



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
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**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 40 OF THE COVENANT**

Concluding observations of the Human Rights Committee

BOTSWANA

1. The Human Rights Committee considered the initial report of Botswana (CCPR/C/BWA/1) at its 2515th, 2516th and 2517th meetings, held on 19 and 20 March 2008 (CCPR/C/SR. 2515, 2516 and 2517). At its 2527th meeting, held on 28 March 2008 (CCPR/C/SR.2527), it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission, albeit considerably late, of the State party's initial report and the opportunity thus offered to begin the dialogue with the State party.

3. The Committee appreciates the written replies submitted by the delegation, as well as the detailed answers it provided to the Committee's oral questions. It particularly welcomes the efforts made by the State party, both in its initial report and during the dialogue with the Committee, to acknowledge the challenges faced in the implementation of the Covenant.

B. Positive aspects

4. The Committee notes with satisfaction the strong democratic culture of the State party, as well as the establishing of universal basic education, and its considerable achievements in addressing the challenges posed by the HIV/AIDS pandemic.

5. The Committee welcomes the increased participation of women in Parliament, at the cabinet level and in the public service, and encourages the State party to strengthen its efforts to promote the participation of women in all walks of public life as well as in the private sector.

C. Principal subjects of concern and recommendations

6. The Committee notes that the Covenant is not directly applicable in domestic law, and is concerned that not all rights provided for in the Covenant are addressed in the Constitution and legislation. While welcoming court judgments that courts should interpret domestic law in a manner consonant with international treaties, including the Covenant, the Committee notes that the knowledge of the rights contained therein by the legal profession is limited (art. 2).

The State party should ensure the harmonization of its domestic law with the provisions of the Covenant. It should provide training regarding provisions of the Covenant to judges and lawyers. It should disseminate the Covenant in the main local languages for the benefit of the public.

7. The Committee regrets the absence of detailed information and statistical data in the State party's initial report and the written replies to its list of issues, which would allow it to assess the impact of Covenant rights in practice in the State party, and which it deems essential to its task in monitoring the implementation of the Covenant.

The State party should provide more comprehensive information on the implementation of its legislation in different areas covered by the Covenant. It should also provide complete relevant statistical data in its next periodic report, disaggregated by, inter alia, gender.

8. While noting the establishment of the Office of the Ombudsman in 1995, the Committee observes the lack of a national human rights institution in the State party, and welcomes the State party's statements that it is willing to consider establishing such an institution (art. 2).

The State party should establish a national human rights institution. It should ensure that the institution will be in full compliance with the Principles relating to the Status of National Institutions (Paris Principles, adopted by the General Assembly in its resolution 48/134 of 20 December 1993). The State party should ensure that its budgetary provisions permit the national institution to discharge its functions effectively.

9. While welcoming the Abolition of Marital Power Act and an amendment of the Matrimonial Causes Act, the Committee notes with concern that the exceptions to the right not to be discriminated against, as provided for in section 15(4) (b), (c) and (d) of the Constitution, are not in compliance with articles 2, 3 and 26 of the Covenant. The Committee is concerned, in particular, at exceptions relating to non-citizens; adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; and the application of customary law. (arts. 2, 3 and 26)

The State party should review section 15 of the Constitution in order to bring it in line with articles 2, 3 and 26 of the Covenant, and amend relevant legislation, such as the Abolition of Marital Power Act, accordingly.

10. The Committee notes with interest the steps undertaken by the State party to review customary laws, and the enactment of legislation to amend such laws. It is, however, concerned that there still remain customary laws and practices that are inconsistent with the rights provided for in the Covenant (art. 2).

The State party should as a matter of priority strengthen its efforts to ensure compatibility of customary laws and practices with the rights provided for in the Covenant.

11. The Committee welcomes the State party's intention to amend the Marriage Act to ensure that all marriages are registered. It remains concerned by the persistence of customary practices that are highly detrimental to women's rights, such as discrimination in the area of marriage and custody of children born outside of wedlock, early marriages and polygamy, and the continued practice of legal guardianship by men of unmarried women (arts. 2 and 3).

The State party should ensure the full participation of women in the review of customary laws and practices. It should outlaw polygamy, which violates the dignity of women, and take effective steps to discourage the persistence of customary practices that are highly detrimental to women's rights.

12. The Committee notes with concern that the precedence of constitutional law over customary law is not always ensured in practice, due especially to the low level of awareness the population has of its rights, such as the entitlement to request a case to be transferred to a constitutional law court and the right to appeal customary courts' decisions before constitutional law courts (arts. 2 and 3).

The State party should increase its efforts to raise awareness of the precedence of constitutional law over customary laws and practices, and of the entitlement to request the transfer of a case to constitutional law courts, and of appeal before such courts.

13. The Committee regrets the delegation's statements that it remains committed to retain the death penalty. It regrets that it was not provided with data on the number of death sentences handed down per year, and on the number of executions per year. It also regrets that it was not provided with full data regarding which crimes incur the death sentence, whereby it could determine whether these offences are included among the most serious crimes within the meaning of article 6, paragraph 2, of the Covenant. The Committee regrets the lack of information on cases considered by the Advisory Committee on the Prerogative of Mercy, and an explanation as to the low level of commutations of the death penalty. It also notes with concern the practice of the secrecy of execution dates, and the fact that the body of the executed person is not returned to the family for burial. The Committee reiterates its view that mandatory imposition of death penalty for any crime is in violation of article 6, paragraph 2, of the Covenant (art. 6).

The State party should ensure that the death penalty is only imposed for the most serious crimes, and it should move towards abolition of the death penalty in accordance with article 6, paragraph 6, of the Covenant. The State party should provide more detailed information on the number of convictions for murder, the number of and reasons for the courts' findings of mitigating circumstances, the number of death sentences imposed by the courts, and on the number of the persons executed year by year. The State party should ensure that public debate on the death penalty is conducted on the basis of a full presentation of all aspects of the matter, especially the importance of achieving progress in the enjoyment of the right to life and the desirability of eventual ratification of the Second Optional Protocol to the Covenant. It should ensure that families are informed in advance of the date of the execution of their family members, and that the body is returned to the family for private burial.

14. The Committee notes with concern the vague and extremely wide reservation which the State party entered in relation to articles 7 and 12 of the Covenant. With regard to the reservation entered into in relation to article 7 of the Covenant, it recalls that reservations offending peremptory norms of international law including the prohibition of torture are incompatible with the objects and purposes of the Covenant (General Comment No. 24, para. 8) (arts. 7 and 12).

The State party should immediately withdraw its reservation to article 7 of the Covenant, and should also withdraw its reservation to article 12.

15. The Committee regrets that the Penal Code does not contain a definition of torture. It does not consider that existing laws treat all forms of torture as offences of sufficient gravity (art. 7).

The State party should define, as soon as possible, the concept of "torture" in accordance with article 7 of the Covenant and make torture a criminal offence. An inquiry should be opened in each case of alleged torture, and the perpetrators of such acts should be prosecuted and punished appropriately. Effective reparations, including adequate compensation, should be granted to any victims.

16. The Committee is concerned by the lack of detailed information on the challenges faced by the State party with regard to human trafficking and the State party's responses thereto, despite its acknowledgment that such practices occur (art. 8).

The State party should redouble its efforts to combat this serious problem, in collaboration with neighbouring countries, inter alia with a view to protecting the human rights of victims. It should also rigorously review the activities of responsible governmental agencies to ensure that no State actors are involved and that its anti-trafficking initiatives are fully coordinated across relevant parts of government.

17. The Committee expresses concern at the incidence of prison overcrowding and the large proportion of persons held on remand in prison, and welcomes the State party's statements that it is considering ways in which to address the overcrowding problem. It is also concerned that families have limited access to persons deprived of their liberty (arts. 7, 9 and 10).

The State party should take measures to ensure that persons on remand are not kept in custody for an unreasonable period of time. It should significantly increase its efforts to guarantee the right of detainees to be treated with humanity and dignity, by ensuring that they live in healthy conditions and have adequate access to health care and food, and otherwise ensure that conditions of detention in the country's prisons are compatible with the United Nations Standard Minimum Rules for the Treatment of Prisoners. It should immediately take action to reduce the prison population. The State party should develop alternative measures to imprisonment, such as community service orders and bail arrangements. The State party should enhance access to prisoners by family members.

18. The Committee, while noting that committing an act of violence against a prisoner is an offence under the Prisons Act, regrets that it has not received information on the practical implementation of this provision. It also regrets the absence of information on cases considered by the Board of Enquiry following a complaint against an officer (art. 7).

The State party should ensure that any act of violence committed against a prisoner is duly prosecuted and punished. It should provide the Committee with more detailed information on the system put in place to hear complaints of prisoners regarding acts of violence.

19. The Committee is concerned about the existence in law and in practice of penal corporal punishment in the State party, in violation of article 7 of the Covenant (art. 7).

The State party should abolish all forms of penal corporal punishment.

20. The Committee welcomes the provision by the State party of free legal assistance in cases where capital punishment may be inflicted, but notes with concern the State party's own admission that the quality of legal representation in such cases is unequal and could be improved. The Committee also notes with concern that there is no provision for legal aid to indigent accused in other criminal cases. In this regard, the Committee welcomes the State party's intention to carry out a study on establishing a legal aid system in Botswana (art. 14).

The State party should introduce a comprehensive criminal legal aid system for those who do not have sufficient means to pay for legal representation, especially in cases where the interests of justice so require in accordance with article 14, paragraph 3 (d), of the Covenant.

21. The Committee is concerned that the customary court system does not appear to function according to basic fair trial provisions, and notes the rule which forbids legal representation in customary courts. The Committee reiterates its General Comment No. 32 on article 14 which provides that customary courts "cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements

of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.” (para. 24) (art. 14).

The State party should ensure that the customary law system and its courts function in a manner consistent with article 14 and General Comment No. 32, paragraph 24, and in particular allow legal representation in customary courts.

22. The Committee notes with concern that the State party criminalizes same-sex sexual activities between consenting adults (arts 17 and 26).

The State party should repeal these provisions of its criminal law.

23. While taking account of the policy which aims at settling the population in order to provide it with essential public services, and while welcoming the State party’s intention to engage in negotiations with those persons who were relocated from the Central Kalahari Game Reserve (CKGR), the Committee notes with concern reports that not all relocated persons will benefit from the High Court decision in *Roy Sesana et al vs Attorney-General*, and that the practical enjoyment of the right to return is conditional on providing identity documents prior to entering the CKGR, obtaining Special Game Licences to hunt and that the State party will not provide access to ground-water for such persons (arts. 12 and 27).

The State party should ensure that all persons who were relocated are granted the right to return to the Central Kalahari Game Reserve, consistent with the reasoning of the High Court decision, and that all necessary measures are taken to facilitate the enjoyment of Covenant rights by these persons upon their return.

24. The Committee is concerned that, despite recent amendments, the current rules regarding appointments to the Ntlo ya Dikgosi do not make provision for fair representation of all tribes. It also notes that the Bogosi Bill, which will repeal and replace the Chieftainship Act, has not been the subject of a full consultation with all interested parties (arts. 25, 26 and 27).

The State party should ensure that it repeals any discriminatory element in the appointment and representation of tribes in the Ntlo ya Dikgosi, to ensure fair representation of all tribes. It should also ensure that consultations are held in relation to the adoption of the Bogosi Bill.

25. The Committee requests the State party to disseminate widely the present concluding observations and its initial report to the general public, including by publishing them on the government website, placing them in all public libraries and distributing them to the leaders of customary institutions and to the Ntlo ya Dikgosi.

26. In accordance with rule 71, paragraph 5, of the Committee’s rules of procedure, the State party should provide, within one year, relevant information on the assessment of the situation and the implementation of the Committee’s recommendations in paragraphs 12, 13, 14 and 17.

27. The Committee requests the State party to provide in its next report, due to be submitted by 31 March 2012, information on the remaining recommendations made and on the Covenant as a whole.
