which the Attorney-General is one, are used to illustrate and underscore the point that employment security can never be guaranteed in the absolute sense. Also, that not only is there no right to work, but a right to work which can be enforced against an employer is very restricted. It is difficult to imagine a situation where there is a "right to work" and the circumstances in which this "right to work" exists. This "right to work" might be ideal perhaps in socialist ideology but it is impractical in the context of modern capitalist economies. It only subsists in the limited sense in which the law permits it, for example, reinstatement to one's former position. Botswana statutes are silent on the question whether there is any "right to work". Nor does the common law recognize such a right. The three specified officers in the constitution epitomize for purposes of our enquiry, the highest form of tenure in comparative terms, when considered within the context of the relativity of employment security. For the three officers it is the highest form of tenure because the appointment is in accordance with the spirit and letter of the constitution and the removal thereof is similarly regulated by the same statute. Moreover, for the three officers the grounds for removal are indicated in the constitution as well as the somewhat complicated procedure for removal. In the exercise of their functions they are not subject to the direction or control of any person or authority. Apart however from the position of the Chief Justice and puisne judges, the security of tenure of the specified officers is unsurpassed in the public service.

3.3 Attorney General

The Constitution of Botswana provides that there shall be an Attorney-General whose office shall be a public office.¹ It further provides that he shall be the principal legal advisor to the Government of Botswana.² The Attorney General has other functions which are equally important and which may be exceedingly difficult to perform without security of tenure of office. These are reproduced below.

“(3) The Attorney-General shall have power in any case in which he considers it desirable to do so –

- (a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;
 - (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
 - (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.
- (4) The powers of the Attorney-General under subsection (3) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions”.³

The constitution further provides that the powers in subsection (3) (b) and (c) above shall be vested in the Attorney-General alone to the exclusion of any person or authority. In the exercise of the functions vested in him above, the Attorney-General shall not be subject to the direction or control of any other person or authority.⁴

It was with regard to the prominence of the functions of the Attorney-General that he was accorded employment protection. The basic law of the land, (constitution) was used to accord the Attorney-General insulation and protection from political and executive influence. Like the other specified officers, the Attorney-General’s security of tenure attaches from the fact of appointment itself. Provisions relating to the removal of the Attorney-General are found in Section 113 of the Constitution. It provides that he may vacate office when he attains the age of

60 years or such other age as Parliament may prescribe. It further states;

“(2) A person holding the office of Attorney-General may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

“(3) If the President considers that the question of removing a person holding the office of Attorney-General from office ought to be investigated then –

- (a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office; and
- (b) the tribunal shall enquire into the matter and report on the facts thereof to the President and advise the President whether the person holding the office of Attorney General ought to be removed from office under this section for inability as aforesaid or for misbehaviour”.⁵

If the tribunal appointed in accordance with the above section advises the President that the person holding the office of Attorney-General should be removed from office for inability as indicated above or for misbehaviour, the President is required to remove such person from office.

The President has power to suspend the incumbent from executing the functions of his office during the period of investigation which he may revoke at any time, in any event when the tribunal set up above advises him that the Attorney-General should not be removed from office.⁶

The office of Attorney-General is an important office in virtually all countries of the Commonwealth. The former High Commission Territories of which Botswana is one are no exceptions. In most countries in the Commonwealth his discretionary power to prosecute and discontinue criminal proceedings is unlimited and unreviewable in the ordinary courts of the

land.

In *Gouriet v. Union of Post Office workers*⁷ Viscount Dilhorne in the course of discussing the reviewability of the powers of the Attorney-General opined;

“... The Attorney-General powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts. If the court can review his refusal to consent to a relator action, it is an exception to the general rule. No authority was cited which supports the conclusion that the courts can do so. Indeed such authority as there is points strongly in the opposite direction.”

It is therefore of fundamental importance that a person exercising such powers should have protected tenure to guarantee that he executes his duties and functions without fear or favor. It is hardly surprising that the position of Attorney-General in Botswana came to be constitutionally entrenched. In Botswana like in other former High Commission territories, this position is both a political and legal office. The Attorney General is the principal legal advisor to government.

3.4 Auditor-General

The office of the Auditor General ranks alongside that of the Attorney-General and Supervisor of Elections. In accordance with the constitution, he has power to audit the accounts of Botswana and of all officers, courts and authorities of the Government of Botswana.⁸ Like the Supervisor of Elections and the Attorney-General, in the exercise of his functions, he is not subject to the

direction or control of any other person or authority.⁹

Considering the above functions of the Auditor-General, an impression is created, that without any form of protection the functions would not find expression. Auditing the accounts of central and local government is an enormous task presenting challenges and beset with a variety of risks mostly political in nature. It was possibly in this light that the office was specified in the constitution.

The constitution provides that a person holding the office of the Auditor-General shall vacate office when he attains the age of 60 years or such other age as parliament may prescribe.¹⁰ It provides further that a person holding the office of Auditor-General may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be removed except in accordance with section 114 of the constitution. It is interesting to note that the procedure for removing the Auditor-General is different from that of the Attorney-General and Supervisor of Elections. The highest body in the land, the National Assembly is entrusted with the responsibility of determining his removal from office. This not only reflects the importance of his office but also the level of security that is intended to be accorded to his tenure. Throughout the entire public service, he remains the only public servant whose investigation for purposes of removal from office is subject to parliamentary sanction. The relevant section provides;

“(3) If the National Assembly resolves that the question of removing a person holding the office of Auditor-General from office under this section ought to be investigated then –

- (a) the Assembly shall, by resolution, appoint a tribunal which shall consist of a chairman and not less than two other members, who hold or have held high judicial office;

- (b) the tribunal shall enquire into the matter and report on the facts to the Assembly;
- (c) the Assembly shall consider the report of the tribunal at the first convenient sitting of the Assembly after it is received and may, upon such consideration, by resolution, remove the Auditor General from office".¹¹

The National Assembly has power by resolution to suspend the incumbent from performing the functions of his office during the period of investigation which it may revoke at any time. In any event such power shall cease to have effect if upon consideration of the report of the tribunal, the Assembly does not remove the Auditor-General from office.¹² Nowhere in the entire public service do we find a single officer whose removal from office is subject to the concentrated power of such a vast assembly. The next specified officer is the Supervisor of Elections. The Botswana Constitution and Electoral Act have been amended to allow the Supervisor of Elections to be superseded by an Independent Electoral Commission, but the following remains relevant because the employment security accorded to the supervisor of Elections will be passed on the Independent Electoral Commission members.

3.5 Supervisor of Elections

The above officer was empowered by the constitution to exercise jurisdiction over the registration of voters for elections of the Elected Members of the National Assembly and over the conduct of such elections.¹³ He was appointed to office by the President.¹⁴ Eminent persons who have held senior positions in or outside the public service in any country and of high integrity were qualified to hold such a post.

In relation to the Supervisor of Elections, the age at which his office had to be vacated was given as 65 years or such other age as may have been prescribed by parliament.¹⁵ The President had power however to permit the incumbent to continue in office for such period as might have been

necessary to enable him to complete any electoral proceedings commenced before he had attained that age. The removal provisions of the Supervisor of Elections were similar to those of the Attorney-General already discussed above. The office of the former was no more nor less important than that of the latter officer. The former provisions appear below for illustrative and comparative purposes.

“(9) A holder of the office of Supervisor of Elections may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior, and shall not be so removed except in accordance with the provisions of this section.

(10) If the President considers that the question of removing the Supervisor of Elections ought to be investigated then –

- (a) he shall appoint a tribunal which shall consist of not less than two members who hold or have held high judicial office;
- (b) the tribunal shall enquire into the matter and report on the facts thereof to the President whether the Supervisor Elections ought to be removed from office under this section for inability as aforesaid or for misbehavior; provided that, pending the determination by the tribunal, the president may appoint a person to act in his place.”¹⁶

If the tribunal appointed in accordance with the foregoing section advised that the Supervisor of Elections ought to be removed for inability or for misbehaviour, the President was enjoined to remove the incumbent from office.¹⁷

3.5.1 The Independent Electoral Commission

The Independent Electoral Commission superseded the office of Supervisor of Elections, which was staffed by 15 permanent members. Although independent and impartial, the office had previously been part of the executive and recruitment had been done mainly through the Directorate of Public Service Management.

The Constitutional (Amendment) Act 1997 made provision for the appointment of the Independent Electoral Commission to “supervise the conduct of elections”.¹⁸ An all party conference recommends persons for appointment by the Judicial Service Commission to the Commission which is composed of 5 members. A High Court judge chairs the Commission.

Members of the Commission are allowed to hold office for a period of two successive parliaments. Any person who has been declared insolvent or bankrupt; or has been convicted of an offence involving dishonesty is disqualified from membership of the Commission. The Secretary to the Commission exercises general supervision over the registration of voters for elections of the members of the national assembly and members of any local authority. Only Botswana citizens qualify for appointment to the position of Secretary provided that they have not been declared insolvent or bankrupt or convicted of any offence involving dishonesty in any country. The grounds of removal of the Secretary to the Commission are similar to those for removal of the then Supervisor of Elections indicated above. The protected tenure of the Supervisor of Elections has been passed on to the Secretary of the Commission who has the responsibility of running the Commission's office. It is the responsibility of the Commission to conduct and supervise elections of elected members of the National Assembly and members of the local authorities;¹⁹ to give instructions and directions to the Secretary of the Commission;²⁰ to ensure that the elections are conducted efficiently, properly, freely and fairly;²¹ and to perform other functions as may be prescribed by an Act of parliament.²²

There are striking similarities in the procedure for removal of these officers including the Secretary to the Independent Electoral Commission. For these officers some person or body is entrusted with determining the question of removal (the National Assembly in the case of

Auditor-General and the President in the case of the other two officers). For these officers a tribunal has to be appointed, two members of whom have held or hold high judicial office. Finally, the President or Assembly has to act on the basis of the tribunal report. In all instances the President or Assembly (as the case may be) is empowered to suspend the incumbent. So delicate is the procedure and awesome the power to remove that it has been entrusted to the highest state official (President) and highest ranking body (parliament). In consequence of the preceding discussion on the powers and importance of all the three officers, there is little doubt that they enjoy considerable tenure of office in the public service, much as parliament had originally intended, by entrenching their offices constitutionally.

3.6 The Position in South Africa

In South Africa, these “officers” also enjoy a great measure of protection. They are appointed in terms of the new constitution,²³ which also provides the relevant grounds for their removal. South Africa does not have a Supervisor of Elections per se. Instead it has a Commission called the Independent Electoral Commission consisting of at least three persons. Section 190 of the South African constitution provides for an Independent Electoral Commission to manage elections of national, provincial and municipal legislative bodies. It also empowers the commission to ensure that those elections are free and fair and to declare the results within a reasonably short period. The equivalent of the Attorney General is a national prosecuting authority headed by a National Director of Public Prosecutions. The constitution of the Republic of South Africa provides in section 179, that the President of the country, who is head of the national executive, should appoint the Director. In addition to the National Director of Prosecutions, there are also Directors of Public Prosecutions appointed in terms of section 179(b) of the constitution. This prosecuting authority performs functions, which are similar to those of the Attorney General in Botswana. It can institute criminal proceedings on behalf of the state, and carry out any necessary functions incidental to instituting criminal proceedings. The Constitution of the Republic of South Africa provides in Section 175 that the National Director of Public Prosecutions:

- (a) must determine, with the concurrence of the cabinet member responsible for the administration of justice, and after consulting with the Directors of Prosecutions, prosecution policy, which must be observed in the presentation process.
- (b) must issue policy directives, which must be observed in the prosecution process.
- (c) may intervene in the prosecution process when policy directives are not complied with; and
- (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
 - (i) the accused person;
 - (ii) the complainant;
 - (iii) any other person or party whom the National Director considers relevant.

We turn briefly to the Auditor General and Independent Electoral Commission for comparative purposes.

3.6.1 The Auditor General (South Africa)

The functions of the Auditor General are laid out in the new constitution. It reads as follows:

“188 (i) The Auditor General must audit and report on the accounts, financial statements and financial management of :

- (a) all national and provincial state departments and administrations;
- (b) all municipalities; and
- (c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General²⁴

The relevant provision relating to his tenure provides:

“189 The Auditor General must be appointed for a fixed, non-renewable term of between five and ten years.”²⁵

3.6.2 Members of the Electoral Commission (South Africa)

In relation to the Electoral Commission the constitution provides:

- “190 (i) The Electoral Commission must
- (a) manage elections of national, provincial, and municipal legislative bodies in accordance with national legislation;
 - (b) ensure that those elections are free and fair; and
 - (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible...”²⁶ The grounds of removal of members of the Electoral Commission and Auditor-General are the same and to be found in one section.

“194 (i) ... the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on –

- (a) the ground of misconduct, incapacity or incompetence;
- (b) a finding to that effect by a Committee of the National Assembly; and
- (c) the adoption by the Assembly of a resolution calling for that person's removal from office¹²⁷

In relation to the removal of the Auditor General the resolution must carry two thirds of members of the Assembly whereas only a vote of simple majority is required for a removal of a member of the Commission. The South African Prosecuting Authority though performing similar functions to the Attorney General (Botswana) differs in structural terms and may not be useful comparative material.

3.7 Other appointments

3.7.1 Members of the bench

Judges of the High Court of Botswana and magistrates also enjoy considerable tenure flowing from the fact and manner of their appointment. Elaborate provisions relating to the removal of judges of the High Court from office are enshrined in the constitution and a full discussion on the subject is contained in the Chapter relating to the Judicial Service Commission. Similarly magistrates also enjoy some protection and their tenure is discussed in the same chapter.

3.7.2 Political appointees

Generally, Ambassadors, members of the Diplomatic Corps, Principal Representatives of Botswana in any other country or accredited to any International Organization and Permanent Secretaries are political appointees. They are appointed at the pleasure of the President and their tenure in office is determinable at his/her will. According to the Botswana General Orders of 1996 the power to discipline these officers is vested in the President. No disciplinary procedures are prescribed and there is no appeal against the decision of the President. In that respect they have little or no guaranteed tenure. That underscores our contention that the process of appointment necessarily affects security of tenure. This is an invidious position that these officers find themselves in. But that is not to say that the person to whom the disciplinary power lies will act arbitrarily and capriciously. The appointing authority and manner of appointment are important variables in the present enquiry. Political appointees and quasi-political appointees enjoy far less protection on appointment.

3.8 Probation

The process of appointment is the genesis of the employment relationship. Once an employee has been recruited into the public service, there is a period when that person is assessed for suitability for that particular position. That qualifying period is called probation. It is during that period that security of tenure is at its most tenuous.

“Probation is the policy of considering no appointment final until the appointee has demonstrated his capacity in his work. The idea was introduced into civil service administration, along with guaranteed tenure, as a means of determining whether the examination and selection system had as a matter of fact resulted in the appointment of qualified personnel to whom tenure might safely be extended.”²⁸

The probation of public servants in Botswana is regulated by the Public Service Act²⁹ and General Orders.³⁰ The Public Service Act is an Act which provides for the administration of public service, appointments to the service, termination of appointments and retirements, Commissions and other matters related to the public service. The General Orders are the rules governing the conditions of service of the Public Service in Botswana. They are a form of a civil service code. The relevant section provides:

“11(1) Where any person is appointed to any public office (otherwise than on promotion or transfer) on pensionable terms he shall first serve a probationary period of two years; or such other period as may be prescribed by the Minister for particular public officers”.³¹

The General Orders, which supplement the provisions of the Public Service Act and Regulations clearly provide that during their period of probation, officers must be regularly supervised and kept under continual and sympathetic observation. Further, that Permanent Secretaries should bring to their notice, in writing, any faults that they may have and must give them every assistance towards correcting their short-comings.³²

Public service employees may be distinguishable in their labor relations from their private sector counterparts in that their conditions of service are regulated by statute and not contract. In Botswana, the Constitution, the Public Service Act and Regulations and the General Orders specifically regulate the employment relationship of public servants. In other words there is no formal contract which incorporates their conditions of service other than the aforementioned statutes. Private sector employment consists of contracts, either for a specified piece of work, without reference to time or a contract for a specified period of time. These two contracts are temporary in nature and accordingly do not entitle the employee with any security beyond the specified piece of work or the specified period of time. A contract for an unspecified period of time is found in both the public and private sector. In the public sector it is subject to statute as

indicated earlier. Whether the one in the public service is a “contract” in the literal sense is a moot point. However probation for any employee in the public or private sector, entails the same considerations. In both public and private sector, the question is whether the probationary employee performs to the required satisfactory standard. In both sectors it is borne in mind that the employee is new and has to be given time to acclimatize and fit into the new arrangement. There is therefore no juridical distinction between the situation in private and public sector employment. Indeed at common law a contract of employment could be made subject to a probationary period.

“ an employee on probation may not claim the right to be employed until the expiry of the probationary period, the employer has the right to terminate the contract if at any time it becomes clear that the purpose of probation has been frustrated.”³³

The following South African cases are illustrative:

In Pelzer v Jaystrong Construction (Pty) Ltd, the learned judge expressed the view that:

“It is true that an appointment on probation and the brevity of service at a particular employer are always factors that should be considered. It should not be overlooked that the first month or five in the employment of a new employer is a very difficult time for an employee. It might be that an employee has given up his job security at his previous work where he might have worked for many years”³⁴

There is no doubt that an employee on probation is effectively on “trial”, with the employer, public or private, with reservations to dismiss on the basis of unsatisfactory performance or conduct. That is why the Botswana General Orders require public servants to be regularly supervised and kept under continual and sympathetic observation, to assess the employee’s performance; furthermore, to provide them with guidance and readily available advice and

adequate support. In Rhodes v SA Bias Binding Manufacturers (Pty) Ltd, the respondent averred that applicant was dismissed during his probationary period because he did not fit into respondent's system of work. The court reinstated applicant and said:

“One would have expected that applicant should have been apprised of the fact that he did not fit into respondent's system in an effort to afford him the opportunity to improve prior to his employment being terminated.”³⁵

In Van Dyk v Marky Investments (Pty) Ltd, the respondent also averred that applicant was dismissed during his probationary period as the respondent was dissatisfied with his work performance. The court said;

“Clearly, poor work performance is an acceptable ground for dismissal. However, an employee must be told by his employer that his performance is unacceptable. He must be made aware, by means of written warnings, of the extent of his employer's dissatisfaction, and must be given an opportunity to improve his performance.”³⁶

In Enslin v Society for the Prevention of Cruelty to Animals, the court opined:

“Regarding the dismissal itself, the court takes the view that even if, as respondent contends there was a probationary period, then it would be expected of an employer during such a probationary period to counsel or to consult with an employee if that employee is found not able to handle the work.”³⁷

In Carlton-Shields v James North (Africa) (Pty) Ltd, De Villiers J proceeded to say the following;

“This court wants to add that an employee on probation should be treated

sympathetically and with patience, especially where he lacks experience in his new work field and he should therefore be given a reasonable opportunity to improve his work performance or to acquire the required skill.”³⁸

The above quotations reflect what is envisaged by the General Orders. They indeed capture and summarize the intention of the framers of the Orders.³⁹ According to the Orders, officers on probation should be formally attached to senior officers for the purposes of induction for a period of at least six months. Extension of probation is possible if the Permanent Secretary considers that the officer is capable of improvement, in those aspects of his/her work and conduct that are unsatisfactory. It is apparently clear from the above that the Orders and courts may have good intentions relating to the protection of the probationary employee, but it is to be conceded that such protection falls short of the protection accorded to someone employed on a permanent basis.

3.9 Promotion

“An officer is promoted when he is appointed to a post to which is attached a higher salary or salary scale with a higher maximum than that attached to the post to which he was last substantively appointed.”⁴⁰

Promotion means by implication, that the employer has tried and tested the employee and consequently found him/her to be worthy of retention. Promotion does mean advancement in rank or position, a clear indication of affirmation of satisfactory performance. Indeed if performance is below satisfactory level, there would be no good reason for the employee to be promoted. At the level of the positive determination to promote him/her the employee enjoys enhanced security of tenure. In the Public Service in Botswana, where a public officer is promoted to a higher office, the first six months (exclusive of any leave period) from the date of promotion constitute that officer’s probationary period for that public office.⁴¹

Similar considerations relating to probation apply, save that the incumbent will revert to his

former rank instead of dismissal from the service if he/she fails to perform satisfactorily or his/her conduct is unsatisfactory.⁴² There is virtually no reported Botswana case on the above topic, consequently, two South African cases have been selected to relay the relevant effect of promotion on tenure. The cases are, Administrator of the Transvaal and Others v Traub and Others, and Foster v Chairman, Commission for Administration.

In Administrator of the Transvaal v Traub and Others,⁴³ a letter signed by 101 doctors, including the respondents in this case, had been published in the *South African Medical Journal* in 1987. The letter described the conditions at Baragwanath Hospital where they worked as thoroughly bad. Other adjectives used in the letter relating to the conditions at the hospital were; “disgusting and despicable”, “inhumane”, “inadequate” and “horrendous”. Some of the respondents (who had obtained their medical degrees at the University of the Witwatersrand) did their internships at the hospital in 1986. In September 1987 each respondent had applied for elevation to the position of Senior House Officer. The position of Senior House Officer was held on a six monthly basis and each appointment was made on application. During November 1987 each of the respondents was notified that his or her application for the post had not been approved. It was common cause in the court *a quo* that the applications had been rejected because of their publication in the medical journal of September 1987. Delivering the majority judgement of Appellate Division of the Supreme Court of South Africa Corbett C.J., said,

“In general it is probably correct to say that a person who applies for appointment to a post is not entitled to be heard before the authority concerned decides to appoint someone else or to make no appointment. The present case, however, exhibits certain distinctive features which, in my view, take it out of the general rule ... the appointment of a young doctor to the post of SHO is a rung, and an essential one at that, in ladder of professional progress in the hospital hierarchy. Refusal to appoint an applicant to such a post constitutes a set-back to his professional career; and where the ground of refusal is unsuitability, also an impingement of his professional reputation ... In the circumstances of this case his

omission to give the respondents a hearing and to apprise them of the ground upon which he was contemplating a rejection of their applications constituted a failure on his part to observe the precepts of natural justice or, in other words, a failure to act fairly.”

Foster v Chairman, Commission for Administration⁴⁴ addressed a more or less similar situation in public employment. Foster was a public servant employed by the Department of Finance in the Inland Revenue Division where he occupied the post of Deputy Head of the Special Investigations Division at Cape Town. As a chartered accountant, he qualified for a professional allowance of R14 100 per annum if his performance was assessed by an evaluation committee to be “satisfactory” or R20 000 per annum if his performance was assessed to be “above average”. He had been employed since 1984 and had advanced rapidly, having received preferential promotion and having been promoted out of turn. In 1989 his professional allowance was increased to R20 000, his performance having been assessed “above average”. A few days after discussing his next evaluation with his immediate superior who made no mention of adverse factors, they had an altercation, the applicant alleging that there was corruption and tax evasion within the Department which were not being investigated. At the next evaluation sitting he was assessed as “not at all a candidate for promotion” on the grounds of “poor interpersonal relations.” The applicant thereby lost his professional allowance and his progress was stunted. The court held that in the circumstances where the applicant’s career had some six months earlier been described as “above average”, he had the legitimate expectation of being heard on the allegations against him before his promotional prospects were taken away from him.

The South African cases on this topic are of persuasive value to the Botswana courts. It is very likely that Botswana courts faced with similar situations may interpret the law in line with the reasoning in Administrator of the Transvaal V Traub and Others and Foster V Chairman, Commission for Administration.

3.10 Relocation

Relocation may assume various forms. It includes a transfer and a posting. The Public Service Act defines “transfer” as the appointment of a public officer to another public office with no alteration or potential alteration to salary.⁴⁵ The General Orders provide that an officer may be transferred from a post in a Ministry or Department to a post on a comparable grade in any other Ministry or Department in the interest of the public service. This is in some respects similar to the South African Act which provides:

“(1) Subject to the provisions of this Act, every officer or employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department, irrespective of whether such a post or position is in another division, or is of a lower or higher grade, or is within or outside the Republic.”⁴⁶

In both Botswana and South Africa, the transfer must be in the interest of the service. In Botswana the transfer must be on a comparable grade to any department or ministry whereas in South Africa it can be to a lower or higher grade in any department or division. Whilst transfers may sometimes work positively, more often than not they result in certain unintended consequences some of which strike at the core of employment security. In an effort to address these concerns, the General Orders provide that;

“Appointing authorities are discouraged from recruiting officers who have resigned from the Public Service to avoid transfer.”⁴⁷

As a principle, an officer may not refuse transfer, except where the proposed transfer is to a different Government service but where practicable the appointing authority is required to discuss the matter with the officer in advance.⁴⁸ The appointing authority is also encouraged where practicable not to effect transfers which have the effect of separating spouses.⁴⁹ The

question to pose, is whether someone is entitled to a hearing prior to the decision to transfer being taken against him/her. One of the earliest cases on the matter is Van Coller v Administrator, Transvaal,⁵⁰ a South African case.

In this case, the applicant had been the principal of a high school. He was transferred to a post as lecturer at a different college following upon the findings by a commission appointed to enquire into a bad relationship alleged to have existed between the applicant and parents of pupils attending the school. At no time was the applicant asked to attend the sessions of the Commission or to testify before it. He learnt of its findings when the respondent had decided to transfer him. The court expressed the view that the applicant had suffered a diminution of status even though he was receiving the same salary. Accordingly, as the respondent had taken a decision prejudicial to the applicant without first affording him a fair opportunity of stating his case the decision to transfer him was set aside.

The reasoning in the above decision was followed with approval by Howard J. in Ngubane v Minister of Education and Culture, Ulundi.⁵¹ The facts in this case were that the applicant, a teacher, had been employed as a rector of a college of education. He was informed by respondent that a charge of misconduct had been made against him and that he was relieved of his post and transferred to a post as principal of a school pending determination of the enquiry against him. The applicant contended that the latter post was inferior in status to that of rector and that the decision to transfer him had been taken without affording him a hearing. In coming to its decision the court expressed the view that in deciding to effect a transfer, the official concerned would have to enquire into and consider various facts and circumstances which affected the applicant's rights and such decision was a quasi judicial one. Furthermore, that, in the absence of any indication to the contrary, the *audi alteram partem* rule was presumed to apply. Accordingly, as the applicant had not been given a hearing of any kind, that decision had not been validly made and was set aside.

In Hlongwa v Minister of Justice, Kwa Zulu,⁵² the applicant, a public prosecutor, was transferred

from Pietermaritzburg to the Nkandla Court. The applicant contended, *inter alia*, that she suffered from a medical condition which required access to medical and hospital facilities which were more accessible in the Pietermaritzburg area and that she had recently become engaged to a man who was permanently stationed in Pietermaritzburg. In his celebrated judgment Didcott J said:

“Generally speaking it seems to me, however, people such as the applicant, people on the professional staff of concerns like the respondent’s organization, would not one thinks be transferred willy-nilly and unilaterally without any consideration at all of their personal circumstances and wishes. One certainly knows of its having been said from time to time that someone or other, a magistrate let us say, has damaged his chances of promotion by not accepting a transfer from a large city where he may have been for many years, where his children may be attending school, where his wife may be in full-time employment, to some remote, rural area. I have never heard of its having happened, however, that such a person has been transferred against his will. Perhaps that does not happen, but at the very least, if it does, one would be surprised were his wishes and personal circumstances to be disregarded entirely in the matter. One would be surprised, in other words, if that were to be done without any reference to him at all. Indeed, one cannot imagine that it would be conducive to a feeling of satisfaction and well-being on the part of such officials if they were liable to summary transfer without any opportunity for being heard at all on the point.”

Accordingly, the judge proceeded, the *audi alteram* principle had not been given full effect and the decision to transfer was set aside. It is contended that the approaches in the above cases reflect and represent current law in both Botswana and South Africa on transfers. Contrast those approaches however with the reasoning in Chule/Ngema v Minister of Justice, Kwa Zulu, and Another.⁵³

In the Chule and Ngema case, the applicants were public servants. They were transferred from their existing stations to outward stations. They contested the legality of the transfers it being common cause that they were transferred without prior consultation. The court pointed out that anyone who joins the public service must realize that the possibility of transfer, is as it were, an occupational hazard and that it may occur during his/her career. Inconvenience, hardship, health considerations or even the uprooting of the family did not entitle the applicants to be heard, the court opined. The Chule/Ngema decision has received critical attention from an academic writer⁵⁴ and serves to accentuate the contention that transfers which are involuntary affect tenure in the public service.

Posting is another area within the realm of public employment which raises similar concerns. An officer is posted when he/she is moved from one post to another in the same Ministry or Department in circumstances not involving promotion.⁵⁵ A transfer on the other hand involves relocation from one area to another within the same designation or on promotion. Like transfers, postings may not be refused, but where practicable the Permanent Secretary is required to discuss the matter with the officer in advance. Again, in determining postings Permanent Secretaries are enjoined to refrain where practicable to avoid the separation of spouses. Equally, here, the principles governing transfers discussed above are applicable.

3.11 Conclusion

Specific offices within the constitution have been rightly accorded security of tenure. These are the Attorney-General, Supervisor of Elections and Auditor General. In the present study, they together with judges of the High Court epitomize the highest level of accountability for their removal from office. A similar level of accountability for their removal is also to be found in similar positions in South Africa. It is contended that promotion positively affects employment security. Transfers and postings may negatively affect tenure if they are not acceptable to the

employees. The applicability of the *audi* principle may alleviate but not solve this problem in the sense that public employees may challenge the decision to transfer with no absolute guarantee of success as illustrated by the above decisions. Probation however, remains the only situation in the employment relationship where protection is at its minimum. We have looked at the genesis of the employment relationship in the public service in this chapter. What follows in the next chapter are the traditions and conventions governing that employment relationship.

ENDNOTES

1. Constitution of Botswana, Section 51 subsection 1 Cap 01:01. Laws of Botswana.
2. See Note 1 above subsection 2.
3. Section 51, Note 1 above.
4. Section 51, Note subsection 7.
5. Section 113, Note 1 above.
6. Note 5 above, subsection 5.
7. 1978 AC 435
8. Section 124, note 1 above.
9. Note 7 above.
10. Section 114 (1) note 1.
11. Note 9 above subsection 3.
11. Section 114 (4) Constitution of Botswana.
13. Section 66 (1) Constitution of Botswana.
14. Section 66 (2) Constitution of Botswana.
15. Section 66 (8) Constitution of Botswana.
16. Section 66 (9) and (10) Constitution of Botswana.
17. Section 66 (11) Constitution of Botswana.
18. Constitutional (Amendment) Act of 1997
19. Section 12 (a) note 17 above.
20. Section 12 (b) note 17 above.
21. Section 12 (c) note 17 above.
22. Section 12 (d) note 17 above.
23. Constitution of the Republic of South Africa 1996.
24. Section 189, see note 22.
25. Section 189, see note 22.

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26. Section 190, see note 22.
 27. Section 194, note 22.
 28. Union of South Africa, Fifth Report of Public Service Enquiry Commission appointed by His Excellency, the Officer Administering the Government of South Africa. Cape Town. 1947. Pg. 63.
 29. Chapter 26:01 Laws of Botswana, Section 11.
 30. General Orders 1996 pg 17 Republic of Botswana.
 31. Note 23 above.
 32. Note 24 above.
 33. Contemporary Labour Law Vol. 2 No. 4 November 1992 pg 41. See further *Ndamase v Fyfe-King* NO 1939 EDL 259.
 34. NH 11/2/1798, 8 August 1989. Note 27 above pg 42.
 35. (1985) 6 ILJ 106 (IC) at 120E.
 36. Unreported (case no. NH 11/2/1303) dated 13 October 1988.
 37. Unreported (case no. NHK 13/2/1580) dated 11 November 1988.
 38. (1990) 11 ILJ 82.
 39. They govern conditions of service of public servants in Botswana. They are made by the President in terms of section 35 of the Public Service Act, Chapter 26:01, Laws of Botswana.
 40. General Orders, 1996 Section 11 See Note 24.
 41. Section 12 (1) Public Service Act, Cap 26:01, Laws of Botswana.
 42. Section 12 (2) note 35 above.
 43. (1989) 10 ILJ 823.
 44. 1991 (4) SA 403.
 45. Section 2, Public Service Act, Cap 26:01, Laws of Botswana.
 46. Statutes of the Republic of South Africa, Public Service Act, 1994. (Proclamation No. 103 of 1994).
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48. Note 39 Section 12.2.
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 51. 1985 (3) SA 160. D & CLD.
 52. 1993 (2) SA 260. D & CLD.
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CHAPTER 4

PUBLIC SERVICE TRADITIONS AND TENURE

4.1 Introduction

The traditions inherited by the Botswana public service at independence from British colonial rule have affected and still continue to affect tenure in the public services. These traditions or conventions governing the position of public servants in the British constitution which in turn, either by design or historic accident, were passed on to the Botswana public service at the time of independence were: public service neutrality, permanency, autonomy, accountability, regard for the public interest, continuity, transparency, freedom from corruption, the duty to be informed, due diligence and confidentiality.

4.2 The principle of political neutrality

The principle of public service neutrality means that public servants will not be directly involved in the political process of policy making. This is predicated on the relationship between the political executive and the public bureaucracy in multiparty democratic states. This principle has been restated as follows:

...A public servant does not take part in active party politics. He/she does not take part in election campaigns and cannot stand for election unless he/she resigns. A politically neutral public servant can vote but does not make publicity about his/her political convictions. Public servants, according to this principle, serve the political party which wins the general election and forms the government, without being influenced by their personal political convictions or preference for a particular political party.¹

Another writer on the subject, basing his assertions on the concept of civil service political neutrality in Kenya proceeded to say the following;

The civil service was visualised as a neutral tool of implementation. This entailed a rather extreme approach to the separation of powers. A neat demarcation was being drawn between the legislative and executive functions of government, and the civil service was seen as a special department within the framework of the executive organ, completely apart from the ordinary political processes".²

The principle of neutrality of the public service is so well established in Whitehall that there is trust and confidence on both sides, the winning political party and public servants who understand the system.³

"Political neutrality is not to say that administrators will not play politics with respect to their own programmes and budgets, but rather they rarely become involved in macroscopic policy debates. A necessary element in giving the needed professional advice is thus a sense of neutrality - withholding oneself from the final decision"⁴

"A bureaucracy remains a separate tool at the disposal of any party that assumes political office and therefore has to be, by nature, permanent".⁵

When Botswana attained independence in 1966, it inherited a relatively small civil service modelled along the above principles. The role of public servants was theoretically to advise and implement the leadership policies. This tradition, which held the public service to be a separate estate from the political order - a profession whose fundamental principle was neutrality and whose tools were in the nature of data and other politically silent values⁶ is not accurately reflected on the ground. In practice there is a fairly intimate interaction between the executive leadership and the public service. As one writer opined:

"It is now generally accepted that political leaders primarily concerned with public policy making, have an important role to play in their execution; similarly, public officers make significant contributions in the process of policy formulation

besides being primarily responsible for their execution"⁷

...the various organs of government do operate in close interaction and a rigid conception of the doctrine would not be justified.⁸

It is a relationship which has been compared to that of a husband and wife in a Victorian household. The minister is the head of the household formally taking all important decisions, but doing this on advice he usually finds difficult and uncomfortable to disregard. Though he is head of the family, he is not really in charge of it, the household is controlled by the permanent secretary who remains publicly unknown, hence the concept of political anonymity of the civil servants.⁹

The relationship between the minister and the civil servant should be that of colleagues working together in a team, cooperative partners seeking to advance the public interest and the efficiency of the Department. The minister should not be an isolated autocrat, giving orders without hearing or considering arguments for alternative courses; nor on the other hand should the civil servant be able to treat him as a mere cipher. The partnership should be alive and virile, rival ideals and opinions should be fairly considered, and the relationship of all should be one of mutual respect on the understanding, of course, that the minister's decision is final.¹⁰

As indicated in the foregoing quotations, the bureaucracy is conceived as a tool at the disposal of the winning political party. The presupposition is that the neutral bureaucracy itself is permanent and there is no victimization. The founding President of the Republic of Botswana, Sir Seretse Khama, in his speech to civil servants in December, 1967 underscored the above by saying:

"What I feel obliged to say to you now has been said by Heads of several independent African States soon after their countries attained independence...

I consider it appropriate that I should preface my remarks by reminding you of the role that the public expect the permanent civil service of a democratic

government to play. In the first instance your duty, as I see it, is to generate ideas and to collate data for use by the politicians in formulating policy. Secondly, it is your duty to help us weigh up those ideas and evaluate them in the light of any possible consequences that may emanate from their implementation, as well as examine in the light of your administrative experience any ideas that we politicians may conceive...

I have referred to you as the "permanent" civil service, and I have used the word "permanent" with a purpose. As you know I and my government hold office at the will of the people of Botswana, and if at the next general election the electorate should choose to entrust the Government and destiny of this country to another of the existing political parties I would have to yield to the will of the people. You as the Civil Service would, however, be expected to carry on under whatever party government the people should choose for themselves. Both for the sake of your own security as employees of government, and for the sake of administrative efficiency, it is important that your tenure of office in the civil Service should not be subject to change of political party government."¹¹

The founding President also underscored the significance and importance of loyalty to the party in power;

"Personally while I am still entrusted with the heavy responsibility of leading this country I feel I am entitled to expect unqualified loyalty to the government and to the state from every civil servant in the Country, local and expatriate; and I trust no one will allow disaffection in any form to undermine that loyalty."¹²

The former President of the country, Sir Ketumile Masire has also endorsed his predecessor's commitment to the principle of public service neutrality.¹³ Addressing the Botswana Civil Servants Association he clearly stated the view that 'it is not possible for a civil servant who exudes partisan politics to be honest and dedicated in performing the functions of public service'.¹⁴ He told Botswana's civil servants 'who compromise the principle of integrity and

exhibit partisan inclinations to resign from public service to practice their politics in the open with a clear conscience.' ¹⁵ He observed that if partisan orientation was allowed in the public service, every time a new government was formed, all servants would have to resign and new ones be appointed, thus defeating the principle of permanency which in turn assumes absolute impartiality, integrity and dedication of the public service. ¹⁶

The Botswana General Orders¹⁷ specifically regulate political and union activities of public officers. They provide that officers are entitled to their own political views but are required to serve all Governments with equal loyalty whatever party may be elected and whatever the officers' political affiliation may be. The Order continues to state that officers may vote at an election if they are eligible to vote, and may attend but not speak at political meetings.

According to the Order, no officer may:

- (i) publicly speak or demonstrate for or against any politician or political party;
- (ii) be an active member nor hold office in any political party or association;
- (iii) speak in public on any political matter, except in the course of his official duties;
- (iv) publish his views on political matters in writing;
- (v) take an active part in support of any candidate in an election;
- (vi) hold political office in any Local Government body, except where the office is held *ex officio*; or
- (vii) do anything by word or deed which is calculated to further the interests of any political party or association. ¹⁸

The regulation of political behaviour by persons holding public office in Botswana is consistent

with that of other Anglophone states with multiparty systems in Africa.¹⁹ In the case of those Anglophone states including Botswana, the rewards of a politically neutral public service are a relatively secure and permanent job in the service unaffected by the vicissitudes of political forces. Indeed the neutrality of the service has been said to be complementary to the 'merit system', according to which appointments and promotions to various positions in the public service are expected to be governed by merit, which is assessed through established legal-rational mechanisms and not on the basis of political affiliation or patronage.²⁰ The correlation between political neutrality and permanency is further pursued below.

4.3 Permanency of the public service

"Political neutrality is predicated upon the existence of a career civil service which owes allegiance to any duly elected government, and upon the preservation of a sharp dividing line between on the one hand parliamentary and ministerial officials who are not permanent and on the other hand the permanent and non-ministerial public servants."²¹

Indeed the permanency of the service in Botswana is endorsed by the General Orders which govern the conditions of service of public employees. They provide:

"Elections may pass, and political power may ebb and flow, but the Public Service Stands firm. Career Officers, serving the Government of the day without fear or favour, provide the continuity that is essential for stability and public confidence."²²

"...permanence in a Civil Servant means something more than security of tenure or the mere retention of a job for long time. it means the retention of that job during a change of government."²³

By reference to 'Career Officers' the General Orders envisages a situation where a young man or woman is recruited at an early age into the service with an implied promise of a life career during which he works his way up the hierarchy of the service. This service is distinctly non political

having certain key features; a uniform system of recruitment into the service, uniform rules of conditions of service, promotion on the basis of merit and uniform rules on pensions. The promise of a career means an assurance of life-long employment which can be terminated only by mental or physical incapacity or the commission of a criminal offence.²⁴

The importance of the existence of a uniform system of recruitment means that arbitrariness, favouritism, nepotism and cronyism among other vices do not creep into the system thus rendering it open to abuse by politicians. Without a uniform system, politicians could pick and choose whom they liked. The whole idea and underlying basis of a permanent public service would be destroyed. Moreover, the existence of uniform rules of conditions of service guarantees that the "playing fields" are level, that no public servant is treated more favourably than others. In Botswana, the Public Service Act and Regulations and the General Orders provide that uniformity, and consequently impact on employment security. The pension scheme, which entitles an officer to additional remuneration on his retirement on the grounds of age is an important feature of the career system supporting and sustaining permanence in the public service. This form of compensation for termination of employment at the end of one's productive years in the public service is an attractive feature of the public service career system. It is something to look forward to at the end of one's career as a reward for the selfless sacrifice made whilst in the public service. Pension should not be viewed in isolation but should be considered as a built in feature of the public service career system.

Inevitably the consequences of a career system in the public service supported by a host of regulations predominantly protective in nature and buttressed by the application of public law principles, are that almost every public servant remains in his job until retiring age. The retiring age in the service varies between 45 and 65 years.

Generally, the appointment system directly impacts on employment security of public servants. There are some officers who are subject to presidential discipline and who hold office at the pleasure of the President, and in respect of these officers no disciplinary procedures are prescribed and there is no appeal against the decision of the President.²⁵ These are political appointees whose tenure may be linked to the Presidential term of office. Such officers include

Ambassador, High commissioner, Principal Representative of Botswana in any other country or accredited to any international organisation, Secretary to Cabinet and Commissioner of Police.²⁶

The presidential involvement in these appointments affects their loyalty. It is difficult to imagine a Secretary to Cabinet of a former Government continuing to perform his functions with equal loyalty to a new Government which is voted into power. Even if his loyalty is not in doubt, automatic confidence from the new government would be difficult to come by. In other jurisdictions like the United States of America, these are political appointees and what is entirely clear is that political appointees qua-political appointees who may or may not take the form of presidential aides have their term of office linked to that of the United States President. The concept of permanence in the face of changes of government does not apply to them in those circumstances²⁷.

4.4 Anonymity, accountability and autonomy

Generally, civil servants as mentioned in the preceding paragraphs are required to be loyal to the government of the day and to carry out its decisions with "precisely the same energy and goodwill, whether they agree with it or not."²⁸ It is in return for this loyalty that they remain anonymous and insulated from public criticism and public praise.²⁹ The general understanding is that civil servants are accountable to their departmental ministers who are in turn accountable to Parliament for the conduct of the civil service.³⁰ The General Orders, governing the conditions of service of Public Servants in Botswana in its Charter on the public service, reflects accountability as one of the nine principles charting the course of the public service in the country. This accountability is described as follows;

"Cabinet Ministers are politically accountable to the public for the successes or failures of the Ministries they supervise. Permanent Secretaries are administratively accountable to the public for the performance of their Ministries. Every Public Officer is, however, accountable for the due performance of his duties and for the general successes and failures of those he supervises. Accountability carries with it the right to share the credit for the successes of the Ministry, the Department or the Public Officers themselves, but also the

responsibility to share or shoulder the blame for their mistakes or failures."

In a general overview on the 'Structure of the public service in Botswana, the author³¹ stated;

"A cabinet Minister is responsible for every act done or omitted to be done in his ministry. Occasionally, Ministers delegate certain things to civil servants, and when this happens, all what the Minister is delegating is his authority but he should accept the consequences of any defect of administration or any policy which provokes criticism in Parliament. He cannot avoid responsibility by trying to pass the blame to civil servants."

This is in conformity with the provisions of the 'Public Service Charter' as aforesaid. Indeed the Minister is the political head of the Ministry and consequently also its political mouth-piece. It is here that the principle of anonymity manifests itself strongly. Since the public servant is denied public praise it also logically follows that he should be protected from public criticism. The same author continues;

"The only way in which the blame could be passed directly to a civil servant is if the said civil servant could be allowed to exculpate himself through the same form and on the same platform. An attempt to allow public officers to respond publicly to political criticisms can only serve to place their integrity and political neutrality in jeopardy."³²

Ideally, the public servant will remain anonymous if he has acted in accordance with the instructions of his superiors including the Minister. He should also be protected if he has acted in accordance with policy laid down by the Minister or carried out his explicit order. It is entirely clear that anonymity and accountability have a significant impact on security of tenure in the public services. Without anonymity, the public servant would become exposed to public criticism thereby making it difficult for him to execute his duties without fear or favour. There are situations where for example, the public servant has taken action against the Minister's instructions or policy or without the Minister's knowledge or where the public servant's conduct

is deplorable. It is in such circumstances that the anonymity and protection could be lost.

"...there is no obligation on the part of the Minister to endorse what he believes to be wrong or defend what is obviously wrong. In the circumstances, the matter would be the subject of disciplinary proceedings and the Minister would provide full account to Parliament."³³

The question of tenure is interwoven with the public service traditions. Neutrality, permanency, integrity, accountability, anonymity, loyalty and autonomy all in their various degrees impact on public service tenure. In Botswana, the constitutional dispensation of a multi-party set up reinforces the autonomy of the public service. The constitutional context predicated on the doctrine of the separation of powers leaves little allowance for the politicisation of the service. Only states with one party available for election as the Government of the day heavily politicize the service consequently eroding its neutrality, permanency and autonomy, factors impacting on the tenure of public officers. To date, the autonomy of the Bureaucracy in Botswana has been maintained by the country's constitution, Public Service Act and Regulations and General Orders. These Statutes have not been amended to allow for any systematic politicisation of the service.

4.5 Other principles

The above are not the only public service traditions in Botswana. There are others which have also fostered a proud tradition of public service and expected to be upheld by every officer. These other principles which are part of the nine set out in the Charter³⁴ are set out below for completeness and comparative jurisprudence.

4.5.1 Regard for the public interest

The Charter indicates that as public servants, their conduct must be characterised by courtesy, humility, respect for every person, regardless of station in life, and regard for the public interest. This public interest according to the Charter encompasses respect for the law, immediate compliance with court orders, adherence to principles of natural justice, full consideration of both

long term and short term effects of administrative action. It also covers adherence to previous commitments including international obligations, avoidance of personal interests and the consideration of all matters relevant to any issue.

4.5.2 Continuity

This is more or less modelled along the principle of permanency. The Charter states that the service is expected to operate in a regular and reliable manner, so that all services which it offers to the public, including decision-making services are provided on a continuous basis. It further states that situations of non-continuity where key officers in a field are away at once so that service is interrupted or delayed should not be permitted to occur. Similarly, the Charter continues, continuity of knowledge and experience should not be disturbed by block transfers or relocation of public officers. Continuity also demands that powers be delegated when sole decision makers are absent. This effectively guarantees prompt and predictable service to the general public.

4.5.3 Transparency

This is an aspect of accountability. The Charter provides that transparency does not entitle public officers to breach their normal duty of confidentiality under the Public Service Act, nor does it entitle members of the public to have access to private information concerning others which is to be found in the public service files. According to the Charter, members of the public are entitled to have access to non-confidential information on the operation and activities of the public service. Administrative law principles of natural justice form part of this principle of transparency. Those interested in administrative decisions or actions are entitled to be heard before decisions adverse to them are made and to be informed of the reasons for such decisions and of any avenues of appeal which may be open to them. This according to the Charter is of equal application to members of the public and public officers.

4.5.4 Freedom from corruption

Public officers are required not only to be on their guard against corruption, abuse of office and influence peddling in all its forms, but actively to participate in the fight against corruption by promptly reporting all improper activities and by helping to bring offenders to justice.

4.5.5 The duty to be informed

The Charter enjoins public officers to be conversant with the Public Service Act, General Orders, Financial Instructions and Procedures, Supplies Regulations, Transport Regulations and all other rules governing public officers. They are required to keep themselves informed of all matters pertinent to their services.

4.5.6 Due diligence

This requires that the concerns, complaints and applications of members of the public should be dealt with promptly and thoroughly. Officers are required to adhere to the highest standards of diligence and efficiency as a matter of national duty and pride.

The above principles together with others inherited at independence provide the necessary framework on which service to the public is based. Public employees having a specific position within the Botswana constitution and in most cases forming part of the executive wing of government are subject to the above principles or conventions. Underscoring the importance of these conventions one writer proceeded to say the following:

A civil service in which this tradition is widely accepted and understood is secure in its future."³⁵

4.5.7 Confidentiality

This is an important aspect of public service tradition or convention. It cuts across most if not all

public services in the world. In Botswana, public servants are required to sign a declaration in the relevant form as an acknowledgement of their obligation of confidentiality under the Public Service Act.

It is also an offence under the National Security Act³⁶ to impart confidential information gained as a public officer to any unauthorised person either during service or after leaving the public service. This relates to breaches of National Security but breaches of confidentiality in the public service are also covered.³⁷ This obligation of confidentiality is clearly illustrated by the Wright³⁸ case which occurred in the United Kingdom.

Wright, a former member of the British Security Service who had gone to live in retirement in Tasmania, was the author of the book *Spycatcher* which contained an account of alleged irregularities in, and alleged unlawful activities carried out by members of the Security Service. By reason of the contract terms of service with the Crown and the provisions of the Official Secrets Act 1911 there was no possibility of the book's publication in the United Kingdom.

Accordingly he entered into an agreement with the Australian subsidiary of an English publishing company for the book's publication in Australia. In September 1985 the Crown commenced proceedings in New South Wales to prevent such publication, but it appeared that the interim relief obtained in New South Wales did not prevent Wright and his publishers from publishing the book outside Australia. Accordingly steps were taken to have the book published in the United States where, in the circumstances, no injunctive relief could be obtained to prevent publication. On 22 June and 23 June respectively, the *Observer's* and the *Guardian's* newspapers each published in the United Kingdom an article on the Australian proceedings which included Wright's allegations. The Attorney General was granted interlocutory injunctions against the newspapers until trial restraining them from disclosing or publishing any information obtained by Wright.

The court held that members and former members of the Security Service owed a lifelong duty of confidence to the Crown and since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain

the newspapers from future publication of any information on the allegations in Spycatcher.³⁹

4.6 Conclusion

Public service traditions constitute an important and indispensable politico-legal device, whose effect is basically to ensure that as governments come and go, with political power ebbing and flowing public servants retain their jobs. A public service that has cultivated virtues of loyalty, integrity, impartiality, autonomy and accountability amongst others is certain to be secure in its future. These virtues are central concerns and constitute the ethics of the service. Some of these traditions may or may not have the force of law but any public servant abiding by these principles will certainly have permanent tenure. This should of course be construed subject to contentions made in the other chapters of this study. If the public consider or it is apparent that the public servant identifies with a particular ideology or party in the performance of his duties, his impartiality would be questionable and consequently his tenure would be seriously at risk. What is entirely clear from the above discussion is that any serious breach of the service traditions more or less impacts on that particular public servant's employment security.

In this chapter we have considered the traditions and conventions governing the conduct of public servants both in their relations with each other and in their dealings with the public which they serve. These traditions and conventions become applicable on appointment to the service. In addition, the public servant automatically becomes subject to the wider prevailing regime of public service labour relations. We turn in the next chapter to examine this public service labour relations regime.

ENDNOTES

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5. See note 4 above pg 117
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7. See note 1 pg 161.
8. See note 2 above.
9. Mading D. (Master of Public Administration Candidate University of Botswana) The Neutrality and Anonymity of the Public Service. (unpublished paper) pg 3.
10. Morrison H., *Government and Parliament*, (Oxford University Press, London. 1954).
11. Temane B. K., The Evolution and Development of the Botswana Civil Service. (1890-1990) (Gaborone, 1990) pg 135-136
12. Note 10 above at pg 140
13. Haile K. Asmerom and Elisa P. Reis (editors) *Democratization and Bureaucratic Neutrality*, (Macmillian Press Ltd, London 1996). Pg 201
14. Note 13 above pg 205.
15. Note 13 above pg 205.
16. Botswana Daily News, January 1985
17. General Orders Governing the Conditions of Service of the Public Service of The Republic of Botswana (Government Printer, Gaborone 1996) pg 31
18. See Note 17 above.
19. Nwabueze B.O; *Presidentialism in Commonwealth Africa* (C. Hurst & Company) London, 1974 page 180.

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20. See note 13 above.
 21. Drewry G., and Butcher T.: *The Civil Service Today* (Basil Blackwell Ltd, Oxford. 1988) pg 217.
 22. Note 13 above pg 3.
 23. Parris H.; *Constitutional Bureaucracy* (George Allen and Unwin, London. 1969) pg 27.
 24. A career civil service is one of the traditions left behind by the British in their former African territories, Botswana being one of them. The promise of career is however subject to laws governing the conditions of service of public service employees. See Anthony H. Rweyemamu; Goran Hyden - *A Decade of Public Administration in Africa*, (East African Literature Bureau, Nairobi 1975) pg 37.
 25. See Note 17 above, Order 47 pg 37
 26. See note 17 above Order 44, pg 36 There are some presidential appointments whose tenure is constitutionally protected and has been the subject of our discussion in Chapter 3. These appointments include appointment to the Office of Attorney-General.
 27. Hamilton V. Charles, *American Government* (Scott, Foresman and Company) Dallas, 1982 page 319.
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 29. Note 28 above.
 30. Note 28 above.
 31. Temane B.K.; *The Evolution and Development of the Botswana Civil Service* (1890-1990) (Gaborone, 1990) pg 151.
 32. Note 31 above.
 33. Note 31 above at pg 152
 34. This Chapter is in the General Order governing the conditions of service of public servants and serves as a guide to officers both in their relations with each other and in their dealings with the public which they serve.
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CHAPTER 5

PUBLIC SERVICE LABOUR RELATIONS

5.1 Freedom of association

Freedom of association (from which the right to join a union and within that union to bargain collectively with others is derived) is a fundamental human right. According to the “Declaration of Philadelphia” in 1944 by the labour conference, it is essential to sustained progress.

Public service labour relations (especially those of Botswana and South Africa) impact significantly on security of tenure of public servants. This chapter emphasises the contention that there is more security of employment in circumstances where an employee is allowed to join a union and within that union bargain collectively with others.

An attempt is made to find out how aspects of industrial relations in the two countries have significantly been influenced by conventions and recommendations of the International Labour Organisation. An argument is made that International labour standards impact positively on security of tenure in both the public and private sector especially the right to freedom of association. The study acknowledges the special and peculiar nature of the public service but however urges for an indivisible labour law regime for both public and private employment.

An outline of unionisation in the public service in Botswana and South Africa is made. The position in Botswana is less than satisfactory in that only associations are permitted and only manual workers employed by the state can organise and belong to unions. The South African position is found to be appealing and it is argued that Botswana can learn from its experience.

5.2 International Labour Organisation conventions, recommendations and resolutions

International Labour Organisation standards are intended to be universal in nature.¹ They are intended to be applicable to and capable of attainment by countries with very different social

structures and at different stages of industrial development.² They are flexible and set as meaningful targets for social development. In framing any conventions or recommendation the International Labour Organisation has "due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries."³ Systematic efforts are made in the standard setting process to give effect to this constitutional principle.⁴

International labour standards have exerted and continue to exert their influence in every corner of the world, in industrialised and developing countries alike, that the policy constantly pursued by the International Labour Organisation of adopting standards designed to be universally applicable would appear to be still fully valid today.⁵

International Labour Organisation standards may either take the form of a convention or recommendation. A convention is designed to be ratified. Like an international treaty, a ratifying state undertakes to discharge certain binding obligations, and there is regular international supervision of the way in which those obligations are observed.⁶ A recommendation on the other hand, gives rise to no binding obligations but provides guidelines for national policies and action. It is essentially for this reason that workers' delegates to the International Labour Conference often press for the adoption of conventions whereas the employers' delegates are more in favour of recommendations.⁷

It is against this background that when we consider the question of unionisation in the public service, particularly the right to join a union, the relevance of International Labour standards comes to the fore. The question then becomes, what do International Labour Organisation conventions and recommendations say on the matter?

The question of unionisation, whether in the public or private sector is inextricably linked, if not part of the broader fundamental human right called freedom of association. Human rights are an essential concern of the International Labour Organisation, and none of them is more important to it than freedom of association.⁸ As a specialised agency within the United Nations system, the

International Labour Organisation is an organisation with the fundamental purpose of defending and increasing human freedom, and in particular civil liberties.⁹

5.3 Freedom of association conventions

The International Labour Organisation has adopted several conventions related to freedom of association. Conventions no. 87 and 98 belong to the category of its instruments the purpose of which is to promote and guarantee certain basic human rights within the broader sphere of social rights.¹⁰ The principles embodied in these Conventions do not presuppose any standard pattern of trade union organisation, but they serve as a yardstick against which to measure the freedom of a trade union movement, irrespective of the way in which it is organised.¹¹

Conventions no. 87 and 98 cover different areas as regards the exercise of trade union rights and their provisions are intended primarily as safeguards to guarantee the exercise of these rights as appropriate to the area concerned.¹² Both conventions protect the right to establish and join a trade union, but not freedom of non-association.

"In fact, during the discussion of the first of these instruments an amendment to secure recognition of the right not to join an organisation was rejected. Subsequently, at the time of the adoption of Convention 98, it was agreed that this instrument should not be interpreted as authorising or prohibiting union security arrangements, such questions being matters for regulation in accordance with national practice. In consequence, legal systems which permit the conclusion of union security clauses are not deemed to be contrary to convention 98, nor are those which prohibit such practices in pursuance of the principle of freedom of non-association."¹³

It should be borne in mind, that the fundamental inquiry here is security of employment in the public service. To the extent that this inquiry is being examined we are constrained to consider the question of unionisation in the public service which is bound with the broader fundamental right of freedom of association. It will be argued in the course of the study that the extension of freedom of association to workers, either in the public or private sector greatly enhances and

promotes security of employment. The following freedom of association principles taken from: International Labour Organisation Principles, Standards and Procedures Concerning Freedom of Association¹⁴ underscore the importance and significance of the above contention.

5.4 Freedom of association convention no. 87

- (I) Recognition of the right to organise: the right to organise is to be granted to workers and employers, without distinction whatsoever (Article 2 of Convention No. 87). Only the armed forces and the police may be exempted by national laws or regulations. The general right guarantees freedom of association without distinction or discrimination in respect of occupation, sex, colour, creed, race, nationality or political opinion. The supervisory bodies of the International Labour Organisation have clearly indicated that national legislation that seeks to deny or restrict the recognition of the right to organise of certain groups, whether established by occupation or by other criteria, contravenes the convention.¹⁵

While the tenor of Convention no. 87 is crystal clear, and in conformity thereof, virtually all countries recognise the right of association of workers in the private sector in order to defend their rights by being organised, the same does not always apply to public servants and officials. There are those countries whose public servants have exactly the same right of association as their private sector counterparts; in others the right does not exist for certain classes of public servants or is curtailed by restrictions that do not normally apply to other workers. And in some countries, the legislation does not recognise the right of all public servants and officials to organise, or explicitly refuses them this right.¹⁶

In Botswana a distinction is made between public servants who are manual workers and those who are not manual workers. Manual workers who are public servants are then accorded the right to form and belong to unions in order to defend their rights but the other class of public servants are allowed to set up associations which are in fact recognised by the government as the employer for the purpose of discussing wages and other aspects of working conditions. The fact that their right of association is recognised

by law does not mean that as public employees they are able to establish effective organisations to protect their interests. Consequently, Botswana belongs to that category of countries where the right to form and belong to trade unions for certain classes of public servants does not exist or is curtailed by restrictions that do not normally apply to other workers. The lack of effective organisation seriously compromises and erodes the ability of public servants to negotiate with their employer for a better and more secure employment relationship.

Although the armed forces and the police are the only classes that may be excluded under Convention no. 87 from the right to establish trade unions, the legislation in some countries also excludes fire service personnel and prison staff (the latter on the grounds that they are comparable to the police). So far as the International Labour Organisation is concerned, the functions exercised by these classes of public servants would not normally justify their exclusion from the right to organise under Article 9 of the Convention.¹⁷

5.5 Establishment of organisations

It must be possible for organisations to be established without previous authorisation (Article 2). In terms of Article 2 workers and employers should not have to seek permission from the public authorities before setting up an industrial organisation. Clearly and by implication, the authorities should not impose legal formalities which would be equivalent, in practice, to previous authorisation nor constitute an obstacle amounting in fact to a prohibition.¹⁸

5.6 Free choice of organisation

Workers and employers are guaranteed the right to establish and, subject only to the rules of the organisation concerned, to join organisation of their own choosing (Article 2). This freedom of choice in establishing and joining organisations must be regarded as one of the foundations of freedom of association. It entails among other things, the right to determine the structure and composition of trade unions; to set up one or more organisations in any one enterprise, occupation or branch of activity, and to establish federations or confederations in full freedom.¹⁹

The setting of a minimum number of members for an organisation could well affect freedom of choice by making it more difficult to establish an organisation. The principle to be applied in this regard is that where an effort is made to specify the minimum number of members for the founding or the existence of an organisation, this number should be set at a reasonable level, so that the establishment of the organisation should not be hindered.²⁰

5.7 Functioning of organisations

Organisations shall be free from interference by the public authority when drawing up their constitutions and rules, electing their representatives, organising their administration and activities and formulating their programmes (Article 3). International Labour Organisation instruments seek to guarantee not only the right to establish and join organisations but also the freedom of these organisations to function.

5.8 Dissolution or suspension

Organisations shall not be liable to be dissolved or suspended by administrative authority. The dissolution and suspension of trade unions are regarded by the International Labour Organisation as extreme forms of interference by the authorities in the activities of organisations. In view of the gravity of these measures, it is important that they should be accompanied by the necessary guarantees, which can be secured only under normal judicial procedure. The dissolution of a union involves such serious consequences for the occupational representation of workers that it is preferable, in the interests of labour relations, that action of this kind should be taken only in the last resort, after exhausting other possibilities with less serious consequences.

5.9 Federations and confederations

Organisations shall have the right to establish and join federations and confederations (Article 5). Freedom of Association Convention No. 87 encourages and gives trade unions organisations the freedom to join or establish federations and confederations so that they can effectively represent their workers. Employers also have a similar right to join and establish federations and

confederations to articulate their interests.

5.10 International affiliation

Organisations, federations and confederations shall have the right to affiliate with international organisations of workers and employers (Article 5).

5.11 Organisation and the law

In exercising the rights provided for in the convention, workers and employers and their respective organisations shall respect the law of the land; however, the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in the convention (Article 8).

5.12 Anti-union discrimination

Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment, both at the time of entering employment and during the employment relationship. Such protection shall apply more particularly in respect of acts calculated to:

- (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
- (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours (Article 1 of Convention 98).

5.13 Importance of convention 87 (1948) concerning freedom of association and protection of the right to organise and its impact on security of employment in the public service

Freedom of Association is one of those fundamental human rights enunciated by the United Nations in December 1948 in the Universal Declaration of Human Rights. It is also in the International Covenant on Civil and Political Rights of 16th December 1966. Amongst those principles enunciated in the Universal Declaration of Human Rights which are of equal importance (some of which are pertinent to the present study) are:

- (a) the right to freedom and security of the person and freedom from arbitrary arrest and detention;
- (b) freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers;
- (c) freedom of assembly;
- (d) the right to a fair trial by an independent and impartial tribunal;
- (e) the right to protection of the property of trade union organisations.

The International Labour Organisation, owing its existence largely to the promotional efforts of trade union organisations, could not fail to give recognition in its constitution of 1919 to the principle of freedom of association as of one of the objectives to be attained by the Organisation through its programme of action.²¹ The "Declaration of Philadelphia" in 1944 by the Labour Conference re-affirmed this principle, it being emphasised that "freedom of expression and association" are essential to sustained progress. There is no doubt, that it was because of the continued importance of this principle that when most of the former British colonies in Africa gained their independence, they had freedom of assembly and association enshrined in their constitutions, and protected as a fundamental right and freedom of the individual. The power of the workers irrespective of whether they were employed in the public service or in the private sector lay in their ability to freely associate and freely organise themselves into workers

organisations or associations, and only then could they collectively through representatives of their own choice, articulate their interests and defend their rights. Consequently freedom of expression and association is the vehicle through which they can speak and be heard. Taking the argument to its logical conclusion, workers security of tenure is better protected through continued dialogue by workers representatives with their employers or employers organisations. As the old adage goes; "Unity is Strength". The strength of the workers lies in their unity. This then brings us to the International Labour Organisation principles, standards and procedures outlined above concerning freedom of association. The above outlined principles are so basic to ensuring security of employment in the public service that a denial to public servants of any one of them seriously compromises and threatens to erode the collective power that public servants potentially have either as associations or organisations or in whatever form they may exist.

5.14 Collective bargaining in the public service

Convention no. 87 and Convention no. 98 protect the right to establish and join a trade union. The latter Convention is mainly concerned with the protection of trade unions and is also an International Labour Organisation instrument setting forth its basic principles in respect of collective bargaining, the obligation to promote this practice and the voluntary nature of such bargaining.²² The right to establish and join trade unions would itself be empty if there was no protected right to organise and bargain collectively. Consequently, collective bargaining is fundamental to the whole question of security of tenure. While Convention no. 98 is supposedly not meant to deal with the position of public servants engaged in the administration of the state nor was it to be construed as prejudicing their rights or status in any way, it is very relevant to the present enquiry. Its relevance lies in it being an accepted institution in all modern industrial societies to resolve disputes between employers and employees and to determine minimum wages and working conditions. While this study vehemently agitates for collective bargaining structures to be extended to the public services to the maximum extent possible for purposes of employment security, it is however appreciated that the public service has special characteristics which are found in various degrees in most countries. For purposes of completeness it is important that we explore some of the arguments for treating public sector work differently from the private sector.

The following were some of the arguments identified in a paper entitled; "Collective bargaining in the Public Sector"²³ at a conference on Labour Law.

- (i) Executive nature of service: according to the paper, the exclusion of public sector employment collective bargaining is sometimes founded on the premise that the service is semi-political and vocational and that the purpose of government is not profit or self interest, but public interest. Functionaries in the public service are seen as a neutral subordinate component, at the call of the government of the day to execute policy and law. The author however contends that the above ground is anachronistic, that the service may be in the public interest although the employees who deliver the service motivated by their own and not the public interest.
- (ii) Collective bargaining jeopardises state security: on this score it is argued by the author that there is concern that if employees in government service have a right to associate this may clash with state security. For this reason even the International Labour Organisation Convention on Freedom of Association and the Right to Organise which guarantees workers the right to form and join organisations of their own choosing to all workers, permits exclusion of the armed forces and the police.
- (iii) Public sector employment is quintessentially political: collective bargaining and strikes in the private sector are in part justified precisely because they are private and the economic pressure of a dispute between an employer and its workforce is felt by the employer who controls the workplace and has the capacity as well as the legal or at least equitable obligation to negotiate a settlement. Secondary strikes involve employers who are not directly in dispute with the striking workers and are viewed less favourably and tend to receive little or no legal support.

Sarah Christie²⁴ argues that in a sense all public sector strikes are secondary as the social and economic costs of public sector labour disputes are not carried by the state as employer, but by an unpredictable community. She gives the example that if clerical staff

in the department of manpower were to strike, Workmen's Compensation Act benefits are denied to people who have nothing to do with the dispute and no direct or immediate capacity to effect change in attitude or behaviour of those directly in conflict.

- (iv) Public service tends to be a monopoly: it is argued by the author, that public service is often a monopoly or near monopoly and this may make it difficult to set up a substantive service should labour disputes threaten service continuity. That furthermore, the consequences may be devastating to public health and security.
- (v) Public sector provides essential services: there is an assumption here that all public or government service is essential and that the focus of legislative control is directed at ensuring 'the continuation of the service at a basic level, either by the workers in dispute or by others'.

Christie in her paper argues that while some services may be essential there are inconsistencies. Some services she argues are essential and yet are unregulated. Others are deemed essential yet they are not. The Labour Relations Act outlaws all strikes in essential services. Discussing the notion that the public service is essential, the author says

"There is little factual support for the notion that public service is preternaturally essential. The functions and services of modern governments (and local authorities) vary in the degree to which they are essential to public welfare and attempts to define essential service are bedevilled by social and economic relativism. As state departments and agencies become privatised, the nature of the state as employer has changed. The service supplied by the military, the police and fire fighters is different in importance and kind from that of the public service and teachers. We should explore the extent and nature of the public service and consider whether a particular service is monopolistic and the extent to which the state is involved in economic activity."²⁵

The above are some of the arguments generally put across to vitiate the contention that there

should be collective bargaining in the public service. It may be quite difficult to refute some of the above arguments and the International Labour Organisation recognizing this dilemma, allows some flexibility in the choice of methods of determining conditions of employment in the public service. Procedures enabling conditions of employment to be negotiated between public authorities and the organisations concerned are envisaged by the International Labour Organisation or such other methods as will allow representatives of public employees to participate in the determination of those matters. Article 6 of Convention 98 allows public servants engaged in the administration to be excluded from its scope (collective bargaining and the obligation to promote it) but other categories should enjoy the guarantees of the convention and therefore be able to negotiate collectively their conditions of employment, including wages.²⁶ Countries like Argentina, Belgium, Guatemala, Italy, Spain and Portugal have legislation guaranteeing the right of collective bargaining of the public servants.²⁷ It is however denied to public servants in Colombia, Iraq, Liberia and Pakistan amongst other countries.

It should be borne in mind that the focus of the present study is the importance of unionisation in the public service and how it affects security of employment therein. Amongst background material are the International Labour Organisation convention and recommendations of freedom of association and collective bargaining. There is absolutely no doubt that the essence of their existence is to greatly enhance the bargaining power of the workers. This is irrespective of where they are employed, semi-public, public or private employment. What follows is the position of unionisation in the public service in Botswana. The position in South Africa will also be looked at for purposes of comparative jurisprudence.

5.15 Unionisation in the public service in Botswana

In considering the issue of public service unionisation in Botswana, the genesis is none other than the constitution of the country, of which the relevant section is 13(1), falling under protection of fundamental rights and freedoms of the individual. The section is reproduced below in its entirety.

"13(1) Except with his own consent, no person shall be hindered in the enjoyment of his

freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
 - (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
 - (c) that imposes restrictions upon public officers, employees of local government bodies, or teachers; or
 - (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration) and conditions whereby registration may be refused on the grounds that any other trade union already registered, or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not be reasonably justifiable in a democratic society".²⁸

The freedom to assemble and associate with other persons and in particular to form and belong to trade unions or other associations for the protection of ones interests is generally permitted by the constitution of Botswana. While the constitution allows restrictions to be imposed on public officers, employees of local government bodies or teachers in respect of forming or joining trade unions or other associations, the present restrictions arise mainly by necessary implication. The Employment Act of Botswana which mainly regulates employment relationships between private and parastatal sector employees and employers allows public sector employees of the industrial class to form and belong to trade unions. The term "employee" in the Employment Act has been defined to include industrial class employees in the public sector. The industrial class employees apart, all categories of employees in the primary sector are not allowed to form and belong to a trade union or to enter into collective bargaining or any meaningful negotiations about the terms and conditions of service with the employer, the government. The Public Service Act, which is concerned with the organisation of the civil service, appointments and conditions of service, stipulates that the President may make regulations for the setting up of a body for the purpose of consultations between government and public sector employees.²⁹ The body that has been created to cater for such consultations in central government is the Botswana Civil Servants Association, and in local authorities is the Botswana Unified Local Government Service. Both bodies can only consult, and cannot enter into any collective bargaining with government on behalf of their members. This conspicuous absence of collective bargaining or the denial thereof to public servants other than to the industrial class workers deals a terrible blow to job security in the public service, and consequently renders the so-called freedom of assembly and association enshrined in Section 13 of the constitution a hollow right for the majority of public servants. It is perhaps convenient at this stage to sketch an outline of the consultation process between central government and public servants.

5.16 The consultation framework

The public service consultative machinery has two levels. The lower level has been created at the ministerial level to deal mainly, but not exclusively, with ministry specific issues only. In this respect the relevant section provides;³⁰

- "(1) There shall be established in each Ministry, a Ministerial Consultative Committee which shall consist of the Permanent Secretary of the Ministry who shall be the Chairman and three other members in that Ministry who shall be appointed by the Minister of that Ministry, and four members (who may or may not be members of the association) appointed by the association or, in default of the appointment, elected from among themselves by persons employed in that Ministry.
- (2) In appointing the members, the association shall bear in mind the need to represent as far as possible all categories of staff in such Ministry.
- (3) The members appointed by the association shall be appointed after the members appointed by the Minister and the association shall not appoint any person to be a member who has been so appointed by the Minister."

The other level is the Central Joint Staff Consultative Council. Ministerial Consultative Committees operating within each of the executive ministries report to the Central Joint Staff Consultative Council, which is the national body nominated partly by the Minister responsible for the public service and partly by the Botswana Civil Servants Association. The section³¹ creating the Central Joint Staff Consultative Council provides -

- "(1) There shall be established a Central Joint Staff Consultative Council which shall consist of the Director and six other members of the rank of Permanent Secretary who shall be nominated by the Minister, and the Minister shall appoint one of those seven members to be Chairman, together with six members nominated by the Association.
- (2) In nominating the members, the Association shall bear in mind the need to represent as far as possible all categories of officers in the public service.
- (3) There shall be a Deputy Chairman of the Council elected from among themselves by the members nominated by the Association."

The Council is enjoined by the Regulations to, *inter alia*, consider terms and conditions of service and advise on methods of ensuring improvements in general working conditions, productivity and staff relations within the public service and on measures necessary for the furtherance of good industrial relations between government and the public service.³²

The present consultative machinery has been in existence for more than 18 years and is the result of the successful negotiation between the National Executive Committee of the Botswana Civil Servants Association and His Excellency the late President of the Republic of Botswana in February, 1970.³³

The Public Service Consultative Machinery was established to promote better industrial relations between public servants generally as employees, and, government as employer. This machinery enjoys both the legal backing and the political commitment of the government. The crucial question is therefore whether the present consultative machinery plays the role that collective bargaining could have played in the public service employment relationship. Can the consultative machinery significantly affect the security of employment of public servants? Can it improve and maintain desirable industrial relations between government and public servants? If the consultative machinery can impact on security of tenure of public servants, the extent to which it can do so is obviously less than what collective bargaining can do for public servants. It is conceded that the consultative machinery can indeed to some extent improve and maintain cordial relations between government and public servants, but not to the extent that forming and belonging to trade unions, and engaging in collective bargaining could have done for them. Consequently, the consultative machinery though useful sharply compromises the ability of public servants to collectively engage their employer in the protection of their interests as workers. As a result of the consultative machinery, public servants can not engage in industrial action. Indeed there is no room for industrial action in the consultative machinery. There is no ultimate weapon that public servants (other than industrial workers) wield in order to carry through their demands when negotiating with government. In the ultimate analysis, the consultative machinery legitimises governmental action and agenda.

The absence of the right to strike in the consultative machinery, which right should be seen as an

essential part of the mechanism of collective bargaining through which capitalism tries to accommodate conflict between workers and employers, robs the process of what could otherwise have been a good association for public servants. Otto Kahn Freund's view in *Labour and the Law* is compelling:

"These are the ultimate sanctions without which the bargaining powers of the two sides lack credibility. There can be no equilibrium in industrial relations without freedom to strike".³⁴

"While this consultative arrangement is suitable for a highly developed system of negotiation and joint consultation, it has not been 100% successful. In practice and in reality there have been relatively fewer shortcomings than successes of this consultative machinery."³⁵

Examples³⁶ of some of the problems of this system of negotiation include the following:

- (a) some ministerial consultative committees not functioning effectively due to a variety of reasons;
- (b) submission of agenda items system not functioning as smoothly as desired both at ministerial and national levels;
- (c) promotion of some influential and effective members representing public servants to higher posts having disruptive impact at the Central Joint Staff Consultative Council; and
- (d) reluctance or indifference of the majority of public service employees to join the Botswana Civil Servants Association which has a negative impact on the strengthening of the Association and consequently the consultative machinery which was intended to benefit all civil servants.

It is appropriate at this stage to proceed to consider the position in South Africa in regard to public service workers. What follows is a short account of that position.

5.17 Unionisation in the South African public service

When the International Labour Organisation was formed under the Treaty of Versailles after the end of the first World War, South Africa was an original member.³⁷ Later, in the 1960's criticism of South Africa's internal policies and of its representation within the International Labour Organisation led to a direct confrontation and challenge to its authority and status.³⁸ Amidst all that, South Africa gave notice to withdraw in terms of the ILO Constitution which took effect in 1966. It was after an absence from the Organisation of some thirty years that South Africa rejoined it on 26 June 1994.³⁹

One little-known fact about the period in question is that throughout the period of South Africa's existence outside the ILO, it continued to be bound by, and to apply, ILO law to which it had signified its adherence during the time of its membership.⁴⁰

Indeed the preamble in the Labour Relations Act No. 66 of 1995 affirming South Africa's commitment to ILO law contains the statements as to why it was enacted:

to change the law governing labour relations, and for that purpose . . . to give effect to public international law obligations of the Republic relating to labour relations.⁴¹

According to a former senior ILO official, this does not confine itself to ILO conventions or even to ILO instruments as a whole; it is such as to incorporate all obligations under public international law, including any of those generated through the ILO (its principles and its Constitution, the obligations thereunder, international labour legislation and interpretation thereof as well as the jurisprudence of its institutional organs).⁴²

The Fact Finding and Conciliation Commission⁴³ of the International Labour Organisation illustrates the importance of the role played by the ILO during South Africa's transitional period. In this instance, the Congress of South African Trade Unions (COSATU) complained to the ILO that the South African Governments' Amendment to the Labour Relations Act in 1988 infringed

the ILO's principles of freedom of association because they promoted registration of racially constituted unions and infringed the right to strike.

The Fact Finding and Conciliation Commission (FFCC) of the ILO undertook a comprehensive inquiry during February 1992 into the extent to which the labour relations situation in South Africa conformed with ILO standards on freedom of association, the right to organise, and the right to bargain.

Cosatu had alleged that, if passed, the amendments would make fundamental inroads into the freedom of association of trade unions. Among the unions which would suffer most would be the affiliates of Cosatu which, having membership in excess of one million, was the largest federation of trade unions in South Africa. Cosatu requested the ILO or such other body as might, in international law, have competence to entertain the complaint to conduct the investigation.⁴⁴

The Commission's report which appeared towards the end of 1992, recommended reforms on a number of issues, including the extension of labour relations legislation to the public sector, farm workers, domestic workers and removal of restrictions on trade union membership. In the light of the above, there is no doubt that freedom of association and collective bargaining in South Africa which are of concern in this chapter, are protected, elaborated and elucidated in terms of the Constitution of the ILO as well as through specific instruments adopted over the years by the International Labour Conference.⁴⁵ It may well be due to the influence of the ILO that South African public servants came to be accorded freedom of association and collective bargaining consistent with ILO principles.⁴⁶

The range of matters covered by the Commission included; ⁴⁷ aspects of the registration procedure for trade unions; interference by the authorities in the administration of trade unions; administrative interference on collective bargaining outcomes; limitations on the right to strike and other matters such as the position of the public sector employees, farm workers and domestic workers.⁴⁸ It was as a result of the findings of the Commission and its recommendations that the present labour relations in the country was placed in the context of international labour standards.

Compliance with the recommendations ensured that basic civil liberties were guaranteed and international norms of freedom of association and collective bargaining made part of South African law.⁴⁹

5.18 Freedom of association

The constitution of the Republic of South Africa of 1996 makes provision for freedom of association. The general freedom of association is supported by provisions on Labour Relations in the Bill of Rights. The relevant provisions are reproduced below for illustrative purposes;

"23(1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

- (a) to form and join a union
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.

(3) Every employer has the right -

- (a) to form and join an employers' organisation; and
- (b) to participate in the activities of an employers' organisation.

(4) Every trade union and every employers' organisation has the right -

- (a) to determine its own administration, programme and activities;
- (b) to organise,

- (c) to bargain collectively, and
 - (d) to form and join a federation.
- (5) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements."⁵⁰

The new Labour Relations Act aligns South Africa's Labour Relations framework with that of the rest of the world.⁵¹ Chapter two of the Act deals with freedom of association. It guarantees freedom of association for all workers within its scope.⁵² Similar freedom of association rights are provided for an employer.

The guarantee of freedom of association by the South African Constitution and its Labour Relations Act⁵³ brings it into line with the Universal Declaration of Human Rights, the International Covenant on Economical and Political Rights and Labour Organisation Convention no. 87 and 98 on the right to form and belong to a trade union and to bargain collectively in order to protect one's interests.

"In addition to freedom of association, the new Labour Relations Act provides a series of organisational rights for unions. These include trade union access to recruit, meet or ballot its members. For the public service, any recognised trade union has these access rights, even in work places where it has no members or only a few members. However, these organisational rights can be denied to minority unions if the majority union/s and government agree on the threshold of members required to qualify for certain organisational rights. In the rest of the public sector, these rights are granted to unions that have a presence at a particular workplace and all work places under the jurisdiction of a bargaining council where the union is a recognised participant."⁵⁴

The South African Labour Relations Act applies to all workers with the exception of the National Defence Force, the National Intelligence Agency,⁵⁵ and the South African Secret Service. These institutions constitute essential services and it would be appropriate to strictly regulate their collective bargaining and right to strike.

5.19 Collective bargaining

The public servants in South Africa are permitted to organise themselves into unions and to bargain collectively. This is in accordance with the labour provisions in the new constitution and the new Labour Relations Act. The underlying thrust of the new Labour Relations Act is towards voluntary centralised collective bargaining - within an industrial sector.⁵⁶ It is argued that this will be achieved by the establishment of bargaining councils by the parties to the bargaining process. The National Economic Development and Labour Council would determine the demarcation sectors for collective bargaining purposes. In order to deal with all matters where uniform rules, norms and standards apply across the public service, a coordinating council known as the Public Service Co-ordinating Council was created by the new Labour Relations Act. Other matters within its jurisdiction are terms and condition of service that apply to two or more sectors or involve an issue that falls within the jurisdiction of the state as employer not to a particular sector. Workplace forums as sites for co-determination have been created. The function of workplace forums within the public service will remain limited since most of the other issues will be handled within the bargaining arrangements and will continue to remain bargaining issues.

Public servants are not only allowed to bargain collectively, they are in the ultimate analysis allowed to use the ultimate weapon at their disposal, strike action, in order to back up their demands. The Labour Relations Act guarantees every employee in South Africa the right to strike in accordance with the constitution. The only possible exclusion remains public servants employed in services determined to be essential services. Those allowed to strike can do so provided certain procedures have been followed. The procedures are either developed by the bargaining parties or if the parties have not developed their procedures, those procedures specified in the Act have to be followed. Conciliation is voluntary and is encouraged if the unions want to exercise their right to resort to industrial action.

5.20 Other Countries

Lesotho like Botswana is a former British colony. Together with Swaziland and Botswana it belonged to what was then called High Commission territories, ruled by the High Commissioner

from the Cape Colony. They all received Roman Dutch law from the Cape Colony and thus have a common legal system. At one point in time the three countries even shared a common university called the University of Botswana, Lesotho and Swaziland. It is not therefore strange that ultimately the position relating to civil servants in Lesotho came to be similar to that of Botswana.

Before the advent of the decision in Lesotho Union of Public Employees v. The speaker of the National Assembly and Others,⁵⁷ public servants in Lesotho could form, join and belong to trade unions. The new bill, which the applicant union sought to attack and have nullified in court was intended to prohibit public officers from joining trade unions and excluding them from the provisions of the Labour Code Order of 1992. The union contended that the said provisions if enacted into law were unconstitutional. The court observed that it could not interfere with the legislative process of parliament but nonetheless considered the question of the constitutionality of those provisions.

The relevant section protecting freedom of association in Lesotho (which though differently worded) does not differ much with that of Botswana provided:

- (1) Every person shall be entitled to, and except with his own consent shall not be hindered in his enjoyment of freedom of peaceful assembly, without arms, that is to say, freedom to assemble with other persons.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with and in contravention of this section to the extent that the law in question makes provision.
 - a) in the interests of defence, public safety, public morality or public health.
 - b) For the purpose of protecting the rights and freedoms of other persons; or
 - c) For the purpose of imposing restrictions upon public officers ...⁵⁸

An important and relevant section of the constitution provided;

“Lesotho shall take appropriate steps in order to encourage the formation of

independent trade unions to protect workers rights and interests and to promote sound labour relations and fair employment practices.⁵⁹

In the course of his judgement, Kheola C.J. proceeded on to say;

“It seems to me that section 16(2) of the constitution gives the Government the right or power to restrict the freedom of association as far as public officers are concerned. It provides that nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of any law to the extent that the law in question make provision, among other things, for the purpose of imposing restrictions upon public officers in the sphere of labour practices.”⁶⁰

Kheola C.J., went on to say that freedom of association of public officers had not been eliminated because they were free to establish and join staff associations and provision was made for a Public Service Joint Advisory Council. The aim of this council was to secure cooperation between the government and the general body of public officers.

In Lesotho the Public Service Bill, 1995 prohibited public servants from joining trade unions and excluded them from the Labour Code Order of 1992. In Botswana the Public Service Act, which is concerned with the organisation of the Civil Service, appointments and conditions of service, stipulates that the President may make regulations for the setting up of a body for the purpose of consultations between government and public servants. In both countries the public servants enjoy associational rights only. The labour code order 1992 as amended in Lesotho relates only to private sector employees whereas the Employment Act⁶¹ of Botswana excludes public servants. It is contended that this kind of situation is unhealthy both for Lesotho and Botswana public services.

This decision should be contrasted with the South African National Defence Union v. Minister of Defence.⁶² In this matter members of the Defence Union went to court and argued that subsections (1), (3) and (4) of Section 126 B of the Defence Act 44 of 1957 were unconstitutional

and invalid.

Subsection (1) of section 126 B prohibited members of the permanent force of South Africa from becoming members of a trade union. Subsection 2 prohibited members of the union from participating in strikes, acts of protest or similar activities. Subsection 4 contained a comprehensive definition of “act of public protest for purposes of the Act.

Section 23 of the constitution of South African provided;

“(1) Everyone has the right to fair labour practices.

2) Every worker has the right –

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.”

The Transvaal Provincial Division having struck down the provisions complained of as unconstitutional, the minister appealed to the Constitutional Court. In delivering her judgement O’regan said;

“If the approach of the ILO is adopted, it would seem to follow that when section 23(2) speaks of “worker” it should be interpreted to include members of the armed forces...”⁶³

She went on to say that as she had concluded that members of the defence force constituted workers for the purposes of section 23 (2) of the constitution it must follow that the Defence Act infringes their right to form and belong to trade unions. This is a land mark decision in labour relations considering that the right to form and join trade unions and to strike is a constitutional right in South Africa. It is not yet entrenched in Botswana.

5.21 Conclusion

The constitution of Botswana allows every individual freedom of association and of assembly in its fundamental rights and freedoms or bill of rights. What the constitution of Botswana gives with the right hand (freedom of association) it again takes away with the left hand (places restrictions on that freedom). The result is therefore that legislation in Botswana does not allow all public servants to unionise and bargain collectively in order to protect their interests. Only a few public servants can do so and these are industrial workers in public employment. The system of negotiation and joint consultation between public employees and government does not always function effectively. Even if it did, which is rare, public servants cannot engage in industrial action, the ultimate power that private sector employees have at their disposal in solving their disputes. It is only when all public servants are allowed to unionise and bargain collectively with the threat of the use of strike action that there can be relative security of employment in the public service.

The new Labour Relations framework in South Africa creates a single regime for all workers in South Africa. It regulates both private and public sector workers. Both sectors have been accorded freedom of association, the right to bargain collectively, organisational rights, bargaining councils and can resort to industrial action. These general rights in the Labour Relations Act are recognised in the country's new constitution. This is a positive development for security of employment in the South African public service. The South African public service position should provide a good and simple lesson for the public servants in Botswana: that in order to enjoy relative job security, the constitution should have a labour code enshrined in it. Amongst such rights in that code should be the right to form and belong to a union, the right of all workers to participate in the programmes and activities of that union and to strike in order to back up demands after bargaining collectively. All workers should have a basic floor of rights in a Labour Code without distinction which should include organisational rights. In respect of all the above, South Africa is indeed ahead of most countries in the region. Botswana has a lot to learn from the South African experience. It has recently ratified thirteen International Labour Organisation instruments including Convention no. 87 of 1948 on Freedom of Association and Convention no. 98 of 1949 on the right to organise and bargain collectively. Throughout the

period of South African's existence outside the International Labour Organisation, it continued to be bound and to apply International Labour Organisation law.⁶⁴

Earlier in this chapter, it was indicated that the constitution of Botswana gives with one hand (freedom of association) and takes away with the other (places restrictions on that freedom). The result is that legislation in Botswana does not allow public servants to unionise and to bargain collectively in order to protect their interests. However, within the prevailing public service labour regime, there are Service Commissions meant to sustain and guard the interests of public servants. These Commissions are the Judicial and Public Service Commissions. The next chapter examines the structures, roles and impact of these Service Commissions on the employment security of public servants.

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CHAPTER 6

THE ROLE OF THE PUBLIC SERVICE COMMISSION AND JUDICIAL SERVICE COMMISSION

6.1 The Public Service Commission

This chapter attempts to provide in outline form historical perspectives on the Public Service Commission to the extent that it has an impact on security of tenure in the public services in Botswana. The issues attempted to be resolved are whether there was security of employment guaranteed in the past through institutions inherited from the former colonial administration and the extent of such protection today. The chapter seeks to find out whether, if there previously existed some form of employment protection, this continued into the post-independence era in Botswana. The role and impact of the Public and Judicial Service Commissions on security of employment in Botswana and South Africa will be considered. The structures of these institutions will also be examined. The chapter will first focus on the Public Service Commission in Botswana and then the South African Public Service Commission. Finally the structures of the Judicial Service Commission in Botswana and South Africa respectively will be considered. The South African Public and Judicial Service Commissions are considered mainly for purposes of comparative jurisprudence and to provide valuable lessons for Botswana where improvements to the existing system can be made.

6.2 Historical perspectives

The Public Service Commission in Anglophone African states was one of the legacies of colonial rule.¹ Most English speaking African states which were former British colonies inherited it as part of the entrenched provisions of the Independence Constitutions.² The British were merely passing on the benefit of the experience of past British politicians.³ The entrenched provisions relating to the Public Service Commission in the newly independent African states constitutions could not be amended except by a complicated procedure, including an affirmative vote of not less than two-thirds of members of both houses of the legislature.⁴ These Public Service

Commissions in newly independent African states were given powers of appointment, promotion and discipline and in the exercise of those powers they were not subject to the direction or control of any body or authority. Civil servants, politicians and legislators were disqualified from being members of the Public Service Commission. This was in order to insulate appointments, promotions and discipline from political or other influence.

Past British experience had shown that before the establishment of the British Civil Service Commission, appointments and promotions were not based on merit and fitness but on political and official patronage. Sons, daughters and relatives of men of influence who were of mediocre quality had simply found their way into the Civil Service before the Commission was set up. The Northcote-Trevelyan Commission had recommended the adoption of the merit principle in order to ensure that favouritism was excluded from the appointment and promotion of civil servants in Britain.

The institution of the Public Service Commission is relatively new to the civil service in African states.⁵ It was not heard of before constitutional changes brought about self government and independence.⁶ In the colonial era, such appointments as were not made by the Colonial Office and the Crown Agents, were made by officials in the country's Colonial Secretariat.⁷

It was against such a background that Botswana came to have constitutional provisions relating to and entrenching the Public Service Commission. The British colonial masters imposed the Public Service Commission on Botswana as part of the independence package. Although the Public Service Commission was initiated to insulate appointments, promotions and discipline from political influence, it also came to protect civil servants from losing their jobs for malicious or capricious reasons. The Public Service Commission which was in a way a fourth arm of government ensured that there was security of employment in the public service.

6.3 The role of the public service commission

There should be a machinery set up by government to regulate appointments, promotions and discipline. The machinery should be able to regulate these areas with a firm conviction of

independence, impartiality and a strong sense of justice. No other area in the career of a public servant is as sensitive and important as being appointed, promoted or disciplined. The Public Service Commission is therefore the machinery adopted in many states and charged with such a task. Apart from the United Kingdom, countries with such a commission included Botswana, Kenya, Ghana and South Africa. These countries had different names for the Service Commissions. In South Africa, for example, it was known as the Commission for Administration from about 1980 to 1994.

Generally, political appointments were an exception and these included post of Permanent Secretary or posts of equivalent or higher status. For these, the usual arrangement was that the Prime Minister had to be consulted when they were appointed, promoted or disciplined.³

The existence of the Public Service Commission was one of 'stabilizing influence'. At the time when the Public Service Commissions were introduced into constitutions of new African states including Botswana, there was a large contingent of expatriate public servants and few local public servants. The granting of independence to these states saw the introduction of programmes of "Africanization and/or localisation" of the public service in the new states. The result was that the early commissions were looked upon as institutions for furthering the prospects and protecting the careers of expatriate officers.⁹ This problem of perception was a difficulty that these early commissions had to contend with. The early commissions were vehicles for protecting the careers of public servants, local or expatriate.

In order for a public service commission to perform its role effectively, that is, ensure that public servants are secure in their employment, it had to have security of tenure itself. In order to ensure that its members were secure, it was usual to have a provision in the constitution of the country setting up the Commission, granting it powers of appointment, promotion and discipline, and indicating that in the execution of its functions it would not be subject to the direction or control of any person, body or authority. Furthermore, civil servants, legislators and any persons who had taken an active part in politics were disqualified from being members of the Public Service Commission. Generally, the minimum term of office for members of the Commission was set at a period of four years. While a four year appointment period may not guarantee tenure, the length

of appointment to that office may go some way in ensuring that a member of the commission acts responsibly and independently. It was not unusual therefore that the Botswana Public Service Commission came to follow more or less the above format.

6.4 The structure of the public service commission in Botswana

In the case of Botswana, there is no doubt that the Commission was given security of tenure. This is because of the inclusion of provisions setting up the Commission in the Constitution of Botswana. A prudent choice was made between putting the provisions in a statute other than the Constitution and in the Constitution itself. If the provisions setting up the Commission in Botswana had been put in an ordinary statute, different considerations would have applied. It is more difficult to amend a constitution than it is to amend an ordinary statute. Section 89 of the Constitution of Botswana, which relates to the amendment of the constitution, especially provisions relating to Chapter Seven which include the Public Service Commission, provides;

"89(1) Subject to the provisions of this section Parliament may alter this constitution

(2) A bill for an Act of Parliament under this section shall not be introduced into the National Assembly unless the text of the Bill has been published in the Gazette not less than 30 days before it is so introduced.

(3) In so far as it alters any of the provisions of-

(a) Chapter II; Sections 30 to 44 inclusive, 47 - 51 inclusive, and 56; Sections 77 to 70 inclusive and Section 85; Chapter VII:¹⁰ or Sections 117 to 120 inclusive and Section 127 in its application to any of the provisions mentioned in this paragraph.

(b) ... a bill for an Act of Parliament under this section shall not be passed by the National Assembly unless-

- (i) the final voting on the Bill in the Assembly takes place not less than three months after the previous voting thereon in the Assembly;

and

- (ii) at such final voting the Bill is supported by the votes of not less than two thirds of all members of the Assembly”.

It is clear from the above provisions that it would present some difficulty to amend the Constitution. It is for that reason that public servants in countries with Commissions set up in constitutions have stronger protection than those set up by ordinary statute. Section 109 (1) creating the Public Service Commission provides-

"There shall be a Public Service Commission for Botswana which shall consist of a chairman and not less than two or more than four other members.

- (2) The members of the Public Service Commission shall be appointed by the president.
- (3) A person shall not be qualified for appointment as a member of the Public Service Commission if he is a member of the National Assembly or a public officer, or is or has within the two years immediately preceding his appointment been actively engaged in politics."

It should be noted that members of the legislature are barred from membership of the Commission. The Commission is insulated from possible legislative influence or interference. Similarly public officers are barred because of the possible conflict of interest that might arise. A public officer might find himself in an extremely difficult position when a fellow officer appears before him for a disciplinary offence which might involve possible removal from the service. Equally, he might find himself in such a position when a fellow officer's promotion is being

considered. Those engaged in politics are also not particularly suitable for membership of the Commission, which is a non-political quasi judicial body.¹¹

Originally, as indicated above, the Public Service Commission of Botswana was responsible for recruitment of staff, discipline and dismissal of public officers with certain exceptions.¹² This position was found to be unsatisfactory and a complete change was effected by the Constitution (Amendment) Act, 1970¹³ and Public Service Act, 1970.¹⁴ The main reasons for the change were said to be the need for better co-ordination of the overall control and development of the public service and fully centralized control of the public service in the office of the president.

It was felt that the powers given to the Public Service Commission at the time of independence were too wide.¹⁵ It was further felt that the Public Service Commission was inhibiting the process of localization in its recruitment policies¹⁶ and that the Public Service Commission was a very expensive body for maintaining impartiality in the public service¹⁷ recruitment, discipline and dismissal initiatives.

To date, the powers of appointment and disciplinary control in respect of certain officers in Botswana are vested in the Director of Public Service Management which is a Botswana innovation and in respect of others in the Permanent Secretary to the President. The Public Service Commission was retained as a body to hear appeals from the decisions of the Director and the Permanent Secretary to the President with regard to removal from office or any other punishment.¹⁸ Section 6 of the Public Service Act¹⁹ provides;

"(1) Subject to the constitution, the power to appoint, remove or exercise disciplinary control over any public officer shall be vested-

(a) in the case of any public officer on the superscale (other than an officer to whom Section 110 of the Constitution does not apply), in the Permanent Secretary to the President; and

(b) in any other case, in the Director in accordance with this Act".

Notwithstanding the removal of powers of appointment, promotion and discipline from the Public Service Commission, the Commission still retains its protective provisions in the constitution. The powers were whittled down but it is still functioning impartially as an appeals body from the decisions of the Director of Public Service Management and the Permanent Secretary to the President affecting public servants. However, taking away the powers of the Commission had a significant impact on security of employment in the public service. Prospective public servants could no longer rely on an independent national institution which in their image stood for integrity, justice and unity to recruit them into the service. Those already in the service had less security of employment than before.

Members of the Commission could hold office for a period of three years in terms of the constitution and they could only be removed by the president from office for inability to discharge the functions of their office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.²⁰ Section 109 provides:

"(7) If the President considers that the question of removing a member of the Public Service Commission under subsection (b) of this Section ought to be investigated, then-

- (a) the President shall appoint a tribunal which shall consist of a Chairman and not less than two other members selected by the Chief Justice from among persons who hold or have held high judicial office; and
- (b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to him whether the member ought to be removed under subsection (6) of this section, and the President shall act in accordance with that recommendation.
- (c) A member of the Public Service Commission shall not be removed from office except in accordance with the provisions of this Section.

- (11) Except as provided in subsection (13) of this section the Public Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this constitution."

The powers of the Commission relating to the hearing of appeals are to be found in section 111 of the Constitution. It provides-

- "(1) Any person other than a member of the Botswana Police Force or the Prison Service who has been removed from office or subjected to any other punishment by the exercise of any powers conferred on any person under the provisions of Section 110 of the Constitution may appeal to the Public Service Commission who may dismiss such appeal or allow it wholly or in part.
- (2) Subject to the provisions of subsection (3) every decision of the Public Service Commission under the provisions of this Section shall be final.
- (3) Notwithstanding anything contained in subsection (2) if the Public Service Commission dismisses an appeal or allows it in part only the person who appealed may appeal to the President."

While it may have been a good idea to create a central personnel agency responsible for recruitment, promotion, creation and grading of posts, specification of qualifications, the training of officers and their postings as is now the case in Botswana, the side effect was to sharply compromise the justification for the existence of the Public Service Commission in its present form. It is not surprising that the reduced role of the Commission resulted in reduced salaries for the Commissioners.²¹

The 1970 amendment of the Constitution and Public Service Act led to creation of a central personnel agency responsible for virtually all matters related to the Public Service. This personnel agency is the Directorate of Public Service Management. The overall purpose of the

Directorate of Public Service Management was-

- (a) to uphold and enhance the lofty national principles and objectives and provide a stable, reliable and impartial public service of the government of the day.
- (b) to increase the effectiveness of the government by providing human resource input so that the various governmental services to the public and national development activities are carried out and national objectives achieved, and
- (c) to effectively manage the public service within the framework of effective service to the public, concern for the welfare of the employee, adherence to the Public Service Act and attainment of the national socio-economic development objectives.²²

The Directorate aims however, to achieve the following specific objectives (arising out of the overall ones) amongst others -

- (a) provide national leadership and serve as Government's focal point for all national policies and operational matters relating to the public service and management of human resources within the public sector,
- (b) ensure provision of stable, adequate, competent and effective public service which will serve the government in power,
- (c) maintain the Public Service of the Republic of Botswana which has unequalled standards, high integrity, morals and competency to discharge effectively all responsibilities at all levels of operations, and
- (d) provide manpower resources to carry out the numerous service and development related functions of government.²³
- (e) maintain a comprehensive and up-to-date public service manpower inventory in terms of skills, experience, deployment for purposes of manpower planning, utilisation and

- development.
- (f) ensure that entry, retention and advancement in the public service are determined primarily on the basis of merit (relative ability, knowledge and attitudes) and with primary regard to efficiency of the public service.
 - (g) ensure optimal utilization of the public service human resource which will be reflected through higher personnel productivity, better organisational performance and effective attainment of the national socio-economic service and developmental goals.
 - (h) administer public service related regulations and terms of the service with due regard to the national principle of democracy, development, social justice and harmony and on the basis of sound concepts and practice of human resources management.

These objectives are required to be achieved within the confines of the Constitution of Botswana. In the context of the public service, the constitution provides for the appointment of key officers in government, their discipline and removal. The rest of the public service personnel is appointed in accordance with the Public Service Act as required by the Constitution.

The Directorate of Public Service Management, which is the central command of the activities of the public service, makes and executes all national policies in relation to recruitment, training and retraining, education and promotions of all public servants amongst other functions. Public servants in the various government departments are from time to time sent to various institutions both within and outside the country to enhance their competence and skills in their multifarious activities. This tends to raise public service standards and consequently their productivity and security of tenure.

In addition to being within the confines of the constitution, the objects of the Directorate have to be consistent with the government's socio-economic development policies which are said to be rooted in the traditional culture of the country. The principles which comprise the traditional culture of the country are democracy, development, self reliance and unity. Furthermore, the objects are required to be consistent with the country's national development objectives, which

are rapid economic growth, social justice, economic independence and sustained development amongst others. The above is therefore the context within which the Directorate's objectives have to operate.

6.5 The Public Service Commission in South Africa

The first Public Service Commission in South Africa was established in 1912, after the unification of the country in 1910. It was composed of three members. Between 1980 and 1994 it was known as the Commission for Administration. It was primarily established to serve as the custodian of the merit and efficiency principle in the public service.²⁴

"The Public Service Commission being one of a number of statutory central administrative institutions, has the role of promoting order, impartiality, accountability, fairness, effectiveness, efficiency, merit, transparency and ethical behaviour and of counteracting corruption, nepotism and cronyism, in the public service.

The Commission, as a statutory and a non-political institution, plays an important role in the South African system of public administration and particularly in regard to the administration of the public service. The Commission serves as a counterbalance for political authority within the system of government and administration, in order to ensure the fair administration and functioning of the public service. In discharging its responsibilities, the Commission is guided by two basic principles, namely those of merit and efficiency."²⁵

The Interim Constitution of the Republic of South Africa, 1993, which was approved by the Multi-party Negotiating Council and passed by Parliament provided the foundation of the future Public Service Commission. This interim constitution identified a number of constitutional principles in its schedule²⁶ covering many and varied aspects of importance to the proper functioning of the state.²⁷ Certain of these have a direct bearing on the public service and Public Service Commission. Constitutional principle XIX provided for the independence and impartiality of a Public Service Commission.

"The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor General and a Public Protector shall be provided for and safeguarded by the constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service". Chapter 13 of the interim constitution³⁸ made provision for an independent and impartial Public Service Commission composed of three to five members appointed by the president. The Public Service Commission created in terms of the Interim Constitution and the new constitution of the Republic of South Africa is empowered to promote the values and principles of public administration in the public service. The new Constitution²⁹ also provides specifically that the Commission shall be independent, impartial and regulated by national legislation. It provides further that each of the provinces may nominate a representative to be appointed to the Commission. Provincial representatives in the Commission may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.³⁰

The new constitution creates a single Public Service Commission for the Republic of South Africa. It also provides that:

The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudicial in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the service ...³¹

Other organs of state are enjoined to assist and protect the Commission and to ensure the independence, impartiality, dignity and effectiveness of the Commission through legislative and other measures. No person or organ of state may interfere with the functioning of the Commission.³²

The powers and functions of the Commission as set out in the new constitution are;

- (a) to promote the values and principles set out in section 195 throughout the public service;
- (b) to investigate, monitor and evaluate the organisation and administration, and the

- personnel practices, of the public service;
- (c) to propose measures to ensure effective and efficient performance within the public service;
 - (d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;
 - (e) to report in respect of its activities and the performance of its functions, including any findings it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with...³³
 - (f) ... to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.³⁴

Members of the Public Service Commission are prohibited from holding office in any political party or political organisation and are required to be non-partisan in the performance of their duties. The composition, appointment, tenure, vacation of office and functioning of the Commission are prescribed by the Public Service Commission Act.³⁵

Section 196 of the new Constitution provides that the Commission should in respect of the exercise and performance of its powers and functions be accountable to Parliament. It is required to submit annual reports and where necessary special reports to Parliament regarding its activities as part of the process designed to ensure proper accountability.³⁶

The role of the Public Service Commission described above makes it a quasi-judicial body which has executive responsibility in making appointments, transfers and promotions and in exercising discipline over the public service. The position in South Africa indeed goes far beyond what the pre-independence Public Service Commissions in Africa's new emergent states did in terms of its

role. It certainly guarantees security of tenure of its public servants much more than its counterpart in Botswana. Whereas the South African Public Service Commission can recommend, direct, enquire and advise over a considerable range of personnel related matters, its counterpart in Botswana cannot recommend an appointment neither can it conduct an enquiry nor advise in respect of any appointment or promotion. It is largely an appellate body to which disciplinary cases are referred, and its other functions as are found in fragmentary and scattered statutes include being an Independent Examinations Council, examining and moderating civil service examinations and being the final arbiter in deciding such issues as pension entitlements in compassionate and other cases of premature retirement.³⁷ It is both unfortunate and regrettable that such a one time powerful institution in Botswana should have been reduced to little or nothing in terms of its functions, thus exposing the Public Service to favouritism, corruption and cronyism.

In comparative terms, the position in South Africa has gone a long way in ensuring that public servants are protected especially in those areas that affect them crucially; appointment, promotion, transfers and discharges from the public service. These are matters that enhance public service neutrality, integrity and permanence. South Africa has provided for Provincial Public Service Commissions which have the same or similar powers in respect of matters crucial to public servants save that such Provincial Commissions can advise the Premier or member of the Executive Council in regard to matters relating to the public service. Another important South African innovation is the inclusion of a provision which provides that a recommendation of the Public Service Commission shall generally be implemented within a period of six months. This renders the Public Service Commission powerful and effective in its operation.

The situation in Botswana, however unfortunate in my view, should be considered against the argument that is improper and against all principles of organisation and management to separate powers of appointment, promotions and discipline from those of general staff development, that is, leadership, training, motivation and evaluation of performance.³⁸ Thus Botswana created a central personnel agency in which all aspects related to public service management were centralised. Another argument supporting the creation of a centralised public service management is that the Public Service Commission was desirable at the time of independence but

is now not as important as the managerial functions of a central personnel agency which should be given first priority. Whether these arguments have sufficient force in themselves or not, does not change the fact that security of tenure of public servants has been seriously eroded in Botswana by the 1970 amendment of the Constitution and Public Service Act.

The operational framework of the South African Public Service Commission should furthermore be seen and evaluated against the basic values and principles governing public administration enshrined in the Constitution.³⁹ These values and principles are captured in section 195 which provides that:

195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) Peoples needs must be responded to, and the public must be encouraged to participate in policy making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career development practices, to maximise human potential, must be cultivated.

- (I) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation.⁴⁰

The successive governments of South Africa ensured through the system of apartheid that public administration was not representative of the South African people. Most posts in public administration with lucrative salaries were reserved for the white race. Recruitment into the service was partly based on colour and race, with blacks occupying the less lucrative lower rungs of public administration. It is only recently that the new Constitution is trying to remedy the past imbalances by providing for broader representation of the whole population.

6.6 Other countries with public service commissions

There are other African countries which had similar Public Service Commissions at the time of independence, Kenya being a good example. The Public Service Commission in Kenya could initially appoint persons to hold or act in offices in the public service. It could also discipline and remove such persons from office.⁴¹ The power to appoint officers of Auditor-General, Attorney-General and Permanent Secretaries could be exercised by the Governor-General with the advice of the Commission.⁴² Restrictions were also imposed to deny public officers and politicians membership of the Commission.⁴³

Subsequent amendments to the constitution vested in the President wide powers in relation to the civil service. Members of the Public Service Commission could now be appointed by the President at his own discretion. The Public Service Commission could delegate any of its powers to any one or more of its members or to any officer of the public service provided it did so with the President's authority.⁴⁴ The political and legal reality was that the subsequent constitutional amendments in Kenya gave the President unlimited discretion in relation to appointments in the civil service. He could constitute and abolish offices for the Republic, making appointments and terminating any such appointments. Like the Botswana situation, the Public Service Commission

was relegated to playing a limited auxiliary role in relation to the public service.

6.7 The Judicial Service Commission

Like the Public Service Commission, the Judicial Service Commission is an integral yet independent and impartial part of the executive. The structure and composition of the Judicial Service Commission makes it generally an ideal institution for guaranteeing the personal and functional independence of members of the bench.

6.7.1 The structure of the Judicial Service Commission in Botswana

The constitution of Botswana in Section 103 creates a body within the judicial arm of government called the Judicial Service Commission.

"103 (1) There shall be a Judicial Service Commission for Botswana which shall consist of -

- (a) the Chief Justice, who shall be Chairman;
- (b) the Chairman of the Public Service Commission or such other member of that Commission as may for the time being be designated in that behalf by the Chairman of that Commission.
- (c) one other member who shall be appointed by the Chief Justice and the Chairman of the Public Service Commission acting together.

(2) The member appointed under subsection (1) (c) of this section may be removed from office by the Chief Justice and the Chairman of the Public Service Commission acting together, but he may be removed only for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour. Such a member shall in any case

vacate his office at the expiration of a period of three years from the date of his appointment."

Appointments to judicial office within the judicial arm of government are made by the president acting in accordance with the advice of the Judicial Service Commission. The Chief Justice, the President of the Court of Appeal and judges of the Industrial Court are however appointed without recourse to the Judicial Service Commission's advice.

"96 (1) The Chief Justice shall be appointed by the President..."⁴⁵

"100 (1) The President of the Court of Appeal shall, unless that office is held ex-officio by the Chief Justice, be appointed by the president."⁴⁶

The Trades Disputes Amendment Act of 1992 provides:⁴⁷

"17(3) Industrial Court judges shall be appointed by the President from among persons possessing the qualifications to be puisne judges of the High Court, as prescribed in Section 96(3) of the Constitution".

The Judicial Service Commission like its counterpart the Public Service Commission is insulated from executive and legislative control in the exercise of its functions. In this respect Section 103 (4) of the Constitution provides:

"The Judicial Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this constitution."

The Commission has been given power to regulate its own procedure and subject to that procedure, it may act notwithstanding any vacancy in its membership or the absence of any member and its proceedings are not invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings. The decision of the Commission requires the concurrence of a majority of its members.

Apart from the appointment of the President of the Court of Appeal, Chief Justice and the judges of the Industrial Court, the rest of the judicial officers are appointed by the President in accordance with the advice of the Judicial Service Commission. In that regard Section 104 of the Constitution provides:

"(1) Power to appoint persons to hold or act in offices to which this section applies, to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the President acting in accordance with the advice of the Judicial Service Commission.

(2) The offices to which this section applies are -

- (a) the office of the Registrar of the Court of Appeal and High Court;
- (b) all offices of magistrate;
- (c) such other offices of President or member of any court or connected with any court as may be prescribed by or under an Act of Parliament.

(3) In this section references to a court do not include references to a court martial.

6.7.2 The role of the Judicial Service Commission

The Judicial Service Commission is an integral yet supposedly independent part of the judiciary. As an arm of government, the judiciary is theoretically independent from the other arms of government (the executive and legislature). It is this independence that enables it to perform its functions of adjudicating disputes between government and citizens, and between individuals without any fear or favour. In order to safeguard this independence and impartiality which are the cornerstone of this arm of government, a body is created with which the president acting on its advice, appoints, determines the terms of office and conditions of service of members of the

judiciary. This body is the Judicial Service Commission. The body therefore ensures that the personal independence of the judiciary as opposed to its functional independence is not controlled arbitrarily by government bodies. The personal independence of the judiciary means the appointment, terms of office and conditions of service⁴⁸ of its members. The functional independence of the Courts means that in the exercise of their powers they are only subject to law.⁴⁹

This institution called the Judicial Service Commission is also a legacy of British colonial rule in Anglophone Africa. Most if not all former British dependencies in Africa inherited it, among them Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Swaziland, Tanzania, Uganda and Zambia.⁵⁰ In order for the Judicial Service Commission to function effectively in Botswana, it was entrenched in the constitution to make it difficult to interfere with its operations. Its composition makes it particularly suitable for guaranteeing the personal independence of the judges and magistrates thus increasing their security of employment. Amongst members of the Commission is the Chief Justice who in his own right as a judge of the High Court has considerable security of tenure. In this regard, Section 97 provides:⁵¹

"(3) If the President considers that the question of removing a judge of the High Court under this section ought to be investigated then -

- (a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;
 - (b) the tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office under this Section for inability as aforesaid or for misbehaviour.
- (4) Where a tribunal appointed under subsection (3) of this section advises the President that a judge of the High Court ought to be removed from office for inability as aforesaid or for misbehaviour, the President shall remove such

judge from office."

The courts in Botswana have not had occasion to interpret the above provisions. In Trinidad and Tobago, however, in the matter of Evan Rees and Others v. Richard Alfred Crane³² provisions similar to the ones above were considered by the Privy Council. The facts were that the respondent, a judge of the High Court of Trinidad and Tobago, held office subject to the fundamental right to the protection of law recognized by the constitution. He could (as is the case in Botswana) only be removed from office for inability to perform the functions of his office for inability to perform the functions of his office, whether from infirmity of mind or body or any other cause, or for misbehaviour. After receiving complaints about the respondent, the chief Justice of Trinidad and Tobago decided not to include him on the roster of judges who were to sit in court for the following term. The Judicial and Legal Service Commission, of which the Chief Justice was an ex officio member, agreed with that decision. The respondent was eventually informed that it had been decided that he should cease to preside in court until further notice. Without notifying the respondent of the case against him the Commission met to consider whether to make a representation to the President that the question of removing the respondent from office ought to be investigated (as is the case in Botswana). After the Commission had requested further information, the Chief Justice supplied it with statistics and records of respondent's performance in court. The Chief Justice thereafter ceased to participate in the Commission's deliberations. The respondent was neither told of the complaints against him nor was he given an opportunity to answer them. The Commission made a representation to the President that the question of removing the respondent from office for inability to perform the functions thereof due to bodily infirmity and or misbehaviour ought to be investigated. In consequence thereof the President appointed a tribunal to inquire into the matter, report on the facts and recommend to him whether he should refer the question of removal of respondent from office to the Judicial Committee of the Privy Council. The president suspended the respondent from performing the functions of his office.

In the light of this, respondent commenced proceedings against the appellants who were members of the tribunal, the Chief Justice, members of the Commission and the Attorney – General of Tobago seeking judicial review and redress for alleged infringements of his

constitutional rights.

Deciding in favour of the respondent, Lord Slynn of Hadley (delivering their Lordships judgement) proceeded to say;

“Their Lordships agree with the majority in the Court of Appeal that what happened here went beyond mere administrative arrangement. Despite the fact that the respondent continued to receive his salary and theoretically (as has been argued) could have exercised some power, e.g to grant an injunction if approached directly to do so the respondent was effectively barred from exercising his functions as a judge sitting in court. He was left out of the October to January roster and there was no indication that he would thereafter sit again. It was in effect an indefinite suspension. This in their Lordships view was outwith the powers of Bernard C.J.⁵³”

Holding that the principles of natural justice applied, Lord Slynn continued;

“Having considered all the points raised by counsel for both sides and the judgments and writings referred to therein, their Lordships are satisfied that in all circumstances the respondent was not treated fairly. He ought to have been told of the allegations made to the commission and given a chance to deal with them – not necessarily by oral hearing, but in whatever way was necessary for him to make his reply.⁵⁴”

It is interesting to note that “infirmity” or “inability to discharge his duties” or “misbehaviour” were not defined. Neither is there any local jurisprudence in relation to the interpretation of these terms. It is clear from the above case that the Botswana provisions could be said to attract principles of natural justice should they be invoked against a judge.

The Chairman of the Public Service Commission who is a member of the Judicial Service Commission also has considerable security of tenure in his own right quite apart from being a member of the latter Commission. Both the Chief Justice and the Chairman of the Public Service Commission have considerable protection in their substantive posts which significantly increases by again being members of the Judicial Service Commission. The other member has less protection, being appointed by the Chief Justice and the Chairman of the Public Service Commission acting jointly and also removable from office by both of them acting on grounds specified in the constitution, and in any event such member shall vacate his office at the expiration of a period of three years from the date of this appointment. The grounds for the removal of this other member are inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other case) or for misbehaviour. In consideration of the above the Judicial Service Commission stands out to be the most powerful independent organ within the judiciary, determining the security of employment of judges and magistrates who are public servants. On the question of magistrates and judges being public servants, Section 127 provides:

"(2) In this constitution, unless the context otherwise requires, references to offices in the public service shall be construed as including references to the offices of judges of the Court of Appeal and judges of the High Court and the offices of members of all subordinate courts (being offices the emoluments of which, or any part of the emoluments attaching to which, are paid directly out of moneys provided by parliament)."⁵⁵

"Judges are thereby made members of the public service."⁵⁶

It may be a very good and important thing to have the Judicial Service Commission being the strongest institution within the judicial arm of government, or in any event the strongest within and outside the judiciary, but it is another to ensure that as a matter of fact those public servants falling under its control have security of employment. Admittedly, judges have the strongest protection against removal and dismissal but sadly magistrates have less protection. If a magistrate is dismissed from office or removed in terms of Section 104 of the Constitution, there

is no elaborate structure of appeal as is the case with other public officers. Once a magistrate is removed from office by the president acting in accordance with the advice of the Public Service Commission, he can not appeal to the Public Service Commission nor Judicial Service Commission or the President. Section 111 of the constitution provides:

"(1) Any person other than a member of the Botswana Police Force or the Prison Service who has been removed from office or subjected to any other punishment by the exercise of any powers conferred on any person under the provisions of section 110 of this Constitution may appeal to the Public Service Commission who may dismiss such appeal or allow it wholly or in part."

Section 110 of the constitution provides in part:

"(2) The provisions of this section shall not apply in relation to the following offices, that is to say -

... (b) any office to which Section 104 or 112 of the constitution applies."

Section 104 of the constitution is the same section granting the President power to appoint persons to hold or act in, exercise disciplinary control and to remove persons from such posts acting in accordance with the advice of the Judicial Service Commission. It would have been a magnificent idea to create probably the strongest institution within a branch of government to secure employment for Judicial Officers and at the same time put up an elaborate appeal structure in case of dismissal or removal from office. Presently magistrates can only appeal to the courts against removal or dismissal which is the last resort for them. No judge has ever been removed from office pursuant to section 104 of the constitution of Botswana but a magistrate was redeployed in 1996 by the President acting on the advice of the Judicial Services Commission. The magistrate was redeployed to the Attorney General's Chambers as a senior state counsel. The Judicial Service Commission refrained from giving reasons for the redeployment but proceeded to say that to do so would not be in the interests of the particular magistrate concerned.

6.7.3 The Role of the Judicial Service Commission in South Africa

While Botswana has had the Judicial Service Commission since its independence in 1966. South Africa's Judicial Service Commission was established as recently as 1994. A Judicial Service Commission was provided for in the Interim Constitution and its membership was assented to by the President on 5th July and operations commenced on 13 July 1994.

Presenting the Bill (for its establishment) for debate before the National Assembly, the Minister of Justice proceeded to say the following:

"... It is very important that we should understand that the establishment of a Judicial Service Commission is a radical break from the past. We have had a past in which the judiciary was appointed by the executive. There have been a great many accusations that our judiciary is not independent. There has been much controversy with regard to this matter and as a result of that the judiciary has suffered from lack of legitimacy.

The Judicial Service Commission is important because it removes control over appointments to the judiciary from hands of the executive and places it in the hands of a body which will consider this matter independently of the wishes of the executive.

It is a very important innovation for our country..."⁵⁷

The Commission is allowed to determine and regulate its own procedure and requires the support of at least an ordinary majority of all its members. The Commission is further empowered to appoint committees from among its members and to assign any of its powers and functions to such committee. The South African Judicial Service Commission reflects broadly the various interest groups that go a long way in creating a truly independent and impartial body. The Constitutional Court, the Supreme Court, administration of justice, advocates profession, attorneys profession, law faculties are represented. The diverse and expansive membership of the

Commission ensures that judges in South Africa have considerable security of tenure. It is indeed a radical break from the past for South Africa to have such a large and high profile body to screen the appointment and removal of judges. Admittedly, it is a South African innovation because it is only restricted to judges whereas in countries like Botswana, the Judicial Service Commission has equal application in the appointment and removal of both magistrates and judges.

The new Constitution of the Republic of South Africa reflects broadly the composition of the Judicial Service Commission as encapsulated in Section 105 of the Interim Constitution and like the interim constitution also provides grounds for the removal of judges from office. The new composition of the Judicial Service Commission is as follows:

“178 (1) There is a Judicial Service Commission consisting of -

- (a) the Chief Justice, who presides at meetings of the Commission;
- (b) the President of the Constitutional Court;
- (c) one Judge President designated by the Judges President;
- (d) the Cabinet member responsible for the administration of justice, or an alternative designated by that Cabinet member;
- (e) two practising advocates nominated from within the advocate’s profession to represent the profession as a whole, and appointed by the President;
- (f) two practising attorneys nominated from within the attorney’s profession to represent the profession as a whole;
- (g) one teacher of law designated by teachers of law at South African universities;

- (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
- (I) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
- (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
- (k) when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.

According to the new Constitution, a judge may be removed from office only if:

- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct; and
- (b) the National Assembly calls for that judge to be removed, by a resolution adopted by at least two-thirds of its members.⁵⁸

The president must remove a judge from office upon adoption of a resolution calling for that judge to be removed. Furthermore, the president, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in paragraph (a) and (b) above as provided for in the new Constitution. The Judicial Service Commission Act No. 9 of 1994 of the Republic of South Africa provides for the submission by the Commission (within six months after the end of every year) to parliament of a report in writing regarding its activities

during that year. Its counterpart in Botswana does not have an equivalent provision and no report of its activities has ever been published.

6.7.4 Other Countries

Gambia, Ghana, Lesotho, Malawi, Mauritius, Swaziland, Uganda and Zambia have their judges appointed either by President, the King or Governor-General as the case may be on the advice of the Judicial Service Commission.⁵⁹ Mauritius and the Gambia have a Governor General as the official appointing judges on the advice of the Judicial Service Commission. In the Gambia, Lesotho, Malawi, Mauritius, Swaziland and Zambia, the chairman of the Public Service Commission is made a member of the Judicial Service Commission.⁶⁰ Invariably, the Chief Justice in the countries mentioned above, is a member of the Commission.⁶¹ Another relevant feature is that these countries have an independence constitution dated in the 1960's onwards. Their Judicial Service Commission is in some respects similar to that of Botswana.

6.8 Conclusion

The Public Service Commission in Botswana has been stripped of most of its powers. It can no longer appoint or recruit personnel into the public service. To date, it has no power to discipline nor remove any public servant from office. Consequently, all the matters that are crucial to the careers of a public servant (appointment, discipline and removal) have been relocated in the Director of Public Service Management. The Director of the Public Service cannot realistically be as impartial and independent in the exercise of those functions as the Public Service Commission had been. Security of employment therefore becomes eroded with the relocation of those matters which are crucial to the careers of public servants.

The South African form of the institution of the Public Service Commission appears to be the highest form that such an institution can take. All matters that are important in a public servant's career are located in one central independent and impartial institution which is the Commission. In South Africa, there has not been an erosion, but an advancement in relative terms, of the protection of employment for public servants through the strengthening and expansion of the role

of the Commission by both the Interim Constitution and the new Constitution. Vices like corruption, nepotism and cronyism can easily find their way into the present arrangement in Botswana whereas the Public Service Commission in South Africa is one of a number of central administrative institutions with the role of counteracting them.

Whereas in the Botswana Judicial Service Commission the stakeholders (attorneys, advocates and law society) are not represented, there is wide representation in the South African Commission. Moreover, despite the representation which is wide, the South African Service Commission is functioning well in practice. South Africa being such a vast country, it would be difficult to achieve true representation reflecting the interests of all those interested in the Judiciary.

The Judicial Service Commission in Botswana and South Africa appears to be a powerful institution. In both countries judges enjoy relative security of tenure and the procedure for their removal is elaborate and protective. Magistrates in Botswana are appointed by the president acting in accordance with the advice of the Judicial Service Commission but have less security compared to judges. Upon removal from office by the President acting on the Commission's advice, magistrates cannot appeal to any Commission, nor can they appeal to the President. The elaborate procedure for appeal accorded to public servants is not available to them. This situation is extremely unsatisfactory for magistrates in Botswana, since they are both judicial and public servants at the same time, and should enjoy similar if not more protection than ordinary public servants. The statute does not require the Judicial Service Commission in Botswana to publish annual reports of its activities nor does it in practice do so. In the light of the above, judges in both Botswana and South Africa enjoy considerable security of tenure whilst their more junior officers (magistrates) have limited protection. There is no doubt that with a little more political will, the same protection can be extended to them.

The protection afforded to public servants in Botswana by these Service Commissions is structural. These Commissions form part of the constitutional structure of good governance inherited at independence. The high watermark of the protection of public servants simply lies within the realm of both administrative law and labour law. These branches of law overlap

effectively governing the principles applicable to discipline and dismissals in public employment.

The next Chapter is devoted to an examination of the principles affecting discipline and dismissals in the Botswana public service.

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ENDNOTES

1. The 9th Inter African Public Administration Seminar held in Gaborone, Botswana. 3rd 9th October, 1970. *Delegation and Control in the Public Service*. English Press, Nairobi. The role of the Public Service pg 20.
2. Ibid. See also *The Role of the Public Service Commission in New African States* by A.M. Mogwe pg 135 above. Also by W.N. Wamalwa at pg 21 above. (1970)
3. Note 1 above pg 20.
4. Note 1 above pg 20.
5. The Civil Service in Commonwealth Africa. Development and Transition. A.L. Adu. *The Public Service Commission*, Chapter 8 pg 137. (1969)
6. Note 5.
7. Note 5.
8. Note 5 pg 138.
9. Note 1 pg 20.
10. The underlining is mine. Section 89 is found in Cap 01:01 Laws of Botswana which is the Constitution.
11. Note 2 pg 144.
12. *Comparative Development of the Public Services in Botswana and the Western (Bantu) Areas*; W.J.O. Jeppe pg 133. South African Journal of African Affairs Vol 1 1971.
13. Act No. 25 of 1970.
14. Act No. 26 of 1970.
15. Note 12.
16. Note 12.
17. Note 12. The chairman of the Public Service Commission received a salary of R4, 656 p.a. and each of the four members R1, 164 p.a. reduced to R600 and R500 p.a. respectively in 1970.
18. Note 12 pg 23.

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19. Cap 26:02 Laws of Botswana.
 20. Section 109 (b) of the Constitution Cap 01:01.
 21. Note 17.
 22. DP 20/15/03.
 23. Note 22.
 24. *Annual Report of the Public Service Commission 1994.*
 25. Note 24 pg 3.
 26. Schedule 4 of the Interim Constitution of 1993.
 27. *The New Constitution and the Public Service.* (Commission for Administration, Cape Town, 1994) pg 5.
 28. Sections 209, 210 and 211.
 29. *White Paper, Government Gazette*, 24 November 1995.
 30. *Constitution of the Republic of South Africa*, Chapter 10 Section 196.
 31. Section 196 (2) Constitution of South Africa.
 32. Sub Section 3 Note 31.
 33. Sub Section 4 Note 31 above.
 34. Note 33 above.
 35. Note 24.
 36. Act No. 65 of 1984 as subsequently amended.
 37. Annual Report of the Public Service Commission 1994 pg 5.
 38. *The Role of the Public Service Commission in New African States* by A.M. Mogwe. Permanent Secretary to the President pp 133-140. Note 1 above.
 39. Constitution of the Republic of South Africa 1996 Chapter 10 Sec 195.
 40. Note 39 above.
 41. J.B. Ojwang, *Constitutional Development in Kenya* (Acts Press, Nairobi. 1990) pg 90.
 42. Note 41 above pg 90.

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43. Note 41 above pg 90.
 44. Note 41 above pg 91.
 45. Constitution of Botswana, Section 96 (1).
 46. Constitution of Botswana, Section 100 (1).
 47. Section 17(3) Trade Disputes (Amendment) Act, 1992. Act No. 23 of 1992.
 48. *Constitutional Law*, Rautenbach and Malherbe 1994 pg 201. Second edition.
 49. Note 44.
 50. Hugh Corder; *The appointment of judges: Some comparative ideas*. Stellenbosch Law Review. Vol 3 No. 2, 1992 pg 229.
 51. Section 97 of the Constitution of Botswana.
 52. 1994 (2) WLR 576
 53. At page 490
 54. At Page 492
 55. Section 127 (2) of the Constitution of Botswana.
 56. *Botswana Railways Organisation v Setsogo and Others*, Court of Appeal No. 51/95.
 57. Hansard, 22 June - 1 July 1994. Speech to the National Assembly by Dullar Omar, Minister of Justice.
 58. Annual Report of the Judicial Service Commission 1996.
 59. Note 50 above pg 228 - 229.
 60. Note 50 above pg 228 - 229.
 61. Note 50 above pg 228 - 229.

CHAPTER 7

DISCIPLINE AND DISMISSALS IN THE PUBLIC SERVICE

7.1 Introduction

The issue of discipline and dismissal in the public service in Botswana lies at the very core of our study because of its impact on employment security. This chapter probes the extent and applicability of principles of substantive and procedural fairness and their impact on security of tenure in public employment. The application of substantive and procedural fairness would serve to enhance security of tenure for public servants. Considered in connection with substantive and procedural fairness is the broader concept of natural justice and the doctrine of legitimate expectation.

7.2 Statutory regulation

The terms and conditions of service for public servants in Botswana are regulated mainly by statute and the common law. The predominant statutes are the Constitution, Public Service Act, Public Service Regulations and General Orders. Generally, discipline and dismissal for most public servants is governed by Public Service Regulations made in accordance with the Public Service Act. The relevant section provides:-

"The president may make regulations for the better carrying out of the purposes and provisions of this Act and without derogating from the generality of the foregoing such regulations may provide for:-

"(d) the procedure for taking disciplinary action against public officers,

(e) the punishments which may be awarded for breaches of discipline.¹

Disciplinary procedure for public servants is provided for by Statute and if it is to be taken

against a public officer, the appropriate procedure must be commenced as soon as possible.

"Where disciplinary proceedings are to be or may be taken against any officer the appropriate procedure shall be commenced as soon as possible."²

The disciplinary process in the public service involves a preliminary investigation, interdiction, enquiry and punishment. It is this process that we intend to consider, whether it has the necessary built-in safeguards to enhance, rather than militate against security of employment in the public service. Whilst the procedure for discipline and removal from the public service is laid down by statute, the principles of natural justice, being public law principles and not expressly nor by necessary implication excluded by the relevant statute, form part of the enquiry process. The doctrine of legitimate expectation which together with natural justice strives to ensure that public servants are not unfairly deprived of their interests and expectations is of fairly recent origin. These doctrines are examined below.

7.3 Natural justice

This concept has been defined as:

"the stereotyped expression which is used to describe those fundamental principles of fairness which underlie every civilized system of law;"³

"the principles of fair play so deeply rooted in the minds of Englishmen that a provision for an enquiry necessarily imports that the accused should be given his chance of defence and explanation"⁴;

"The principles of natural justice embody fundamental notions of procedural fairness and justice,"⁵

or

"natural justice tries to guarantee that the parties who will be affected by the decisions receive a fair and unbiased hearing before the administrative tribunals reach their decisions."⁶

In order to underscore the importance of the principles of natural justice and their impact in the context of public employment, it is therefore necessary to set out in detail what these principles are and what they entail.

"The rules of natural justice are common-law rules applicable to administrative enquiries and hearings. Their aim is to ensure that public authorities do not act arbitrarily and that they take fair decisions which are in the public interest."⁷

Adherence to rules of natural justice by courts and administrative tribunals and enquiries leads to decisions which are both procedurally and substantively fair. The same rules lead to similar conclusions in the context of public employment.

"By required adherence to standards of procedural fairness, not only is justice seen to be done, but also these principles assist tribunals to reach substantively correct decisions."⁸

Initially, the position articulated by the courts was that:

"It is firmly established in our law when a statute gives judicial or quasi-judicial powers to affect prejudicially the right of a person or property, there is a presumption, in the absence of an express provision or of a clear intention to the contrary, that the power so given is to be exercised in accordance with the fundamental principles of justice. One of these principles is that the person affected should be given the opportunity to defend himself or of being heard."⁹

There has now been a shift from the traditional approach captured above that the principles of natural justice are applicable to a statutory body exercising judicial and quasi-judicial functions.

The position is the following:

"It is now well settled that a statutory body which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard."¹⁰

Basically, there are two principles of natural justice. These are:

- (a) that a party involved in a matter should be given an opportunity to present his/her case before the decision maker comes to a decision adversely affecting him/her. This is referred to as the *audi alteram partem* principle, meaning literally, hear the other side, and
- (b) that an adjudicator should be impartial and unbiased when reaching or coming to a decision. The Latin maxim is: *nemo iudex in causa propria sua* (no man may sit and judge in his own cause).

Botswana's courts have decided some cases on natural justice relating to public employment. Although these cases are not necessarily on the public service, they illustrate the scope of natural justice, for example:

National Development Bank v Benedict Kenosi Thothe¹¹ is a local case where natural justice principles were held to apply to a big corporate body which in this case was the National Development Bank. The facts were that respondent was offered an appointment as a field officer with the appellant Bank in 1973. He accepted the appointment and continued in his employment with the Bank until 1990 when he was promoted to the position of Assistant General Manager. In 1991, he received a letter from the general manager advising him to proceed on leave with full pay for 30 days "pending investigation on an irregularity on a borehole loan and any ancillary matters." Meantime he was told not to enter the Bank's premises during that period. The leave

was later extended as the investigations had not been completed. In 1992 he was summoned by the General Manager and asked to resign or face summary dismissal. He declined, only to receive a letter, terminating his services with the Bank. He then went to court. The court held that the National Development Bank which was a creature of statute, was a public authority. The court continued:

"And there can be no doubt that they can employ/dismiss such employees under and in accordance with the provisions of such statutes and in accordance with the rules and regulations made under powers granted under them...

I am firmly of the view that where no such rules and regulations exist, all such public bodies are bound to observe the rules of natural justice in the procedure which they employ in disciplining members of their staff."

In this case the conditions of service laid down the procedures that had to be followed in circumstances where an employee committed a disciplinary offence. Part of the procedure included a clause to the effect that charges of an offence which involves disciplinary action shall be made in writing, clearly stating the nature of the offence, and inviting the employee to reply to charges as stated. The respondent employee had not been subjected to that procedure. Specifically, he had not been given a hearing. Consequently as the requirements of the procedure laid down or at any rate those of natural justice had not been followed both the High Court and the Court of Appeal held that the dismissal was unfair, and reinstatement was ordered.

Chief Seepapitso Gaseitsiwe v Attorney-General¹²

In this case, the Minister of Local Government and Lands suspended Chief Seepapitso from being Chief of the Bangwaketse on the ground of the unsatisfactory behaviour of the Chief. The Chief's son, Leema Gaseitsiwe, was appointed to be acting Chief during the period of his father's suspension. The Chief challenged the Minister's suspension order in Court on the grounds that the Minister acted in bad faith, that he was actuated by improper and dishonest motives and that his action was arbitrary and grossly unreasonable.

The relevant provision of the statute authorising suspension of the Chief required the minister to furnish the Chief with the grounds upon which his suspension was based. It was only after holding an inquiry, with the chief fully furnished with allegations against him, that the Minister could take disciplinary action if he was of the opinion that the allegations had been confirmed. The Court of Appeal confirming the decision of the lower court on the aspect of the suspension of the chief said:

"The above mentioned misconduct, which spans a period of more than twenty years, reveals the appellant as an irresponsible despot with little respect for authority, peace and good order, and no respect for the law. His past record indicates that he is an incorrigible trouble-maker."

His record had indicated a previous suspension as chief for one year, repeated public warnings and reprimands by the Vice President, the Minister and the Permanent Secretary; a High Court conviction, dereliction of duties and a fine for assaulting a customs officer amongst others. The full panoply of the requirements of law had been followed and the chief could not be heard to complain that justice had not been done. The court was satisfied that natural justice principles had been followed.

This examination of the principles of natural justice sheds some light and assists us in understanding the Public Service Act and Regulations. It is an interesting revelation that some of the Public Service Regulations may in themselves be a codification of these principles of justice.

The two principles of natural justice mentioned above; namely, *audi alteram partem* (the right to be heard) and *nemo iudex in causa propria sua* (no man should be a judge in his own cause) go to the very core of procedural fairness in discipline and pre-dismissal cases. Industrial courts have since their creation been consistent in their emphasis on them that they have become "trite rules of industrial relations law and practice."¹³ It should be noted that the above principles constitute the irreducible procedural standards which courts, tribunals and statutory bodies are required to take into account in disciplinary enquiries. There are other criteria which amplify and

qualify these principles. It is to a consideration of these principles that we turn. It should be borne in mind that the fundamental enquiry is whether they constitute part of a process designed to enhance security of tenure in public employment.

7.4 Procedural fairness

It has become a trite rule of industrial law and practice that an enquiry should be held in discipline and pre-dismissal cases for misconduct.

"At the heart of this requirement is the simple recognition that before it is fair to dismiss a man for alleged misconduct he is entitled to know what he is supposed to have done and to challenge those who say he did it."¹⁴

The cardinal requirements for a fair disciplinary enquiry are the following:

(1) Notice of intended action

"The first leg of the meaning most commonly given to the principle "*audi alteram partem*" is that the party who is to be affected by the ruling of administrative agency concerned must be notified of the intended action, in order that proper effect may be given to the second leg, viz the opportunity to be heard."¹⁵

As Franklin¹⁶ puts it, the employee must be "informed with sufficient particularity of the charge which is to be met in sufficient time to prepare for the enquiry."

Better still, "the employee who faces discipline must be given a reasonable notice of the time and place the employer intends holding the enquiry."¹⁷

According to Cameron,¹⁸ the employee should be given advance warning of the charges. He argues that it would be "grossly unfair to summon an employee to a fairly timed enquiry but leave him or her ignorant of what conduct is complained of until the hearing commences." He cites the

case of NUM and Another v Kloof Gold Mining Co. Ltd.¹⁹ where it was stated that if justice is to be done, it is essential that an employee should be informed before the holding of the enquiry of all relevant allegations and charges.

(2) The need for a hearing

The administrative agency making a decision adversely affecting rights of a particular party should afford such party an opportunity to present an opposing case if he so desires.²⁰ The employee must be given a hearing prior to dismissal. The procedure may range from formal to extremely informal depending on the particular situation. The employee must not be fobbed off with a sham hearing.²¹ The mere pretence of a hearing is frowned upon by the courts. The enquiry must be a genuine one into the guilt or innocence (including surrounding circumstances) of the respective employee. A hearing given for ulterior or coercive purposes will not suffice. According to Cameron "the employer must:

- (i) investigate the alleged default properly;
- (ii) give due consideration to the circumstances upon which he wishes to rely for termination;
- (iii) give proper weight to the factors which may have influenced or caused the employee's default;
- (iv) duly consider the employee's work, personal circumstances and other relevant factors, including anything which might weigh in favour of the employee; and
- (v) bear in mind any alternative punishments or procedures which will ensure a fair hearing."²²

Denial of a hearing on the basis that the case is an 'open and shut' case was criticized by Megarry, J. in John v Rees²³ where he held;

"As everybody who has anything to do with the law will know, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those of us with any knowledge of human nature, who pause to think for a moment, likely to underestimate the feeling of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

Article 7 of the International Labour Organization's Termination of Employment Convention²⁴ provides that the employment of a worker shall not be terminated before he is provided with an opportunity to defend himself against the allegations made against him. This convention has been cited with approval in numerous cases including Lefu v Western Areas Gold Mining Company.²⁵

(3) The employer must disclose all essential allegations and charges to the employee

All the material charges against the employee must be disclosed to him in order that he may be in a position to deal with them.

"Indeed, the omission by an administrative authority to disclose prejudicial facts lying against a party who is being heard, strikes at the heart of the hearing itself, as a party who does not know of what he is being accused, cannot possibly present rebutting evidence."²⁶

In NUM and Others v Transvaal Navigation Collieries and Estate Co. Ltd²⁷ the employees were given an opportunity to state their case. They had not been given the exact nature of the case against them. The names of the deponents and their allegations had been withheld and the employees could not properly conduct their defence. Their dismissals were consequently set aside.

(4) Representation of employee

The employee is entitled to be represented or assisted at the hearing.²⁸ According to Cameron it is not a "requirement that the employee should be represented or assisted at every pre-dismissal hearing: only that he or she should be fully able to exercise the right to call an assistant or representative in aid; and if the exercise of this entitlement is thwarted the hearing will be unfair."

The International Labour Organization Recommendations on Termination of Employment 1963 and 1982 provide that the employee should be entitled to be represented by some person. In the context of labour relations, it may be anyone from the workplace, a trade union official or colleague. This is true in the context of private sector employment but there is some doubt regarding this position in the context of public employment where there is no unionization. The Public Service Act provides for legal representation before the Public Service Commission.

There is no doubt that being able to be represented by another employee or legal representative, being given a hearing as well as having received advance warning of the charges and disclosure of allegations enhances to a significant extent security of employment in public employment. There would be a world of difference if the above factors were not required and indeed labour relations in public employment would not have come of age. The above are however, not the only factors. We turn next to consider other factors.

(5) The employee should be allowed to challenge his accusers.²⁹

The accused worker should in all fairness be allowed to question those who incriminate him and to challenge the reliability of their version. Cameron states that such an opportunity to question should be granted face-to-face. That the employee should not only be present when the evidence is presented against him; but should also be allowed to put questions to the witnesses whenever possible.

(6) The employee must be allowed to call witnesses.³⁰

The employee must be able to give evidence himself and to call witnesses in his defence. It would clearly be unfair if the employee were not be allowed to do so.

(7) The enquiry must have been fairly timed³¹

"A prompt hearing is essential whilst the evidence remains clear and unclouded by forgetfulness. However, the employee should be given an opportunity to prepare his case and thus it cannot be too prompt so as to interfere with the employee's ability to prepare."³²

(8) The enquiry should be conducted in good faith

"While allowance will be made for the undesirable practicalities of prior contact, personal impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective and fair judgment to bear on the issues involved will render the procedure unfair."³³

Cameron states, that "in the employment context the full rigour of the law as it has developed in relation to statutory or domestic tribunals is not applied. That the person or persons deciding on guilt or innocence and on the appropriate penalty will in many cases know the accused employee (including past history, employment record, previous warnings) and may even have formed some initial impression as to the events in issue." The article by Cameroon should be considered in the private employment context where the employment relationship is one of contract. The parties in that relationship are familiar with each other and the antecedent acts may well be familiar knowledge. This is particularly true in Botswana, where Permanent Secretaries have disciplinary powers and supervise civil servants.

The principle that the enquiry should be conducted in good faith falls under the second broad principle of natural justice - the principle of impartiality (also referred to as the *nemo iudex in sua*

causa principle). The purpose of the principle is to ensure the absence of any interest by the decision making institution. As a cardinal rule no man may sit and judge in his own cause. If the decision maker has some interest of a pecuniary or personal nature in the outcome of the proceedings he/she will be disqualified from sitting as a judge.

(9) The right to appeal

The employee should be allowed to appeal within the established management hierarchy. In much the same way that the enquiry must be genuine, the appeal panel must not be a mere formality. The members of the appeal panel must apply their minds fairly and impartially to all the relevant factors and considerations.³⁴

An attempt has been made in Botswana to provide public servants with an outline procedure to be followed in cases where a disciplinary enquiry is to be made. The Public Service Regulations are themselves a codification of some of the above mentioned principles of justice. At the very core of these principles is the notion that the enquiry must be directed at finding out the truth of the matter and consequently arriving at a fair and just decision for both the employer and the employee.

The procedure which is in line with the afore-mentioned principles will be set out below for purposes of completeness of this study.

7.5 Procedural safeguards in the public service regulations

11(1) Where a Permanent Secretary becomes aware of allegations of misconduct against an officer he shall, if he is of the opinion that disciplinary proceedings may be necessary, instruct some other officer of a rank not less Senior than the officer against whom the allegations of misconduct have been made to hold a preliminary investigation into those allegations.

(2) if following the preliminary investigation, the Permanent Secretary is of the

opinion that there is a prima facie case against the officer concerned, he shall prepare a list of charges against the officer in such form as may be prescribed in General Orders, with such modifications as may be necessary in any particular case.

(3) The list of charges shall be sent to the officer against whom they are made and he shall be informed that he has such period, being not less than 14 days as appears reasonable in all the circumstances to the Permanent Secretary to reply in explanation of the charges against him."³⁵

It should be borne in mind that whereas the procedural fairness principles considered above have been more or less codified by these Regulations, other principles of natural justice not included in the regulations are to be derived from the common law.

Ridge v. Baldwin³⁶ is one of the leading common law cases on natural justice illustrating that failure to accord a party an opportunity to be heard vitiates the proceedings in question. In this case Ridge who was the Chief Constable of Brighton had been arrested in October 1957 and charged with conspiracy to obstruct the course of justice. A few days later he was suspended from duty by the Watch Committee. At his trial, Ridge was acquitted. However, when sentencing two police officers from his office who were charged with him (but were convicted) the trial judge was critical of Ridge's leadership of the force. At a later date when a corruption charge was brought against Ridge, the prosecution offered no evidence. The learned judge directed Ridge's acquittal but was critical again of his leadership of the force.

The Watch Committee met the next day and decided that Ridge should be dismissed. The municipal corporation's Act of 1882 provided that the Watch Committee could dismiss "any borough constable whom they thought negligent in the discharge of his duty, or otherwise unfit for the same." Ridge was not asked to attend the meeting but was later told that he had summarily been dismissed. At the request of Ridge's solicitor, the Watch Committee reconvened some days later. Having received Ridge's representations, the Watch Committee decided not to change the original decision. Before the second meeting, Ridge gave formal notice of appeal against the

original decision to the Home Secretary. Part of the relief sought was a declaration that the purported termination was illegal, ultra vires and void and that he was still the Chief Constable of Brighton. Streatfield J. dismissed his appeal and so did the Court of Appeal. He appealed to the House of Lords. The appellant's case was that in proceeding under the Act of 1882 the Watch Committee was bound to observe what are commonly called principles of natural justice. That before attempting to reach any decision they were bound to inform him of the grounds on which they proposed to act and give him a fair opportunity of being heard in his own defence. The House of Lords ruled in favour of Ridge. That the power of dismissal in the 1882 Act could not then be exercised until the Watch Committee had informed the Constable of the grounds on which they proposed to proceed and have given him an opportunity to present his case in his defence.

The courts are also very scrupulous when dealing with cases involving preliminary investigations. One such case which came before the Privy Council is Paul Wallis Furnell v. Whangarei High Schools Board³⁷. The appellant was employed as a school teacher by the New Zealand Government at a high school. In 1970 a complaint was made to the high school's board about his conduct at the school. The board followed the procedure for investigation in terms of the Education Act 1964 and as prescribed in the regulations. The complaint was investigated by a subcommittee which reported to the board. After receiving the report in accordance with the regulations, the board notified the teacher by letter of the charges made against him and suspended him from his duties at the school pending determination of charges. The appellant was neither interviewed by the sub-committee which made the preliminary investigation of the complaint nor was he given an opportunity to make representations to the sub-committee before it reported to the board. The appellants solicitors wrote to the board complaining of the investigation and requesting further particulars. The board replied giving details of charges. Appellant denied the charges and offered an explanation thereto. The charges were then referred to the Director – General who then referred them to the teachers disciplinary board. A date of hearing having been fixed, the appellant issued proceedings in the Supreme claiming a writ of injunction directed to the high schools board to remove the suspension and reinstate him to teaching duties. The Supreme Court granted the writ but was reversed by the Court of Appeal. He appealed to the Judicial Committee of the Privy Council. In dismissing the appeal, the court

held that it was a principle of natural justice that a man should not be condemned unheard but the sub committee which conducted the preliminary investigation neither condemned nor criticised. It was further held that the scheme of the disciplinary procedure gave no scope for action which could be described as unfair and there were no grounds for thinking that the sub-committee acted unfairly; that the teacher knew that under the terms of his employment he might be suspended "pending the determination" of charges against him and there was no warrant for supposing that the board had acted irresponsibly or unfairly. Ridge v. Bandwin and Furnell v. Whangarei Schools Board are public law cases and should be contrasted with Nissan v. McNellie which has no public law element.

In the South African case of Lamprecht and Nissan SA (Pty) Ltd v. McNeille,³⁸ The Appellate Division found that the question of unfair labour practice did not arise in that case and that as there was no public law element, administrative law did not govern the matter, and that the respondent's right did not flow from the constitution of a voluntary organisation.

The respondent had been dismissed after having been found guilty of misconduct following a disciplinary enquiry. He succeeded in reviewing that decision in the Supreme Court. The ground for the review was that the principles of natural justice had not been followed, that appellant had refused to comply with a request for further and better particulars and also denied the respondent legal representation. It was contended that certain "Grievance and Discipline Handling" guidelines formed part of his terms and conditions of employment thus granting him procedural rights. Dismissing the respondent's case, the court held that, it had not been proved on the facts available even prima facie that the guidelines formed part of his conditions of service. That in so far as the respondent's claim was contractual it had to fail. It should be noted that where there is a public law element as in the public service regulations of Botswana, administrative law principles, supply the justice of the common law.

The Public Service Regulations provide that if the officer does not reply to the charges made against him under regulation 11 within the specified time, or if he fails to exculpate himself from the charges to the satisfaction of the Permanent Secretary, the latter shall prepare and report the case to the responsible officer.

The responsible officer on receipt of the preliminary investigation may call for additional statements or other information relative to the charges or decide to take no further action in which case the matter will be laid to rest. On the other hand, the responsible officer may decide the matter on the basis of the preliminary investigation or refer it to a Committee of Enquiry. At the Committee of Enquiry the full panoply of procedural fairness principles supplied by the justice of the common law is applicable. Breach of any of these principles renders the enquiry proceedings null and void for want of natural justice. In that situation the employee is protected against unjustified termination of his employment. Consequently there is enhanced security of tenure.

7.6 Public servants: the public/private law divide

It is important to bear in mind what is reflected in the chapter on industrial relations in the public service,³⁹ that in Botswana a distinction is made between public servants who belong to the industrial class and others. Industrial class public servants are governed by a completely different legal regime, viz, the Employment Act whereas officer public servants are governed by the Public Service Act and Regulations, General Orders and the common law principles of administrative law. In other words two categories of public servants (industrial class workers and non-industrial class workers) are governed by public law principles derived from administrative law and private law principles derived from industrial law and relations. Interestingly, notwithstanding that divide, the principles of natural justice couched as procedural fairness principles are applicable across that divide. Those principles have been discussed above and the contention made that they serve to enhance security of tenure.

In Thothe v National Development Bank⁴⁰ the Court stated that it recognized the contractual right of an employer to terminate an employment contract but cautioned that if the contemplated termination is a result of misconduct in the case of an employee of a public authority or public body, such employee will be entitled to a hearing in accordance with the rules of natural justice. The court said:

"The law will imply in respect of persons employed in the public service and parastatal organizations that they cannot dismiss employees without them first being afforded a hearing in accordance with the rules of natural justice.⁴¹

At the peril of repeating part of the discussion above, the judgment of Michael Phirinyana v Spie Batignolles⁴² by the Botswana Industrial Court set the following requirements for a fair disciplinary enquiry (applicable to industrial workers or people in private employment):

- (a) Reasonable notice of time and place the employer intends holding the enquiry should be communicated to the employee.
- (b) He must be informed of the charges against him.
- (c) He must be given the option of being represented by a co-worker of his choice.
- (d) The employer must adduce sufficient evidence before the enquiry to prove the alleged misconduct.
- (e) He should be entitled to question witnesses testifying against him.
- (f) He should be allowed to give evidence and to call witnesses.
- (g) He should be allowed to mitigate the effects of the offence.
- (h) He should have a right of appeal.
- (i) The enquiry should be conducted in good faith.

The requirements by the Industrial Court above underscore the contention that as to the applicability of natural justice principles, they have equal application notwithstanding that the employer is public or private.

It should be noted that in private employment a dual enquiry is conducted in deciding whether any dismissal is unfair. According to this construct the first question to ask is whether the dismissal was substantively unfair; and secondly, whether it was procedurally unfair. It is substantively fair if it is for a valid and fair reason, and it is procedurally fair if certain fundamental rights (summarised above) are accorded to the employee before the decision to dismiss is taken. While the law is silent as to whether there should be a valid and fair reason for a dismissal in the public service the de facto position is that there must be such a situation. It is very unusual for a public servant to be removed from office for no apparent reason. In general, the main ground for removal from public office is inefficiency.

7.7 Inefficiency

At the core of the weeding out exercise, initiated by the Government of Botswana at the end of the year 1995, to remove unproductive public servants from public office was the catchword inefficiency. Public servants who were no longer performing efficiently were to be weeded out of the public service. The Botswana Government could not remove public servants from office without legal justification. The legal justification put forward was that of inefficiency. Be that as it may the Public Service Act has laid down certain procedures to be followed in circumstances where removal from office is based on it. These procedures are to be found in the Regulations of the said Act. We revert to the relevant sections for illustrative purposes.

"8(1) If a permanent secretary is satisfied that an officer is unable to carry out his duties efficiently, he shall submit a report thereon to the responsible officer.

(2) The responsible officer, if he is satisfied that there are reasonable grounds to substantiate the allegation of inefficiency, shall furnish the officer concerned with a written statement of the grounds on which it is alleged that he is incapable of carrying out his duties efficiently, and either -

refer the matter to a committee of enquiry; or

deal with the matter himself.

(3) A Committee of Enquiry shall consist of three officers who shall be of a rank not less senior than that of the officer in respect of whom the enquiry is being held.

(4) A committee of enquiry shall enquire into the allegation of inefficiency and inform the responsible officer whether or not in its opinion such allegation has been proved."⁴³

According to the Regulations, if the responsible officer or the Committee of Enquiry finds that the allegation of inefficiency has been proved, the officer may be dismissed from office. Other forms of punishment against such officer include compulsory retirement, reduction in rank, reduction in salary, warning or reprimand. The above procedures ensure that there is justice in the determination of whether a public servant is inefficient or not. Inefficiency is generally the primary ground for removal from the service. If it can be maintained that the above procedures coupled with the requirements of natural justice make it extremely difficult to remove a public servant from office then the argument can be sustained that there is relative security of tenure within the context of discipline and pre-dismissal cases.

We have indicated in the preceding pages that natural justice strives to ensure that there is justice in the workplace, thus ensuring security of tenure for employees. What should be pointed out is that this security of tenure for public employees is compounded also by the doctrine of legitimate expectation which ensures that their interests and expectations are protected. By creating an additional basis for relief for public servants in the realm of administrative law, the doctrine of legitimate expectation extends the protection that has hitherto not been accorded to them.

7.8 The legitimate expectation doctrine in South Africa

The doctrine of legitimate expectation is a concept of administrative law originally developed

by the courts in England. Where a public authority has, for example, promised to follow a certain procedure such that it becomes "established practice", it is in the interests of good administration to require the authority to follow that procedure. The other party would have a legitimate expectation that the authority would follow that "established practice".

"The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned would reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken."⁴⁴

Previously, the approach adopted by courts in Botswana, South Africa and other English-speaking countries was that the rules of natural justice applied only where liberty, property or existing rights had been affected. Where mere interests or expectations had been affected the rules would not apply.⁴⁵ However in Administrator, Transvaal and Others v Traub and Others⁴⁶ the South African Appellate Division accepted that it is insufficient to limit the application of the rules or principles of natural justice to instances where liberty, property or existing rights of an individual are prejudicially affected.⁴⁷ According to Chief Justice Corbett,⁴⁸

"There are many cases where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected."

Interests and expectations are now added to the formula of 'liberty, property and existing rights'. The Traub case presented itself as an ideal opportunity for the judges of the Appellate Division of the Supreme Court of South Africa to formally recognise and introduce the doctrine of legitimate

expectation in South African law. The facts follow briefly stated.

Traub and others were doctors who were denied appointment or re-appointment to the position of senior house officers at the Baragwanath Hospital in Soweto. Re-appointment in the past had occurred automatically after every six months. There was also a long standing practice that on completion of their internship and upon the recommendation of the departmental head concerned doctors would be appointed by the director of hospital services as senior house officers. Traub and others had all signed a letter which severely criticized the provincial administration for its attitude towards conditions in the medical wards of the hospital. In their letter subsequently published in the South African Medical Journal they had described conditions at the hospital as disgusting and deplorable. They referred to the attitude of the authorities as deplorable. They also described the state of affairs at the hospital as inhumane and the facilities as inadequate. Their applications to be appointed or re-appointed as senior house officers were subsequently refused by the director of the hospital services. The reason given was that they were not suitable to fill the aforesaid positions. The Appellate Division held that Traub and others had no antecedent rights which had been affected by the director's decision not to appoint them. Nevertheless the court rejected the earlier classifications of functions of public officials into the categories, 'judicial' and 'quasi-judicial' on the one hand and administrative on the other. It affirmed a general duty of officials to act fairly. In this case, Traub and others had a legitimate expectation recognized by law that a decision prejudicial to their interests would not be taken before they had been granted a fair hearing. In the event of a contemplation to depart from the past practice, a fair hearing would have been given before the decision was taken.

According to Olivier⁴⁹ "the expectation was essentially a substantive one. To grant them procedural protection would seem to be insufficient and could lead to a situation where their expectation would still not be satisfied."

The Traub case therefore extended the traditional grounds for relief in law by recognizing the doctrine of legitimate expectation in South African law. Other earlier South African cases which recognized but did not expound the doctrine of legitimate expectation are Langeni⁵⁰ and Mokoena.⁵¹

In Langeni and Others v Minister of Health and Welfare and Others, four Provincial hospital employees were dismissed on 24 hours notice without a hearing. They applied for an order setting aside the decision to dismiss them as being unlawful and reinstating them in their former employment. The learned judge, Goldstone, ruled that the traditional classification of judicial, quasi-judicial and administrative decisions was no longer adequate in determining whether the rules of natural justice were applicable. He held that the duty to observe the rules of natural justice may be inferred from the nature of the power conferred on the decision-making authority. This constituted a useful approach to the consideration of whether the person affected by such a decision had acquired a right, interest or legitimate expectation which was such that it would be unfair or unjust for the power to deprive such person thereof without a hearing. He further held that in a case where like the present one there is an element of public employment, or support by statute or something in the nature of an office or status, the employee's legitimate expectation of remaining in employment had to be examined to determine whether such employee was entitled to a hearing before the decision was made to terminate his employment. In this matter, the court found that Langeni and others were employed as "temporary workers," their employment being partly governed by statute and regulation, and partly by contract which provided in regard to termination, that it could be done on 24 hours notice. Furthermore, the precarious nature of the employment, irrespective of length of service was such that the applicants expectation of remaining in employment did not extend beyond 24 hours. Accordingly, the rules of natural justice were not applicable.

The above case should be contrasted with Mokoena and Others v Administrator, Transvaal. The applicants were temporary workers employed by the Transvaal Provincial Administration and subject to 24 hours notice of termination of their employment. They had all been employed for a considerable number of years and after the first two years, had become compulsory members of the Pension Scheme established under the Temporary Employees' Pension Fund Act 75 of 1979 and had made contributions thereto. The question before the court was whether the administration could summarily dismiss them without giving any reason. Goldstone J. held that their membership of the Pension Scheme placed them on a different legal footing and that the power of the administrative authority to give them 24 hours notice clearly affected their pension

rights and involved legal consequences for them. Goldstone J. further held that the *audi alteram partem* rule ought to have applied and that the official concerned was obliged to have given an honest and *bona fide* consideration to the representations made by them. Accordingly the decision to dismiss them was vitiated by failure to adhere to the *audi alteram partem* rule.

7.8.1 The position in Botswana

The courts in Botswana have also had occasion to discuss the doctrine of legitimate expectation in a number of cases in public employment. We discuss some of the cases below.

(i) Dismissal

In National Amalgamated Local and Central Government and Parastatal Manual Workers Union v Attorney General,⁵² the workers represented by the above union had gone on strike and Government as employer had decided that the strike was illegal and that those taking part in it should be dismissed. The union had asked its members to go on strike over a minimum wage of P600 per month for the Industrial workers in the public sector, arrived at on 12th July 1991, which government failed or refused to implement. The Government on the other hand contended that a recommendation made by a Joint Committee of both government officials and the union over the minimum wage did not amount to a binding agreement. After the declaration of the strike as illegal some members of the union were dismissed from work and it was in consequence of this that the Manual Workers Union went to court to contest their dismissals. In the course of his judgment Amisshah J.P. said:

"Those placed in authority should in the exercise of their discretionary powers act fairly. This requirement of the law is one of the manifestations of the rules of natural justice. A manifestation which in some cases is described as the *audi alteram partem* rule... It is true that some opportunity was given to the striking workers to explain why they were not at work. But this opportunity was circumscribed by the order from above that only those who were on vacation leave should pass through the needle's eye. In any event, the nature of the case

was such that the kind of hearing given by the government to the individual workers was unlikely to yield a fair result. The reason why the workers were absent from work was patent to high heaven. It was because, to the knowledge of Government, they were taking industrial action...

... the workers in this case have a legitimate expectation which the courts will protect. The law provides that a trade dispute, defined in the Act as "any dispute or difference between an employer or employers and employees or between employees and employees in any trade or industry which is connected with employment of those employees in that trade or industry or with the terms or conditions of or affecting that employment," should be settled in accordance with the Trade Disputes Act... If the settlement is not made under the Act, the worker is entitled to some rational explanation for abandoning the course charted by the Act or to be given an opportunity to comment on such abandonment."

In the result, Amissah J.P. held that there was no binding agreement on Government to pay the Industrial class workers a minimum wage of P600 per month; further, that the Minister's declaration of the Strike as illegal was in order; and finally, that the dismissal of striking workers was unlawful and that the workers should be reinstated.

(ii) Retirement

Sarah Mmoniemang Mothusi v the Attorney-General⁵³

Sarah Mothusi joined the Public Service of Botswana on 1st October 1969. She served in positions of Postal Officer and senior Administrative Officer. She served in several departments.

She was retired after a three month notice given her on 27th September 1990 by the Director of Public Service Management. A notice of motion was filed by her lawyers contesting her retirement from the service. Part of the reasons filed with the Court were that the decision to retire her was vitiated by a failure on the part of the respondent to appreciate the nature and limits of his discretion, that respondents action to retire her was invalid in that it was taken without

notice and without any hearing or observance of the principles of natural justice. It was also averred that Mrs Mothusi had a right or at least a legitimate expectation, that fairness and natural justice would be observed before any such action was taken. Her complaint which was not accepted by the court a quo was that she had a legitimate expectation to serve in the public service until she was 55, that a retirement before that age forced on her by her superiors without giving her an opportunity of being heard was illegal. For purposes of clarity the relevant provisions of the Public Service Act are reproduced hereunder:

"15 (2) Subject to the provision of this section -

- (a) a public officer holding public office before 1st October 1970, shall retire therefrom on attaining the age of 55 years;
- (b) a public officer joining the public office on or after 1st October 1970, shall retire therefrom on attaining the age of 60 years; and
- (c) a female officer may retire from the public service on marriage.

(3) Subject to this section, a public officer who has attained the age of 45 years may in the discretion of the appointing authority be retired from the public service."⁵⁴

Apart from the Act itself, the General Orders which are orders in the form of regulations which govern the conditions of Public Servants, make provision in amplification of the procedures for the implementation of the Statute, with respect to retirement. The relevant provisions are as follows:

"4. An officer appointed on pensionable terms may at the discretion of the Director be required to retire at any time on or after reaching the age of 45 years.

5. If the Permanent Secretary considers that the services of a pensionable officer

should be dispensed with on his attaining the age of 45 years or at any time thereafter, he will recommend accordingly to the Director giving his reasons in full and the officer concerned will not be invited to make representations nor will he be informed of the recommendation."⁵⁵

Mrs Mothusi's argument was that she had joined the Public Service before 1st October 1970, and she had a legitimate expectation to work in the service until she was 55. She argued that this legitimate expectation was acquired as a result of the provision in the Public Service Act which compelled public servants who had joined the Service prior to the specified date to retire at 55. She argued further that if she was retired before that date it would be akin to imposing punishment on her, consequently the rules of natural justice ought to have applied. The court rejected her arguments holding that the Public Service Act read together with the General Orders clearly gave the authority the power to retire an officer who reaches the age of 45 years and that that was the power exercised by the authority.

The facts in the case above cried out for a hearing which was never given. In fact the relevant legislation did not provide for it. In the case below, though somewhat similar to the one above in terms of the basic principles applicable, the applicant was allowed to make representations which was in line with the relevant statutes.

Alfred Chilinde Makgoeng v The Attorney-General⁵⁶

Sometime in 1962 applicant was employed by government or by one of its agencies or functionaries as an unqualified teacher. He taught in several schools before he became qualified as a teacher in January 1966. Thereafter he continued in his profession as a teacher until early in 1987 by which time he had risen to the position of head teacher. He was 55 years old. He was then served with a letter informing him that he was being retired from the teaching service in terms of the 1975 Teaching Service Act.⁵⁷ He was then invited to make representations regarding the Director's intention to retire him from the teaching service, which he allegedly did. The Director retired him compulsorily from the service.

Consequent upon these events the applicant filed an application in the High Court claiming a reversal of the Director's decision and relief, which was dismissed by the High Court. The matter then went to the Court of Appeal. The question before the appellate court was whether the conditions governing the appellants retirement from the service were to be found in the 1966 Act⁵⁸ or in the 1975 Act. Appellant contended that the 1966 Act applied whilst respondent argued that it was the 1975 Act. If the 1966 Act applied, then the purported termination under the 1975 Act was of no force and effect.

Section 12 of the 1966 Act under the marginal note "retirement" provided;

"(1) The Chief Education Officer may require an employer to terminate the appointment of a teacher if in the opinion of the Chief Education Officer the teacher has become incapable of discharging his duties adequately by reason of any infirmity of mind or body which a medical practitioner has certified is likely to be permanent or to continue for more than six months.

(2) Notwithstanding anything contained in section 10 and 11 any teacher whose appointment has not otherwise been terminated shall retire on attaining the age of 65 years."

On the other hand, section 15 of the 1975 Act which made provision for the retirement of teachers provided;

"(2) subject to the provisions of this section, a teacher shall retire from the Unified Teaching Service on attaining the age of 60 years...

(3) subject to the provisions of this section, a teacher who has attained the age of 45 years may, in the discretion of the appointing authority and in the interests of the service, be retired from the Unified Teaching Service."

Section 4(1) of the 1975 Act provided:

"On and after the commencement of this Act, any contract of service between a teacher and government or a local education authority shall be deemed to have been made under this Act and between such teacher and the Director and the provisions of this Act shall apply to any such contract:

Provided that no such teacher shall be subject to any such condition of service which condition of service is less favourable to him than any similar condition which applied in his case immediately before the commencement of this Act."

It was common cause that appellant's service came under the 1966 Act and the 1975 Act when they successively took effect. What was in dispute was whether the proviso to section 4(1) made appellant's retirement fall under one of them. The learned judge of appeal examined the conditions of service under both Acts and came to the conclusion that those under the 1975 Act were less favourable to the appellant than the ones under the 1966 Act. Consequently, he held that the 1966 Act applied and the appeal was upheld.

These two cases are very interesting when compared and contrasted. Sarah Mmoniemang Mothusi argued that she had a legitimate expectation to serve in the public service until she was 55. She further argued that a retirement before that age forced on her by her superiors was illegal. These were very sound and legally attractive arguments and it is regrettable that they were defeated by provisions in "General Orders," which are rules and regulations made in Supplementation of the Public Service Act and Regulations. These rules and regulations provided that she could be retired before that age and she was not to be allowed to make representations with reference thereto. This can only be an aberration of justice. Alfred Chilinde Makgoeng, a teacher in the public service was also retired from the service but was allowed to make representations. It would be an ideal situation if all public servants in Botswana were wherever possible, subjected to similar laws in similar situations. This would lead to consistency and enhanced security of employment.

7.9 Suspensions

Suspension and warnings like dismissals strike at the very core of employment security. In this area there is virtually no reported Botswana case law. There are however South African cases which have instructive value and persuasive force on this topic. The starting point is an extract from Wade⁵⁹ which provides:

Suspension from office as opposed to dismissal, may be nearly as serious a matter for the employee, but the Courts have wavered between two different views. One is that the employer needs a summary power to suspend without hearing or other formality as a holding operation, pending inquiries into suspicions or allegations. The other is that suspension is merely expulsion pro tanto. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Taking the former view in a controversial decision, a majority of the Privy Council held that a school teacher in New Zealand need not be given a hearing before being suspended without pay pending the determination of a disciplinary charge against him. Although it was recognised that suspension without pay might involve hardship and also a temporary slur on the teacher, it was held that he had accepted this possibility in the terms of his employment and that the disciplinary procedure as a whole was fair ...

Favouring the opposite view, the Court of Appeal of New Zealand has rejected the distinction between suspension and expulsion and has held that natural justice is required equally in both cases; and there are similarly clear Australian decisions. Suspension without pay, in particular, may be a severe penalty, and even suspension with pay may injure reputation. In principle the arguments for a fair hearing are unanswerable; and if for reasons of urgency it cannot be given before action is taken, there is no reason why it should not be given as soon as possible afterwards.

South African cases

It should be noted that the extract from Wade above puts across the English position on the subject. South African courts have recently developed some case law on the subject which includes Bula v Minister of Education, Matanzima v Holomisa, Mngoma v Mayor of Katlehong City Council, Raborifi v Minister of Justice and Transport amongst others. These are reproduced below for purposes of comparative jurisprudence. There is a dearth of similar jurisprudence in Botswana case law.

- (I) Bula v Minister of Education⁶⁰ was a matter in which applicant, a teacher, had been suspended by the Education Department pending the outcome of investigations into his alleged misconduct. He was, however, allowed to remain in office for over a year after he was first accused of misconduct and for over six months after a second charge was added. He was thereupon summarily suspended without being afforded a hearing. It was contended by the Education Department, that the suspension of a teacher was not a penalty but rather a procedural step to ensure the orderly and proper continuation of the education of students and that the audi alteram partem principle was not applicable. The court did not accede to that argument. The court held that the case did not require a speedy decision and that the applicant had every reason to assume that the status quo would not be altered without his being afforded the opportunity to be heard.
- (ii) In Matanzima v Holomisa NO and Another,⁶¹ the applicant Paramount Chief had been suspended from discharging his functions and was also required not to draw any salary or remuneration he might have been entitled by virtue of his position. The court held that his interests had clearly been affected and that where there is a decision affecting the career and reputation of a person, there is a clear duty to act fairly which includes compliance with the audi alteram partem maxim. The decision to suspend him without a hearing was set aside.
- (iii) Mngoma and Others v Mayor of Katlehong City Council and Another⁶² depicts a decision similar to the above cases. Applicants had walked out of a city council meeting. They

were warned upon departure that they were exposing themselves to suspensions from meetings of the city council but paid no heed to the warning. The councillors were subsequently suspended without a hearing for 45 days. The court held that the *audi alteram partem* maxim applied. The councillors should have been given notice that a resolution will be moved at a special meeting or at the next regular meeting of the council and the councillors should have been given an opportunity of defending themselves.

Contrast the above decisions with the decision in Bala v Minister of Finance⁶³ where the court held that it is an automatic consequence of a suspension in terms of the relevant Act that the suspended officer shall not be entitled to any emoluments for the period of suspension. Further, it was decided that it is incumbent upon the applicant to call upon the minister to exercise his discretion whereupon it is for the minister to observe the *audi alteram partem* maxim in deciding whether applicant should receive emoluments in whole or in part.

The above cases are also inconsistent with Raborifi and Others v Minister of Justice and Transport.⁶⁴ In this case the court held that a public officer can be suspended from duty in terms of the relevant Act before a charge of misconduct is laid against him and that he is not entitled to a hearing before a decision to suspend him is made in terms thereof. Furthermore, that the question of paying emoluments to a suspended officer involves a separate inquiry and will involve different considerations from those relevant to arriving at a decision to suspend an officer.

The reasoning in Bala v Minister of Finance and Raborifi and Others v Minister of Justice is in league with that of Jacobs and Andere v The Minister of Justice.⁶⁵ In Jacobs case, applicants who were prison warders and had taken part in an illegal strike during which they had conducted themselves in disorderly, undisciplined, provocative and offensive manner. They had been suspended pending an investigation into their fitness to remain in the prison's service.

In an application to have their suspensions set aside on the basis that the *audi alteram partem* principle had not been complied with, the court held that the power in the relevant Act to suspend a member was discretionary, and that the decision to hold an inquiry must be taken first and only

thereafter is it decided whether the member should be suspended pending the inquiry. The decision to suspend is a separate decision to which its own considerations apply. The court held further, that the *audi alteram partem* principle was excluded by necessary implication and the application was dismissed.

Howie J. in Muller v Chairman, Minister's Council, House of Representatives⁶⁶ held that the Jacobs case had been wrongly decided. The judge therein said:

The Swart and Jacobs cases concerned other statutes but those enactments were not significantly different from the Act in any respects which are presently relevant. For the reasons already given I think that the audi rule ought to have been held to have applied to the suspensions with which those matters were concerned. In that regard I am convinced, and I say so with due deference, that those cases were wrongly decided.⁶⁷

The jurisprudence in the Muller case is consistent with that expressed in the Bula, Matanzima and Mngoma cases. It is contended that the juridical basis expressed therein is consistent with sound legal principle. Mhlauli v Minister of Department of Home Affairs and Others⁶⁸ confirmed the correctness of the above line of reasoning by holding that suspension unquestionably constituted a serious disruption of an employee's rights. The social and personal implications of being barred from working and of being seen to have been so barred, and of being deprived of pay, were substantial. Accordingly, the court opined that an employee should be entitled to a hearing prior to his suspension. This approach is advocated to be the correct one to be applied and adopted in Botswana in relation to suspensions made in public employment. It puts a high premium on the protection of employment in the public services. There is no reported case on the subject in Botswana.

7.10 Warnings

The issuing of warnings to public servants constitutes a disciplinary sanction which is punitive in character.⁶⁹

Any procedure or hearing relating to the issuing of warnings can therefore in principle be challenged on the basis that procedural unfairness occurred.⁷⁰

An illustration of this issue is a South African case, Blacker v University of Cape Town and Another.⁷¹ The applicant had been charged with having unauthorised contact with the security police while knowing that such contact would be a sensitive issue for the University. He was employed then as a principal administration officer. A disciplinary inquiry was convened and he was found guilty and given two written warnings and a final written warning in respect of various charges. These were set aside by the Supreme Court on review on the basis that the procedure which had been followed had been unfair in that a decision as to the guilt of the employee had been reached before the employee had been afforded a proper opportunity to testify. This is a South African case and it is hoped that the Botswana courts would follow the same approach. There are no reported or unreported Botswana cases on the subject.

It is appropriate at this stage to provide in outline form the appellate structure in cases where public servants are aggrieved by decisions to discipline or dismiss them from public employment.

7.11 Appeal structure and procedure

Appellate procedure and structure has elaborately been laid out in the Constitution.⁷² The relevant provisions in the Constitution are set out below:

"110 (1) Subject to the provisions of this section and of section 111, 113 and 114 of this Constitution, power to appoint persons to hold or to act in any office in the public service, to exercise disciplinary control over persons holding or acting in such offices shall vest in such person or persons as may be prescribed by Act of Parliament.

The provisions of this section shall not apply in relation to the following offices, that is to say -

the office of judge of the Court of Appeal or of the High Court;

any office to which section 104 or 112 of the constitution applies...

111(1) Any person other than a member of the Botswana Police Force or the Prison Service who has been removed from office or subjected to any other punishment by the exercise of any powers conferred on any person under the provisions of section 110 of this Constitution may appeal to the Public Service Commission who may dismiss such appeal or allow it wholly or in part.

(2) Subject to the provisions of subsection (3) every decision of the Public Service Commission under the provisions of this section shall be final.

(3) Notwithstanding anything contained in subsection (2) if the Public Service Commission dismisses an appeal or allows it in part only the person who appealed may appeal to the President."

The Public Service Regulations relating to discipline also make provision for an appeal to the Public Service Commission. Section 25(3) of those Regulations provides:

"Any person aggrieved by the award of a punishment under this regulation by a Permanent Secretary may appeal to the Public Service Commission."

Members of the Police Force and Prison service in Botswana have been expressly excluded by the Constitution from appealing to the Public Service Commission and to the President. They have their own disciplinary codes and appeal structures within their hierarchy and in any event the Public Service Commission and the President may not be suitable structures to deal with cases from these disciplined services.

Magistrates also are precluded from appealing to the Public Service Commission since they fall under section 104 of the Constitution. They can neither appeal to the Judicial Service

Commission nor to the President. They do not have any built-in internal structures within the judicial arm of government to which they can appeal.

Permanent Secretaries, Ambassadors, High Commissioners, the Secretary to the Cabinet, the Attorney-General, the Commissioner of Police, Principal representatives of Botswana in any other country or accredited to any international organisation and holders of superscale posts are also excluded from appealing to both the Public Service Commission and the President because they fall under section 112 of the Constitution. Only Public Servants envisaged under section 111 can competently appeal to the Commission and the President.

The existence of the above-mentioned appeal structure greatly benefits those public servants envisaged in section 111 of the Constitution, thus ensuring security of employment for them. Denial of the right to appeal and lack of the existence of a similar structure for those not covered under Section 111 greatly compromises security of tenure for them. Permanent Secretaries Ambassadors and High Commissioners are political appointees appointed at the pleasure of the President. Their tenure in office is determinable at his will. To grant them complete employment protection would be politically inappropriate. The Attorney-General⁷³ is the only exception and his tenure is guaranteed by the constitution. The Pelonomi Venson case clearly illustrates the above mentioned position.

Pelonomi Venson was a Permanent Secretary in the Ministry of Local Government, Lands and Housing. She had been implicated in a Report of the Presidential Commission of Inquiry of the Botswana Housing Corporation. As a result, she was administratively charged with colluding with three others to award a building contract to Wade Adams Construction Company without competitive tender. She was also charged with failure to protect the interests of Botswana Housing Corporation when it was her duty to do so. There were also other charges. Pelonomi Venson replied to all the charges but she was nevertheless subsequently dismissed from the Public Service. She could neither appeal to the Public Service Commission nor to the President in terms of the law. The matter was settled out of court even though the case was registered with the courts.

7.12 Public Service Retirements

Elections may pass, and political power may ebb and flow but the public service remains. Career officers serving the government of the day without fear or favour, provide the continuity that is essential for stability and public confidence.

There comes a time in the life and career of a public servant when he/she has to leave the public service on retirement. The retirement provisions for all public servants are standard with the exception of the removal from office or retirement of a judge of the High Court, the Attorney-General or the Auditor-General. A discussion of the provisions relating to these officers has been made in the earlier chapters of this study. The relevant provisions relating to the retirement of public officers are reproduced below for purposes of clarity. They are contained in section 15 of the Public Service Act of Botswana.

“15 (1) In this section, “public officer” means a public officer admitted to permanent and Pensionable terms of service.

(2) Subject to the provisions of this section

- a) A public officer holding public office before 1st October, 1970, shall retire therefrom on attaining the age of 55 years;
- b) A public officer joining the public service on or after 1st October, 1970, shall retire therefrom on attaining the age of 60 years; and
- c) a female public officer may retire from the public service on marriage.

(3) Subject to this section, a public officer who has attained the age of 45 years may in the discretion of the appointing authority be retired from the public service.

(4) Subject to subsection (3), a public officer shall have the right at any time before or after attaining the age of 45 years to give written notification to his responsible officer of his wish to be retired from the public service, and if he gives such notification he shall:

- a) If such notification is given at least six months prior to the date on which he attains the said age, be so retired on attaining that age; or
- b) If such notification is not given at least six months prior to the date on which he attains the said age, be so retired on the first day of the seventh month following the month in which that notification is received.

- (5) If in the opinion of the appointing authority it is in the public interest to retain a public officer in his office beyond the age at which under this section he is required to retire, such officer may, if so willing, be so retained from time to time by the appointing authority for such periods as that authority may determine.
- (6) The minister may, by order published in the Gazette:-
- a) Determine an age greater than 55 years or 60 years, as the case may be, for the purpose of the retirement of public officers under subsection (2); or
 - b) Determine an age greater than 45 years for the purpose of the retirement of public officers under subsections (3) and (4),
- And on and after date on which such order comes into operation:-
- i) the reference in subsection (2) to the age of 55 years or 60 years, as the case may be, or
 - ii) the reference in subsections (3) and (4) to the age of 45 years
- shall be regarded as reference to the greater age respectively determined in that order....
- (7) On the abolition of any public office, a public officer holding the same shall, unless transferred by the appropriate authority to some other public office, be deemed to have retired from the public service.
- (8) Nothing in this section shall be deemed to affect any provision of the Constitution relating to the removal from office or retirement of a judge of the Court of Appeal, a judge of the High Court, the Attorney-General or the Auditor-General.
- (9) Nothing in this section shall be deemed to affect the compulsory retirement of a public officer accordance with any regulations made under this Act relating to disciplinary action.”

It is noteworthy that a female officer may retire from the public service on marriage and also that the appointing authority may retire a public officer who has attained the age of 45 years. Regarding the discretion to retire a public officer upon reaching the age of 45 years, this provision is important in order to infuse flexibility into the system. There may be other reasons compelling the appointing authority to retire someone from the service either in the interests of the service or in that person's interest hence the discretion of the authority to retire that public

servant.

Section 16 of the Public Service Act provides for situations where a public servant may be retired on medical grounds. He/she may be retired if he/she is incapable of discharging the functions of his/her office by reason of infirmity of body or mind and a medical practitioner or board has so certified. Here the officer is invited to make representations should he/she so wish.

It is contended that these retirement provisions effectively terminate the employment relationship between the public servant and the state. They end the security of employment hitherto enjoyed by the public servant through the cessation of the employment relationship. It should be noted in this regard that once a person has been confirmed as a permanent and Pensionable officer in the public service after the usual period of probation he/she holds that appointment until the age of retirement subject of course, to satisfactory performance and good conduct.

7.13 Conclusion

Enquiries in discipline and pre-dismissal cases in public employment attract principles of procedural fairness. The attraction of procedural fairness principles in turn ensures that there is justice in the workplace which results in enhanced security of tenure. It would seem from the above study that public employees enjoy a lot of protection from the principles of administrative law. It is interesting to note from this study how both labour law and administrative law interplay and come to the aid of the public employee. The Public Service Regulations provide elaborate procedures which import into the whole system an array of protective administrative law principles. The Traub case brought developments which are far reaching and extended the protection to public servants on a basis comparable to protection enjoyed by employees in the private sector. Whereas the doctrine of legitimate expectation initially covered liberty, poverty and existing rights, interests and expectations were now added to that formula by the celebrated Traub case. It is contended that these developments have widened the existing protection accorded to public servants through principles of public law, by way of analogy.

ENDNOTES

1. Section 35, Public Act, Cap. 26:01
2. Section 10, Public Service Regulations, Cap. 26:01
3. Hugh Corder, The Content of the *audi alteram partem* rule in South African administrative law 1980 *THRHR* (1980) 43 pg 156..
4. *Maclean v The Workers Union* (1929)1 ChD 602 at 625 per Maugham J.
5. G. Feltoe, *A guide to Zimbabwean Administrative law* 1991 (edition) pg 12.
6. Note 5 above.
7. A paper presented at the First Regional Workshop on Labour Law and Industrial Relations in a Changing Southern Africa, Fredrich Ebert Stiftung/Labour Law Unit, University of Cape Town, 13 - 15 July M.P. Olivier at the Marine Parade Holiday Inn, Durban pg 5, 1993.
8. Note 5 above pg 12.
9. *Publications Control Board v CNA Ltd* 1970 (3) SA 479 AD at 488.
10. *Breen v Amalgamated Engineering Union* 1971 (1) All ER 1148 at 1151.
11. Civil Appeal No. 22 of 1993.
12. Civil Appeal No. 5 of 1995.
13. Andrew Briscoe; Labour Law in Botswana. Gaborone. 1995, Page 35.
14. A.E. Franklin, Seminar on the Industrial Court of Botswana. Gaborone Sun Convention Centre, Thursday, May 18th 1995. Unfair Labour Law Practices - Developments in South Africa, Expected trends and application in Botswana: Avoidance pg. 9.
15. Hugh Corder, The content of the *audi alteram partem* rule in South African administrative law 1980 *THRHR* 43 pg 156.
16. See note 12 above.
17. B.B. Tafa, Seminar on the Industrial Court of Botswana, Gaborone Sun Convention Centre. May 18, 1995. (Dismissals and Termination of Employment) pg. 14.
18. Edwin Cameron, The Right to a hearing before dismissal - part I 1986 *Industrial Law Journal* Vol. 7 part 2.
19. (1986) 7 ILJ 375 (IC) at 384.

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20. See Note 13 above at pg. 161.
 21. See Note 16 above at pg. 193.
 22. See Note 16 above at pg 194.
 23. 1970 ChD 345.
 24. No. 158 of 1982.
 25. (1985) 6 ILJ, 307.
 26. Hugh Corder 1980 THRHR 43 pg 164.
 27. (1986) 7 ILJ 393 (IC).
 28. Note 14 pg 203 above.
 29. Note 14 pg 203 above.
 30. Note 14 pg 213 above.
 31. Note 14 pg 199 above.
 32. Lauren Grindlay, *Labour Law essays*. Procedural fairness in Discipline and dismissal cases University of Cape Town, August 1988.
 33. Note 14 above at pg 213.
 34. See Note 18 above pg 158.
 35. Public Service Regulations, Chapter 26:01 Section 11.
 36. 1994 AC 40.
 37. 1973 AC 600
 38. 1994 (II) BLLR I (AD)
 39. Chapter 4 of this study.
 40. Misc Case No. 253/92 High Court.
 41. *National Development Bank v. Thotho Court of Appeal, Civil Appeal No. 12/92.*
 42. *Michael Phirinyana v Spie Batignolles* IC 18/94.
 43. Public Service Regulations, Chapter 26:01.
 44. *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 A.

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45. See note 7. Pg 11
 46. 1989 (4) SA 731 A.
 47. See Note 46 above.
 48. Note 46 above
 49. Olivier M.P. "Public Sector employment Law: Recent Case Development" 1993 (Unpublished) Page 3.
 50. 1988 (4) SA 93
 51. 1988 (4) SA 912
 52. Civil Appeal No. 26 of 1993.
 53. Civil Appeal No. 15 of 1993.
 54. Public Service Act Section 15 Chapter 26:01
 55. General Orders, Section 119.
 56. Civil Appeal No. 8 of 1989, Court of Appeal.
 57. Unified Teaching Service Act, No. 26 of 1975.
 58. Botswana Teaching Service Act, No. 84 of 1966.
 59. Wade H.W.R.; *Administrative Law* 6th edition at pg 565 - 566.
 60. 1992 (4) SA 716.(TKGD)
 61. 1992 (3) SA 876.(TKGD)
 62. 1992 (3) SA 226. (WLD)
 63. 1992 (4) SA 346.(TKGD)
 64. 1991 (4) SA 442. (BGD)
 65. (1992) 13 ILJ 1136.
 66. 1992 (2) SA 508. SECLD (CPD)
 67. Note 63 above at pg 523.
 68. 1992 (3) SA 645. (SECLD)
 69. See note 7 pg 20.

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70. Note 66 above pg 21.
 71. (1993) 2 LCD 108.
 72. 'Cap 01:01 Botswana Constitution.
 73. Section 113 Chapter 01:01 Laws of Botswana.

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CHAPTER 8

8. SUMMARY AND CONCLUSIONS

8.1 Introduction

The law relating to the public servant in Botswana was the main concern of this study. This general objective was reduced to several specific research questions. The study specifically assessed the efficacy of statutory legislation and the degree to which it promoted tenure for public servants. The study sought to examine the present appointment process and its impact on public service job security. It further examined how probation and transfers within the public service affected continued employment. Public service traditions and their impact on tenure were considered. Labour relations revolving around the ministerial consultative machinery and the joint consultative machinery were discussed. The question was posed, whether public servants should be allowed to form and belong to unions and bargain collectively, with the right to strike in order to back their demands. We sought to comprehend how institutions within the public service like the Public Service Commission and Judicial Service Commission contributed towards employment security. The preceding chapters of this study attempted to answer these questions. This final chapter is intended to summarise the major conclusions of this study and their implications.

8.2 Summary of main findings

The appointment process in the public service is illustrative and underscores a fundamental contention that employment security can never be guaranteed in an absolute sense.¹ Indeed the constitution of Botswana omits amongst its fundamental rights and freedoms the right to work.² Nor would it have been possible to formulate such a right, let alone enforce it against any employer. This position is consistent with situations in other parts of the world, including South Africa. In this era of sophisticated and modern capitalist economies, not only is there no right to work but a right to work which can be enforced against an employer is very restricted. Against this background, it is asserted in chapter 3, that the zenith of security in public employment is appointment to the position of Attorney-General, Supervisor of elections now superseded by the

Independent Electoral Commission, Auditor-General, Chief Justice and puisne judges of the High Court. Appointment to the above positions is made in accordance with the constitution and their removal is similarly regulated by the same statute.

It is suggested that there should be openness and transparency in the appointment of officers specified in the Constitution of Botswana. These positions should be given to people who have demonstrated a high calibre of independence, integrity, honesty and an impeccable record of service in the public sphere in the country. The reasons for the above suggestions are quite clear. These are officers in whom the country reposes great respect and confidence and the process of appointment should reflect that situation. The number of these officers should be increased as and when the circumstances require. The present number should not be cast in stone but should accommodate change. Apart from the Attorney-General, Auditor-General, Judges and the Supervisor of Elections (being replaced by the Independent Electoral Commission) in Botswana there are other institutions which are supportive of democracy which in future should be accommodated if created. These state institutions supporting democracy are, Human Rights Commission, Independent Authority to Regulate Broadcasting (which is vital for freedom of speech) and the Ombudsman. The Ombudsman has already been created and given some protected tenure. It is of significant importance that the other group of public officers are appointed in terms of the Public Service Act and Regulations, General Orders and other Statutes of relatively minor importance. It is not suggested that the above position should be radically altered, rather perhaps, for the other group of public officers, a more neutral appointing authority exercising similar powers under the same statutes in the form of the Public Service Commission should have been retained. This argument will be revisited in subsequent summaries.

When an officer is recruited into the service, there is a period when that person is assessed for suitability for that particular position. That qualifying period is called probation. It is in that period that security of tenure is at its barest minimum. During this induction period, the officer is regularly supervised and kept under continual and sympathetic observation.³ This is meant to provide the officer with guidance, advice and support whenever necessary. The net effect of the above, is to give the probationary employee an opportunity to acclimatize and improve on his/her performance. It is contended in chapter 3, that the laws and regulations governing the status of probationary officers in Botswana may have been made with utmost good faith regarding the

protection of such employees, but it is conceded that such protection falls short of the protection accorded to someone employed on a permanent and pensionable basis. This is acceptable and has a sound juridical basis in law.

An employee who has been tried and tested in the service, having served his probation period is promoteable. At the level of the positive determination to promote him/her, the employee enjoys enhanced tenure. In the public service in Botswana, the first six months from the date of promotion constitute a qualifying period of probation. In this particular instance, there is little risk in that if the incumbent fails to perform to the required standard or his/her conduct is unsatisfactory, he reverts to his former rank instead of dismissal from the service.⁴ It is entirely clear from the above, that promotion impacts positively on tenure. This is acceptable and has a juridical basis in our law.

The Botswana General Orders provide that an officer may be transferred from a post in a Ministry or Department to a post on a comparable grade in any other Ministry or Department in the interest of the service. The appointing authority is discouraged from effecting transfers which have the effect of separating spouses. It is contended in chapter 3, that whilst public servants realize that the possibility of transfers may occur during their careers, it is no longer an occupational hazard as it was before. The preponderance of judicial authority is that inconvenience, hardship and health considerations among other factors will be considered when the issue of a transfer without a hearing is brought before a court which may alleviate but not necessarily solve altogether the range of problems arising from unacceptable transfers.

It is suggested that a clear policy should be formulated for the public service addressing thorny issues related to public service transfers. Such a policy if formulated should have as its basis consultation before, during and immediately after transfer. Consultation before the actual transfer apprising the individual of such a possibility strikes at the very core of good governmental practice which is a vital element of democracy. It is during that consultation process that the personal circumstances of the transferee will be addressed. At the very least an opportunity would have been given to the transferee to state his/her case in relation to the proposed transfer. It is only after the dialogue, when everything has been said and done that the harsh effects of unacceptable transfers can be minimised. Communication should be kept open

between the parties during and immediately after the transfer so that if there is a reversal of circumstances leading to the transfer, it can then be brought to an end. While the interests of the public service are of paramount importance when effecting transfers the above process also takes into account the individual needs of the transferee who should not be left in the cold. Other considerations which should influence the decision to effect a transfer or not should be the question of spouses/family and the special and peculiar needs of the transferee. Just as the paramountcy of the public service should not weigh unduly heavily against the transferee, so should the question of separating spouses/families not weigh too heavily against the transferor. A neat balance should be struck in order to accommodate the needs of the parties. The party to be transferred may be in need of constant medical attention which in itself is a special and peculiar circumstance which may require to be given consideration in reaching a proper decision to transfer. If all the above conditions are incorporated as part of a national policy of transfers in the public service, then the transferee cannot proceed to court and argue that he/her was not accorded a proper opportunity to state his/her case.

The ethics and ethos of the service become applicable immediately upon appointment into the service. Undeniably these traditions and conventions governing the position of public servants in Botswana affect tenure in varying degrees. Their full impact is considered in chapter 4. When Botswana attained her independence in 1966, she inherited a relatively small civil service modelled along the lines of the British public service. The principle of neutrality so well established in Whitehall, holding the public service to be a neutral estate separate from the political order was also inherited. The relationship between the political leaders and bureaucracy is compared in chapter 4 to that of a husband and wife in a Victorian household. The minister is the head of the household formally taking all important decisions, but doing this on advice he/she usually finds difficult and uncomfortable to disregard. Though he/she is head of the family, he/she is not really in charge of it, the household is controlled by the permanent secretary who remains out of the public eye, hence the concept of political anonymity of the civil servants.

It is fundamental that the public service should remain neutral and autonomous, loyal and permanent, both for the sake of the employees' security in employment as government's agents and for the sake of administrative efficiency.⁵ It is important that public employment tenure should not be subject to change of political party that forms government. This is a reflection of

sound political philosophy. It is this political philosophy that guarantees that, as elections and governments come and pass, public servants remain, to provide the continuity that is essential for stability and public confidence.

Continuity which is modelled along the principle of permanency, and transparency (an aspect of accountability) form part of the nine principles which have fostered a proud tradition of the public service in Botswana. Chapter 4 focuses on all these principles and reflects on their impact on tenure. A public service that has cultivated virtues of loyalty, integrity, impartiality, anonymity and accountability is certain to be secure in its future.⁶

The ethos and ethics of the service should be located within the context of the wider public service labour relations. These wider relations are discussed in chapter 5. The chapter acknowledges the special and peculiar nature of the public service though urging an indivisible labour law regime for both public and private employment. The central argument in chapter 5 is that Botswana should accede to International Labour Organisation standards. These standards are primarily intended to be universal, thus capable of being attained by countries with very different social structures and at all stages of industrial development.⁷ Fortunately, Botswana has of late signed some of the International Labour Organisation Conventions, including Conventions 87 and 98 which are intended to promote and guarantee certain basic human rights within the sphere of social rights. The above Conventions protect the right to establish, and join a trade union. It is noteworthy that whilst Botswana may have signed these two conventions and several others, which is a victory for public servants, there has been no change in municipal law to accommodate and reinforce commitment to international labour standards. The entire public service labour relations law discussed in chapter 5 remains unaltered and the government should effect the necessary changes to reflect its new international obligations. The right to form and join a union, to participate in the activities and programmes of such a union and to strike which are presently denied to Botswana public servants, seriously compromises and erodes their bargaining potential.

It is suggested that, within the sphere of public service labour relations, the necessary mechanisms should be put in place to reform the municipal law applicable to public servants and to create an indivisible labour regime. The possibility of amending the constitutional right of

freedom of association in the fundamental rights section to include a right to fair labour practices is advocated. This right to fair labour practices would subsume the right to form and join a union, to take part in the activities and programmes of such a union and to strike. Public servants engaged in essential services should however remain the only possible exclusion. Ordinary legislation can be considered for purposes of bringing about the desired result.

The findings of this study in relation to public service labour relations are that the efficacy of the present ministerial consultative machinery and joint staff consultative machinery is outmoded and has outlived its usefulness. Consequently, collective bargaining and the right to strike should be extended to all workers but those engaged in essential services should not be allowed to strike.

The prevailing public service labour regime in Botswana is such that there are Service Commissions meant to sustain and guard the interests of public servants. Chapter 6 discusses their structures, roles and impact on tenure. Originally, the Public Service Commission was responsible for recruitment of staff and their discipline and dismissal. The Commission was stripped of these powers in 1970 following a constitutional amendment. Presently it serves as an appellate body for public servants.⁸

The reasons why the Public Service Commission was stripped of its powers in 1970 were political and organisational. Politically, the Commission was too powerful and independent. It protected the largely dominant expatriate community from being relieved of their public service positions. Simultaneously, it inhibited the process of localization in its recruitment policies because of its independence. The conditions then were propitious and the spirit was one of nationalism. It is hardly surprising that it was then considered a very expensive body to maintain for purposes of ensuring impartiality within the service. The efficacy with which the Commission executed its functions was the main cause of its demise. It could not be utilised for political purposes by the new political order. To date, the political reasons why the Commission was stripped of its powers have largely been overtaken by events. No longer is there a large

expatriate community to be protected. The process of localization is undoubtedly at its zenith. In this era a body created for ensuring that there is impartiality in the recruitment, discipline and dismissal of public servants is priceless. No other area in the career of a public servant is as crucial and sensitive as recruitment, promotion, discipline and dismissal. In a nutshell, the political reasons have fallen away.

Organisationally, the reasons for the changes are persuasive, especially the creation of a central personnel agency in which all aspects related to public service management were centralised. This would ensure better co-ordination and overall control and development of the service under the office of the president. The political overtones of the organisational reasons are clear. The office of the president could not previously control any of the crucial and sensitive aspects relating to the careers of public servants. The changes in 1970 were effectively done to undo what the pre-independence constitution was meant to protect. Considered in that way, the organisational reasons are farcical. Functionally, the changes have a sound management basis.

The changes effected in 1970 might ostensibly have been appropriate in the political mood of the time but the stark reality is that public servants had more protection prior to the amendment. To suggest however that the pre-1970 position should be re-enacted would be going in a merry-go-round.

As an appeals body (chapter 6) the Public Service Commission requires strengthening through the appointment of adequately qualified members. A combination of extensive experience and professionalism would guarantee its stability, independence and integrity. The panel of four prominent former public servants serving in the Commission is no doubt satisfactory but it could be improved through a selection process which is designed to be transparent and accountable to the various stakeholders. Whilst the Minister has a role to play as an appointing authority on any decision of the Public Service Commission, one is tempted to conclude that the body is wholly independent and impartial in its deliberations despite its reduction in scope. Vacancies in the membership of the Commission should be openly advertised in order to attract the best possible candidates and the honorarium given should be increased in order to retain members.

Apart from discussing the impact of the Public Service Commission on tenure, chapter 6 examines the Judicial Service Commission. This too was a legacy of British colonial rule in Anglophone Africa. Most former British dependencies in Africa inherited it among them Botswana, Lesotho and Swaziland.⁹ This service commission is an integral yet independent part of the executive but plays a crucial role in the appointment and discipline of judges and magistrates. The operation of the Commission requires consolidation regarding its advisory, quasi disciplinary and supervisory role. Ideally, the whole judiciary should be completely separate and distinct from the rest of the public service. (Chapter 2 which gives background material details the various public service ministries). This judicial service commission should have its own distinct terms and conditions of service geared to guarantee tenure to members of the judiciary. The Judicial Service Commission should constitute the nucleus of the judicial service guaranteeing both the personal and functional independence of members of the bench.

Three members constitute the Judicial Service Commission (chapter 6). This is inadequate and not representative of those interested in the administration of justice. The Commission should be required to publish rules, regulations and guidelines relating to its operations as well as an annual report of its activities. The functioning of the Commission over the years could be likened to a 'one person show'. Although the decisions of the Commission could be camouflaged as the decisions of all the members, the reality of the situation is that the Chief Justice's word is final and his/her influence is co-extensive, and the perception is that the judiciary should fall under his direction and control. This is compounded by the fact that other members have no legal training but only general experience in the public service. In the exercise of its functions, the Judicial Service Commission is not subject to the direction or control of any other person or authority. This may literally not be true if it purported to act illegally, dishonestly, fraudulently or in bad faith. The Commission's ouster clause in the Constitution will not save it if it purported to act outside the limits of its given powers. The transparency and exposure of its activities would greatly enhance the security in employment of members of the bench.

The last chapter discusses the statutory and common law position of public servants mainly in Botswana and partly in South Africa (for comparative purposes) in discipline and dismissal cases.

The high watermark of the protection of public servants simply lies within the realm of both administrative law and labour law. These laws overlap effectively governing the principles applicable to discipline and dismissals in public employment.

The rules of natural justice which are fundamental principles of fair play,¹⁰ ensure that before being given the ultimate sanction, which is dismissal from the service, the employee should be given an opportunity to state his/her case.¹¹ The principles of procedural fairness govern the conditions and circumstances under which the employee's case will be stated. They are trite rules of labour law and practice and have been held to apply to discipline and pre-dismissal cases for misconduct (chapter 7).

Quite apart from the limitations enumerated in the above summaries, the creation of an additional basis for relief through the importation of the doctrine of legitimate expectation in administrative law, strengthened the existing protective mechanisms both at common law and through statutes, thus extending security of employment for public servants on a basis comparable to protection enjoyed by employees in the private sector.

The state should indicate its commitment to accepted international standards by ratifying all International Labour Organisation instructions in so far as they could be made applicable to suit local conditions. Measures should be taken to change the present legislative framework to accommodate the anticipated changes. The role of Service Commissions should be considered and redefined in order to play a more effective role both in terms of legitimizing the actions of the state and in protecting public servants. That the role of Public Service Commission is at its lowest ebb is apparent from this study. Re-allocating it some of its former functions without unscrambling the present set up would strengthen it as the only neutral body designed to regulate the affairs of public servants. The present judiciary should be reformed and distinct terms and conditions of service peculiar to it as a new and independent entity created. The above are some of the fundamental issues which public service employment protection raises for immediate consideration.

This study has sought to assess the efficacy of statutory legislation and the degree to which it promotes security of tenure. It has also sought to find out how institutions like the Public Service Commission and Judicial Service Commission have contributed towards employment security in the public service. Amongst other objectives it also has sought to examine the efficacy of the ministerial consultative machinery in promoting industrial relations between the state and its employees. This research has addressed these issues in the preceding chapters. The recurring theme is one of reforming the law in the light of the above investigation.

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APPENDIX I

A draft Charter of Fundamental Rights of Workers in Southern Africa was approved at a meeting of the trade unionists from Botswana, Lesotho, Mozambique, South Africa (COSATU and NACTU), Tanzania, Zambia and Zimbabwe held under the auspices of the Southern African Trade Union Coordination Council (SATUCC) in Harare on 16 April 1991.

The objective of the charter is to protect all workers in the region through a bill specifying labour and other human rights. The draft Charter was then taken back by national trade union centres for discussion and ratification at the national level. The Charter was ratified subject to national laws by the Southern African Labour Commission (SALC) in Lusaka on 12 March 1992. The following is the text of the charter as ratified by SALC.

TEXT

The national trade union centres of Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe, as well as the Azanian Trade Union Coordinating Centre, grouped in the Southern African Trade Union Coordination Council, together with the National Centres inside South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU) demand:

Basic human and trade union rights

The recognition by governments in the region of the universality and indivisibility of basic human rights, in accordance with the United Nations Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, and basic trade union rights as follows:

- The right to strike and engage in other forms of effective industrial action, including solidarity action, without dismissal. The right to strike must follow easy and expeditious procedures;

- Proper definition of essential services to prevent abuse by the state or by employers;
- Automatic organizational rights for representative unions (including the rights to check-off, education and training, freedom of access by trade union officials to all parts of the workplace, holding of meetings, bargaining);
- Right to organize, associate and form trade unions independent from the state and employers, with this right entrenched in the legislation;
- Right to trade unions to conduct their business without state interference.

Conventions of the International Labour Organization (ILO)

- The ratification and implementation of ILO Conventions and Recommendations, and procedures for complaints concerning non-respect of ratified conventions, to be openly discussed at regional level on a tripartite basis, in compliance with the principles of ILO Convention No 120 on Tripartism, preferably in the framework of the Southern African Labour Commission (SALC).

Prevention of discrimination and exploitation

- The prohibition of any form of discrimination based on race, colour, sex, creed, religion, physical disability, marital status, or nationality at the workplace;
- The prohibition of the child labour and all forms of forced and semi-forced labour.

Working and living conditions

- The upward harmonization of minimum requirements laid down in labour legislations and in particular the introduction of a uniform maximum period of work of 40 hours per week, the specification of minimum rest period, annual paid leave, compassionate leave, paid parental leave, adequate occupational health and safety protection, and the stipulation of acceptable rules and compensation for overtime and shift work;
- The right for workers to live and work in a health environment, requiring government action to implement sustainable environmental policies.

Company regulation

- The enactment and enforcement of effective anti-trust legislation and the introduction of a harmonized system for the disclosure of audited financial records and accounts, and all other relevant information, for all public and private companies. Moreover, all companies operating in more than one country within the region should make available their consolidated annual reports in all the countries in which they operate.

Industrial courts

- The establishment of autonomous industrial courts, on the basis of mutual agreement by trade unions and employers on appointment of judges, with right of recourse to an Industrial Appeals Court on the basis of expeditious procedures.

Migrant workers

- Freedom of movement, residence and employment throughout the region;
- The right for migrant workers from within the region to transfer without restrictions their wages and other benefits to their home country. The maintenance of other benefits such

as insurance and contributions to provident funds should be guaranteed upon termination of their contract, even if they return to their home countries. The practice of short-term and temporary employment contracts which force workers to return home in order to be re-engaged anew must be phased out;

- The right for migrant workers to live with their families in the country of employment.

Rights to negotiation

- The provision of mandatory negotiation and protection of workers in the case of collective redundancies or dismissal as a direct consequence of a merger, transfer, introduction of new technology, insolvency, or restructuring, as well as the maintenance of existing workers' rights and standards following any change in ownership.

Economic rights

- The right for trade unions to participate in the social, economic and political decision-making process at all levels (e.g. living wage, health and safety, social wage, taxation, education). These must be processes that strengthen negotiation and collective bargaining;
- Trade union and workers' rights must be guaranteed throughout the region to prevent both unscrupulous employers and governments exploiting lower labour standards in the practice of 'social dumping' whereby companies move their operations to the countries where trade union rights are less respected and so labour costs are cheaper.

Gender rights

- the end of discrimination based on sex, the strengthening of parental rights, and provision

for proper health care and day care centres. These rights will allow women to take their rightful position in all leadership structures of society.

Education rights

- the obligation of governments and employers, as well as trade unions, to contribute towards workers' education and training, and skills development and upgrading, which is particularly important in the light of technical developments. All workers should have the right to paid study leave.

Supervisory procedures

- the establishment of a supervisory procedure at regional level, implemented by a tripartite body, whereby complaints concerning violation of basic human and trade union rights can be reviewed, examined and the ensuing recommendations made public and enforced;
- effective workers organizations' access to all print and electronic media, with guarantee of lack of bias in news coverage through accountability to a tripartite complaints procedure.

CONCLUSION

The onus for the implementation of these demand objectives must lie with national governments and existing regional structures as they carry responsibility for adopting social legislation, preventing social dumping and promoting equitable growth.

We declare that the above objectives are in the best interests of all the working people and of our societies as a whole. As representatives of organized labour in Southern Africa we pledge to struggle side by side for their full implementation.

APPENDIX IICONVENTION NO. 87CONVENTION CONCERNING FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE

(Date of coming into force: 4 July 1950)

The General Conference of the International Labour Organisation,

Having been convened at San Francisco by the Governing Body of the International Labour Office, and having met in its Thirty-first Session on 17 June 1948;

Having decided to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise, which is the seventh item on the agenda of the session;

Considering that the Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and establishing peace;

Considering that the Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress";

Considering that the International Labour Conference, at its Thirtieth Session, unanimously adopted the principles which should form the basis for international regulation;

Considering that the General Assembly of the United Nations, at its Second Session, endorsed

these principles and requested the International Labour Organisation to continue every effort in order that it may be possible to adopt one or several international Conventions;

Adopts this ninth day of July of the year one thousand nine hundred and forty-eight, the following Convention, which may be cited as the Freedom of Association and Protection of the Right to Organise Convention, 1948:

PART 1: FREEDOM OF ASSOCIATION

Article 1

Each member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectives, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this convention the term "organisation" means any organisation of workers and employers for furthering and defending the interests of workers or of employers.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

PART III. MISCELLANEOUS PROVISIONS

Articles 14 – 21

Declarations of application to non-metropolitan territories.

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APPENDIX III

CONVENTION NO. 98

CONVENTION CONCERNING THE APPLICATION OF THE PRINCIPLES OF THE RIGHT TO ORGANISE AND TO BARGAIN COLLECTIVELY

(Date of coming into force: 18 July 1951)

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals concerning the application of the principles of the right to organise and to bargain collectively, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, adopts this first day of July of the year one thousand nine hundred and forty-nine, the following Convention, which may be cited as the Right to Organise and Collective Bargaining Convention, 1949:

Article I

Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

Such protection shall apply more particularly in respect of acts calculated to –

make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership:

cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and

promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

In accordance with the principle set forth in paragraph 3 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

APPENDIX IV

CONVENTION NO. 100

CONVENTION CONCERNING EQUAL REMUNERATION FOR MEN AND WOMEN WORKERS FOR WORK OF EQUAL VALUE

(Date of coming into force: 23 May 1953)

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-fourth Session on 6 June 1951, and

Having decided upon the adoption of certain proposals with regard to the principle of equal remuneration for men and women workers for work of equal value, which is the seventh item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, adopts this twenty-ninth day of June of the year one thousand nine hundred and fifty-one, the following Convention, which may be cited as the Equal Remuneration Convention, 1951:

Article 1

For the purpose of this Convention –

The term “remuneration” includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment;

The term “equal remuneration for men and women workers for work of equal value” refers to rates of remuneration established without discrimination based on sex.

Article 2

Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

This principle may be applied by means of –

- national laws or regulations;
- legally established or recognised machinery for wage determination;
- collective agreements between employers and workers; or
- a combination of these various means.

Article 3

Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.

Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Article 4

Each Member shall co-operate as appropriate with the employers' and workers' organisations concerned for the purpose of giving effect to the provisions of this Convention.

APPENDIX V

CONVENTION NO. 111

CONVENTION CONCERNING DISCRIMINATION IN RESPECT OF EMPLOYMENT
AND OCCUPATION

(Date of coming into force: 15 June 1960)

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on 4 June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and

Considering further that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights,

Adopts this twenty-ninth day of June of the year one thousand nine hundred and fifty-eight, the following Convention, which may be cited as the Discrimination (Employment and Occupation)

Convention, 1958:

Article 1

1. For the purpose of this Convention the term “discrimination” includes –

- any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation
- such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies.

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

For the purpose of this Convention the terms “employment” and “occupation” include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by means appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 4

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice –

- to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
- to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- to pursue the policy in respect of employment under the direct control of a national authority;
- to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- to indicate in its annual reports on the application of the Convention the action taken in

pursuance of the policy and the results secured by such action.

Article 5

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

Articles 6

Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Article 7

Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organisation.

APPENDIX VI

CONVENTION NO. 117

CONVENTION CONCERNING BASIC AIMS AND STANDARDS OF SOCIAL POLICY

(Date of coming into force: 23 April 1964)

The General Conference of the International Labour Organisation.

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-sixth Session on 6 June 1962, and

Having decided upon the adoption of certain proposals concerning the revision of the Social Policy (Non-Metropolitan Territories) Convention, 1947, which is the tenth item on the agenda of the session, primarily, with a view to making its continued application and ratification possible for independent States, and

Considering that these proposals must take the form of an international Convention, and

Considering that economic development must serve as a basis for social progress, and

Considering that every effort should be made, on an international, regional or national basis to secure financial and technical assistance safeguard the interests of the population, and

Considering that, in appropriate international, regional or national action should be taken with a view to establishing conditions of trade which would encourage production at a high level of efficiency and make possible the maintenance of a reasonable standard of living, and

Considering that all possible steps should be taken by appropriate international, regional and national measures to promote improvement in such fields as public health, housing, nutrition, education, the welfare of children, the status of women, conditions of employment, the remuneration of wage earners and independent producers, the protection of migrant workers, social security, standards of public services and general production, and

Considering that all possible steps should be taken effectively to interest and associate the population in the framing and execution of measures of social progress,

Adopts this twenty-second day of June of the year one thousand nine hundred and sixty-two the following Convention, which may be cited as the Social Policy (Basic Aims and Standards) Convention, 1962:

PART I. GENERAL PRINCIPLES

Article 1

All policies shall be primarily directed to the well-being and development of the population and the promotion of its desire for social progress.

All policies of more general application shall be formulated with due regard to their effect upon the well-being of the population.

PART II. IMPROVEMENT OF STANDARD OF LIVING

Article 2

The improvement of standards of living shall be regarded as the principal objective in the planning of economic development.

Article 3

All practicable measures shall be taken in the planning of economic development to harmonise such development with the healthy evolution of the communities concerned.

In particular, efforts shall be made to avoid the disruption of family life and of traditional social units, especially by –

- close to study of the causes and effect of migratory movements and appropriate action where necessary;
- the promotion of town and village planning in areas where economic needs result in the concentration of population;
- the prevention and elimination of congestion in urban areas;
- the improvement of living conditions in rural areas and the establishment of suitable industries in rural areas where adequate manpower is available.

Article 4

The measures to be considered by the competent authorities for the promotion of productive capacity and the improvement of standard of living of agricultural producers shall include –

- (a) the elimination to the fullest practicable extent of the causes of chronic indebtedness;
- (b) the control of the alienation of agricultural land to non-agriculturalists so as to ensure that such alienation takes place only when it is in the best interests of the country;

- (c) the control, by the enforcement of adequate laws or regulations, of the ownership and use of land and resources to ensure that they are used, with due regard to customary rights, in the best interests of the inhabitants of the country;
- (d) the supervision of tenancy arrangements and of working conditions with a view to securing for tenants and labourers the highest practicable standards of living and an equitable share in any advantages which may result from improvements in productivity or in price levels;
- (e) the reduction of production and distribution costs by all practicable means and in particular by forming, encouraging and assisting producers' and consumers co-operatives.

Article 5

1. Measures shall be taken to secure for independent producers and wage earners conditions which will give them scope to improve the living standards by their own efforts and will ensure the maintenance of minimum standards of living as ascertained by means of official inquiries into living conditions, conducted after consultation with the representative organisations of employers and workers.
2. In ascertaining the minimum standards of living, account shall be taken of such essential needs of the workers as food and its nutritive value, housing, clothing, medical care and education.

PART III. PROVISIONS CONCERNING MIGRANT WORKERS.

Article 6

Where the circumstances under which workers are employed involve their living away from their homes, the terms and conditions of their employment shall take account of their normal family needs.

Article 7

Where the labour resources of one area are used on a temporary basis for the benefit of another area, measures shall be taken to encourage the transfer of part of the workers' wages and savings from the area of labour utilisation to the area of labour supply.

Article 8

1. Where the labour resources of a country are used in an area under a different administration, the competent authorities of the countries concerned shall, whenever necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Convention.
2. Such agreements shall provide that the worker shall enjoy protection and advantages not less than those enjoyed by workers resident in the area of labour utilisation.
3. Such agreements shall provide for facilities for enabling the worker to transfer part of his wages and savings to his home.

Article 9

Where workers and their families move from low-cost to higher-cost areas, account shall be taken of the increased cost of living resulting from the change.

PART IV. REMUNERATION OF WORKERS AND RELATED QUESTIONS.

Article 10

1. The fixing of minimum wages by collective agreements freely negotiated between trade unions which are representative of the workers, concerned and employers or employers' organisations shall be encouraged.
2. Where no adequate arrangements exist for the fixing of minimum wages by collective agreement, the necessary arrangements shall be made whereby minimum rates of wages can be fixed in consultation with representatives of the employers and workers, including representatives of their respective organisations, where such exist.
3. The necessary measures shall be taken to ensure that the employers and workers concerned are informed of the minimum wages rates in force and that wages are not paid at less than these rates in cases where they are applicable.
4. A worker to whom minimum rates are applicable and who, since they became applicable, has been paid wages at less than these rates shall be entitled to recover, by judicial or other means authorised by law, the amount by which he has been underpaid, subject to such limitation of time as may be determined by law or regulation.

Article 11

1. The necessary measures shall be taken to ensure the proper payment of all wages earned and employers shall be required to keep registers of wage payments, to issue to workers statements of wage payments and to take other appropriate steps to facilitate the necessary

supervision.

2. Wages shall normally be paid in legal tender only.
3. Wages shall normally be paid direct to the individual worker.
4. The substitution of alcohol or other spirituous beverages for all or any part of wages for services performed by the worker shall be prohibited.
5. Payment of wages shall not be made in taverns or stores, except in the case of workers employed therein.
6. Unless there is an established local custom to the contrary, and the competent authority is satisfied that the continuance of this custom is desired by the workers, wages shall be paid regularly at such intervals as will lessen the likelihood of indebtedness among the wage earners.
7. Where food, housing, clothing and other essential supplies and services form part of remuneration, all practicable steps shall be taken by the competent authority to ensure that they are adequate and their cash value properly assessed.
8. All practicable measures shall be taken –
 - (a) To inform the workers of their wage rights;
 - (b) To prevent any unauthorised deductions from wages; and
 - (c) To restrict the amounts deductible from wages in respect of supplies and services forming part of remuneration to the proper cash value thereof.

Article 12

1. The maximum amounts and manner of repayment of advances on wages shall be regulated by the competent authority.
2. The competent authority shall limit the amount of advances which may be made to a worker in consideration of his taking up employment: the amount of advances permitted shall be clearly explained to the worker.
3. Any advance in excess of the amount laid down by the competent authority shall be legally irrecoverable and may not be recovered by the with-holding of amounts of pay due to the worker at a later date.

Article 13

1. Voluntary forms of thrift shall be encouraged among wage earners and independent producers.
2. All practicable measures shall be taken for the protection of wage earners and independent producers against usury, in particular by action at the reduction of rates of interest on loans, by the control of the operations of money lenders, and by the encouragement of facilities for borrowing money for appropriate purposes through the co-operative credit organisations or through institutions which are under the control of the competent authority.

PART V. NON-DISCRIMINATION ON GROUNDS OF RACE, COLOUR, SEX, BELIEF, TRIBAL ASSOCIATION OR TRADE UNION AFFILIATION

Article 14

1. It shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of –
 - (a) Labour legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the country;
 - (b) Admission to public or private employment;
 - (c) Conditions of engagement and promotion;
 - (d) Opportunities for vocational training;
 - (e) Conditions of work:
 - (f) health, safety and welfare measures;
 - (g) discipline;
 - (h) participation in the negotiation of collective agreements;
 - (i) wage rate, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking.
2. All practicable measures shall be taken to lessen, by raising the rates applicable to the lower-paid workers, any existing differences in wage rates due to discrimination by reason of race, colour, sex, belief, tribal association or trade union affiliation.
3. Workers from one country engaged for employment in another country may be granted in

addition to their wages benefits in cash or in kind to meet any reasonable personal or family expenses resulting from employment away from their homes.

4. The foregoing provisions of this Article shall be without prejudice to such measures as the competent authority may think it necessary or desirable to take for the safeguarding of motherhood and for ensuring the health, safety and welfare of women workers.

PART VI. EDUCATION AND TRAINING.

Article 15

1. Adequate provision shall be made to the maximum extent possible under local conditions, for the progressive development of broad systems of education, vocational training and apprenticeship, with a view to the effective preparation of children and young persons of both sexes for a useful occupation.
2. National laws or regulations shall prescribe the school-leaving age and the minimum age for and conditions of employment.
3. In order that the child population may be able to profit by existing facilities for education and in order that the extension of such facilities may not be hindered by a demand for child labour, the employment of persons below the school-leaving age during the hours when the schools are in session shall be prohibited in areas where educational facilities are provided on a scale adequate for the majority of the children of school age.

Article 16

1. In order to secure high productivity through the development of skilled labour, training in new techniques of production shall be provided in suitable cases.

2. Such training shall be organised or under the supervision of the competent authorities, in consultation with the employers' and workers' organisations of the country from which the trainees come and of the country of training.

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APPENDIX VII

LABOUR RELATIONS ACT, NO. 66, 1995 (SOUTH AFRICA)

SCHEDULE 8

CODE OF GOOD PRACTICE: DISMISSAL

1. Introduction

- (1) This *code of good practice* deals with some of the key aspects of *dismissals* for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of *employees* employed in an establishment may warrant a different approach.
- (2) This Act emphasises the primacy of collective agreements. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements, or the outcome of joint decision-making by an employers and a workplace forum.
- (3) The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.

2. Fair reasons for dismissal

- (1) A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.
- (2) This Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, and the operational requirements of the employer's business.
- (3) This Act provides that a dismissal is automatically unfair if the reason for dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187. The reasons include participation in a lawful strike, intended or actual pregnancy and acts of discrimination.
- (4) In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.

3. Misconduct

Disciplinary procedures prior to dismissal

- (1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.
- (2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.
- (3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissal for misconduct

- (4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to

the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

- (5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.
- (6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

4. Fair procedure

- (1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

- (2) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.
- (3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.
- (4) In exceptional circumstances, if the employee cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5. Disciplinary records

Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

6. Dismissal and industrial action

- (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –
 - (a) the seriousness of the contravention of this Act;
 - (b) attempts made to comply with this Act; and

- (c) whether or not the strike was in response to unjustified conduct by the employer.
- (2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

7. Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and

- (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

8. Incapacity: Poor work performance

- (1) A newly hired employee may be placed on probation for a period that is reasonable given the circumstances of the job. The period should be determined by the nature of the job, and the time it takes to determine the employee's suitability for continued employment. When appropriate, an employer should give an employee whatever evaluation, instruction, training, guidance or counselling the employee requires to render satisfactory service. Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee.
- (2) After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has –
 - (a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and
 - (b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.
- 3. The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.
- 4. In the process, the employee should have the right to be heard and to be assisted

by a trade union representative or a fellow employee.

9. Guidelines in cases of dismissal for poor work performance

Any person determining whether a dismissal for poor work performance is unfair should consider –

- (a) whether or not the employee failed to meet a performance standard; and
 - (b) if the employee did not meet a required performance standard whether or not –
capacity or the injury. If the employee is likely to be absent for a time that is unreasonable long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
 - (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.
 - (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the

duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

- (a) whether or not the employee is capable of performing the work; and
- (b) if the employee is not capable –
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
 - (iii) the availability of any suitable alternative work.

APPENDIX VIII

FIELD WORK QUESTIONNAIRE

Constitutional Guarantees

Omission of the right to work/employment?

Limits capacity of authorities to ensure job security through existing policy and legal measures in parastatals, government, private sector?

Was omission fundamental?

Would it make any difference if there was a right to employment in the constitution?

What factors do you think would constitute such a right/make up such a right?

How would you frame such a right to employment?

How would you define such a right to employment?

What factors would you state as limitations on such a right?

What conduct would you prohibit as encroaching on such a right?

Would such a right be justiciable?

Would such a right be applicable to all employers without distinction, government, public enterprises, destination and private individuals, if not why?

What would you suggest as arguments for such a right?

What countries do you know which have such a right?

Public Service Commission

What role should the public service commission play ideally?

What should be the role of the public service commission?

Should it have a role in the appointment process? Why?

Should it have a role in the promotion process? Why?

Should it be an appeals body?

Would you say that the PSC is independent, impartial in its deliberations? If the answer is no, Give reasons.

Does the present functioning of the PSC ensure security of tenure? If the answer is yes, how?

Prior to 1970 the PSC could appoint, promote and discipline public officers. The constitution and the Public Service Act were then amended thus rendering it primarily an appeals body.

Would you say the PSC prior to 1970 ensured security of tenure than it does today? If yes, what factors are indicative of such security of tenure? If no, what factors are indicative of diminished security of tenure?

What functions would you like the PSC performing? Why?

Would you like the PSC given its prior 1970 functions? Why?

Are you satisfied with the composition of the PSC?

Should members be decreased, increased?

Any suggestion as to its improvement?

Any policy recommendations as to its structure, role, composition?

Judicial Service Commission

What do you perceive to be its functions, role?

Does it appear to be functioning that way?

Are you satisfied with its composition?

Is it insulated from political influence?

If not, how would it be insulated?

Should membership be expanded? If yes, why?

What should its composition reflect?

Should it be retained, abolished? Why?

Should it give reasons/disclose reasons for its actions?

Collective Bargaining

- Are you allowed to bargain collectively? If not, why?
- Should you be allowed to do so? A If so, why?
- Any particular legislation prohibiting you from doing so, any administrative directive etc?
- Do you belong to a staff association?
- What functions does the Staff Association perform?
- What is its importance?
- Does it have organisational rights?
- If you don't have a trade union, should you be allowed to have one?
- Why do you want to unionise?
- Where does its importance lie?
- What is the perceived danger of state employees unionising in essential services excluded?
- How strong are your staff associations?
- Can you take part in a strike, can you strike? Why not?
- How do you enforce your staff association decisions?
- Does government unilaterally decide on your conditions of employment?
- Would you like to see state employees belonging to trade unions?
- Would you like to see the introduction of trade unions by state employees?
- Would you view trade unions as stronger than staff associations?
- Does the consultation process between state employees and government really work?
- Does government push its decisions throughout the consultation process?
- How cohesive are staff associations?
- What are your overall suggestions regarding staff associations?
- What improvements do you want/suggest?
- Which do you prefer consultation or bargaining collectively, staff association or trade unions?
- How would civil servants association improve working conditions?

What would you recommend for the future, civil servants association or trade unions? Why?

Appointments, Probation and Transfers

Who should appoint and why?

A neutral body?

Is the present system effective?

What improvements?

Is probation period too long? If not, why?

How many people do you know have been affected by probation? In what way?

Why should the period of probation in Government be two years instead of six months or one year?

How are transfers effected in your department?

Are you consulted prior to the decision made to transfer you?

Should you be consulted or given a hearing?

Would it make a difference if you were consulted or not?

Would you say that the present system of recruitment affects the employment relationship?

Why?

Does probation affect the employment relationship? How?

Is the way transfers are done likely to affect the employment relationship?

What factors should be considered in transferring state employees?

What would you recommend concerning appointments, probation and transfers?

Misconduct, Discipline and Dismissals

What procedure is adopted for disciplinary offences?

Is the procedure fair? How?

Are you heard before being condemned?

Are you entitled to counsel?

Are you given the charges?

Is the overall system fair?

What could you suggest as its shortcomings?

What improvements of the present system would you suggest?

What is the appeal system like?

Have you ever been tried for a disciplinary offence? Which one?

Which one is more prevalent?

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