Challenges facing the harmonisation of the SADC legal profession: South Africa and Botswana under the spotlight

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Abstract

This paper reviews the harmonisation of the legal professions within the Southern African Development Community (SADC), with particular emphasis on Botswana and South Africa. The subject has not attracted much scholarly attention as it is perceived as a preserve of the professional legal practice, rather than an academic legal discourse. The paper, therefore, contributes a new perspective to a deficient, if not non-existent, scholarship on the free movement of legal services within the sub-region and globally. It ponders the question of accessibility of the professions in either jurisdiction to either citizens, and to other SADC citizens. It is not merely an academic odyssey, as it aims to discuss the real practical challenges facing the harmonisation of the legal professions in the region. It is argued that these challenges must be circumvented before any meaningful advance towards harmonisation of the SADC legal profession can be achieved. The paradox of nationalism and regionalism is clearly illustrated as the vortex of the disharmony in the jurisdictions considered. The paper identifies the pitfalls relating to admission requirements, and contends that they are symptoms of the interests of the atomistic nation-state, premised on the concept of market protectionism.[1] It further considers the free movement of legal services under the General Agreement on Trade in Services (GATS).[2]

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[1] These are nationalistic interests that tend to exalt and elevate the individualistic and particular interests of the state above those of the region, such as market protectionism within the national market. It means that the nation-state protects and seeks to preserve its domestic economic market for its nationals, to the exclusion of foreigners and citizens of the region who are not nationals of such a state. See also Gumede *Thabo Mbeki and the battle for the soul of the ANC* (2007) 258–260.

[2] World Trade Organisation Agreement of 1993 contains the General Agreement on Trade in Services which aims at the liberalisation of trade in services.

INTRODUCTION

South Africa and Botswana have much in common, socio-culturally, politically and economically. The legacy of colonialism, however, has meant that they are separated by artificial, manmade borders. The communities, especially those living along the borders of the two countries, are related, and constitute a single people sharing traditions and culture.[3] However, the relevance of borders in today's world has become a matter for heated debate especially in the context of the renaissance of Africa.[4]

The two legal systems under investigation share a common history and origins, although they have developed uniquely over time. In addition to the 'people's commonalities', South Africa and Botswana have a similar African legal system, generally referred to as African customary law, or indigenous law. Both systems developed from the Roman-Dutch common law system with English law influence, and can be said to be similar hybrids of these two legal traditions.[5]

The historical genesis of these legal systems started in 1652 when Jan van Riebeeck and his entourage arrived at the Cape, bringing with them the only law they knew: the original Dutch law before its codification, now referred to as Roman-Dutch law. This was pre-modernity and pre-industrialisation, and consequently a relatively basic common law legal system that applied, with local mutations, in many of the fragmented European territories left behind by the defunct Roman Empire.[6]

Because during the colonial epoch the Cape was the entry point into the continent of Africa, Roman-Dutch law eventually spread into Botswana and the Southern African hinterland, such as Lesotho, Swaziland and Zimbabwe. In the early 1800s, the British besieged the Cape and seized administration from the Dutch, and as a corollary, introduced English law. This naturally led to the influence of English law, not only in the Cape, but also in other

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3 For instance the tribes of the Bakgatla ba Kgafela and the Barolong boo Ratshidi in the North West Province of the Republic of South Africa spreading across the border into the Southern parts of the Republic of Botswana respectively.

4 For details on the apartheid era fence, see 'Wall of razor wire a cruel barrier to freedom' Globe & Mail January 14 1992 (re-published in Sanger (ed) *Travels with a laptop: Canadian journalists head South* (1993), 77–80). See also, Mukumbira 'Botswana-Zimbabwe: do new fences make good neighbours?' Available at: http://www.africafiles.org/article.asp?ID=6892. (last accessed February 2013).

5 Iya 'The legal system and legal education in Southern Africa: past influences and current challenges' (2001) 51 *Journal of Legal Education 35*.

6 Hosten *et al Introduction to South African law and legal theory* (2ed 1995) 270.

parts of the region. Roman-Dutch law continued to develop under British rule, in so far as it was not amended by statute law. Thus hitherto, Roman-Dutch law is still said to be the common law of the region, even though over the years it has been influenced by the English common law.[7]

The foregoing shared history makes the two countries and others in the region having a similar background, fertile ground for legal harmonisation. Within this harmonisation, indeed as one of the major tools is the harmonisation of legal practice. This, in the Southern African region, is best effected through SADC as the regional body of which all the states concerned are members. An important impetus to overall legal harmonisation is the ability of the members of the states' legal professions, to freely practice in one another's jurisdictions. This, in turn, links up with GATS.

The SADC treaties and Protocol pertinent to harmonisation

Article 5 (1) of the SADC Treaty of 1992 states some of the objectives of the SADC which are pertinent to this research as follows:

> (a) promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;
> (d) promote self-sustaining development on the basis of collective self reliance, and the interdependence of member states.

Article 5 (2) provides that in order to achieve the objectives set out in paragraph 1 of this article, SADC shall:

> (a) Harmonize political and socio-economic policies and plans of member states
> (b) Encourage the peoples of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of programmes and operations of SADC.
> (c) …

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7 See Booi *Botswana's legal system and legal research* (2011) as updated by Charles Manga Fombad 3–10 available at: http://www.nyulawglobal.org/globalex/Botswana1.htm (last accessed 3 November 2011).

(d) Develop policies aimed at the progressive elimination of obstacles to free movement of capital and labour, goods and services, and of the peoples of the region generally, among member states.[8]

The SADC takes its cue on regional integration, from the broader African Union vision on regional integration and cooperation, most recently proclaimed by the African Union Constitutive Act of 2000.[9]

Article 3 of the African Union Constitutive Act envisions to, *inter alia*,

…

(c) accelerate the political and socio-economic integration of the continent and its people;

(d) promote and defend African common positions on issues of interest to the continent and its people;

...

(j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;

(k) promote cooperation in all fields of human activity to raise the living standards of African people; and

(l) coordinate and harmonize policies between existing and future Regional Economic Communities for gradual attainment of the objectives of the Union;

In a nutshell, the above regional legal framework establishes an obligation and enjoins the member states to integrate, as regional integration is the golden thread running through all the instruments constituting the legal framework. The goal of integration in this context, is not limited, and should therefore include industries and services that may impact on its achievement. Therefore, both in terms of the objects set by the SADC Treaty, and subsequently confirmed by the AU Constitutive Act, a single market for lawyers should be actively pursued. Cooperation should, therefore, be developed and nurtured, *inter alia*, in the areas of the provision of legal services between the member states. However, to achieve this free flow of legal services between states requires synchronicity and compatibility of the relevant laws and policies in operation in the state parties involved, as

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8 Article 5 of the Treaty of the South African Development Community of 1992 available at: http://www.sadc.int/documents-publications/sadc-treaty/ (last accessed 23 September 2013).

9 See art 3 of the Constitutive Act of the African Union: adopted in 2000 at the Lome, Togo Summit and entered into force in 2001 available at: http://www.au.int/en/about/constitutive_act (last accessed 23 September 2013).

contemplated by both article 5 of the SADC Treaty[10] and article 3 of the African Union Constitutive Act.[11] There must, furthermore, be a synergy and common understanding as regards the cross-border movement of goods and services, aimed at 'harmonising' laws and policies between states in Southern Africa in the promotion of regional integration.

THE LEGAL PRACTICES

The South African legal practice

The South African legal practice is split between two distinct professions: the attorneys profession and the advocates profession. The attorneys profession is regulated by the Law Society of South Africa (LSSA). In terms of its constitution, the LSSA is constituted by the following regional bodies: Law Societies of the Northern Provinces; the Cape Law Societies; the Kwazulu Natal Law Societies; and the Free State Law Societies.[12] The advocates profession is regulated by the General Council of the Bar of South Africa (GCB). It is made up of different societies of Advocates.[13] The professions are governed by the Attorneys Act[14] and the Admission of Advocates Act[15] respectively. For the purposes of this discussion, the provisions relating to admission to the professions are central.

The legal framework of the South African legal practice is undergoing an overhaul. Some of the proposed reforms are aimed at remedying the lacunae highlighted above and discussed later in this research.[16] For instance, the Legal Practice Bill proposes and envisages a situation where a legal practitioner, once admitted will, have *carte blanche* entitlement and the right of appearance throughout the Republic,[17] as opposed to the current situation where only advocates have that latitude. Attorneys currently only have the right of appearance within the jurisdiction of the law societies to which they are affiliated. Recently, the Minister of Justice and Constitutional

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10 See art 5 of the SADC Treaty of 1992 respectively.

11 See art 3 of the Constitutive Act of the African Union, of 2000 in this regard.

12 For a list of the regional bodies constituting the Law Society of South Africa (LSSA) see s 1(c) of the Constitution of the Law Society of South Africa, available at: http://www.lssa.org.za and http://findanattorney.co.za/law-society (last accessed January 2012).

13 The different societies of advocates are catalogued under s 3 of the Constitution of the General Council of the Bar of South Africa of 1980 as amended in 2010 available at: http://www.sabar.co.za/GCB_ConstitutionJuly2010.pdf (last accessed 3 June 2012).

14 Attorneys Act 53 of 1979 as amended.

15 Admission of Advocates Act 74 of 1964 as amended.

16 The revised Legal Practice Bill of 2012.

17 Section 29 of the revised Legal Practice Bill of 2012.

Development discussed the proposal to transform legal practice, akin to the transformation of the judiciary. Amongst other things, the transformation project will deal with issues relating to accessibility and affordability of legal services, and a proposal to cap legal fees. Access to the legal profession in relation to qualifications will also be central to the transformation agenda. The Bill further proposes an abolition of the LSSAs and the GBC and the creation of a new entity to be known as the Legal Practice Council which will be entrusted with the regulation of the profession and accountable directly to the minister.[18]

The Attorneys profession

The Attorneys Act provides for educational pre-requisites or academic qualifications, over and above practical qualifications known as articles of clerkship, before one can apply to be admitted into the attorneys profession. The Act reads thus,

> 2(1) Any person intending to be admitted as an attorney, shall serve under articles of clerkship for a period of,
> Two years after he or she has satisfied all the requirements for the degree of *baccalaureus legum* of any university in the Republic after pursuing for that degree a course of study of not less than four years;
> (a) Two years if he or she has satisfied all the requirements for the degree of bachelor other than the degree of *baccalaureus legum,* of any university in the Republic or after he or she has been admitted to the status of any such degree by any such university and has satisfied all the requirements for the degree of *baccalaureus legum* of any such university after completing a period of study for such degree of not less than five years in the aggregate;[19]

The Act further sets out the requirements for and duties of an applicant, when submitting the actual application for admission as an attorney after serving as an articled clerk as follows:

> 16 Any person who applies to the court to be admitted or readmitted and enrolled as an attorney, shall satisfy the society of the province wherein he so applies–

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[18] *Id* at Chapter 2. See also the minister's discussion in the *Sunday Times* 20 May 2012 4. Debates on this matter are also available at: http://www.sabinetlaw.co.za/justice-and-constitution/articles/update-legal-practice-bill.

[19] Attorneys Act 53 of 1979 as amended, chapter I, s 2.

(a) that he is a fit and proper person to be so admitted or readmitted and enrolled;
(b) if he has at any time been admitted as an advocate, that his name was subsequently removed from the roll of advocates on his own application; and
(c) if he is a person exempted from service under articles in terms of section 13 (1), that he is still entitled to practise and that his name is still on the roll of solicitors or attorneys of the country or territory referred to in that section, and that no proceedings to have him struck off the roll or suspended from practice are pending;
(d) if his estate has at any time been sequestrated, whether provisionally or finally, that despite such sequestration he is a fit and proper person to be so admitted or readmitted and enrolled.[20]

The Act further provides that in order to be admitted or readmitted as an attorney in South Africa, the applicant must be twenty-one years of age or older, at the time of lodging such application. Moreover, and most importantly, the applicant must be a citizen of South Africa, or have been lawfully admitted into the Republic for permanent residence, and should be ordinarily resident in the Republic.[21] These nationality and permanent residence prerequisites for admission into legal practice, pose the greatest practical obstacle to the freedom of movement of members of the legal professions into South Africa. Similar restrictions limiting the exercise of the legal professions to nationals can be found in most SADC countries. In the cases of Angola and Mozambique, for instance, an exception for permanent residents or foreigners ordinarily resident in the countries, is allowed.

The nationality and residency requirements do not augur well for the African Union's regional and sub-regional integration agenda.[22] They promote market and economic protectionism,[23] and perpetuate the outdated concept

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20 *Id* at s 16.

21 *Id* at s 15(1)(a) and (b).

22 The African Union's regional integration agenda is captured in the legal framework, including but not limited to, art 3 of the Constitutive Act of the African Union adopted in Lome, Togo on 11 July 2000 and entered into force on 26 July 2001 and Article 5 of the Treaty of the Southern African Development Community (SADC) of 1992.

23 Seamon 'The market participant test in dormant commerce clause analysis – protecting protectionism?' 1985 *Duke Law Journal* 697–741. The term 'economic protectionism' has been used by the court to describe attempts by states to advance or protect the economic interests of its own citizens by restricting the movement of articles of interstate commerce either into or out of the state. See *City of Philadelphia v New Jersey* 437 US 617, 627 (1978). This note employs the traditional meaning of the term. The dormant commerce clause's proscription of economic protectionism is derived from the

of the atomistic nation-state.[24] This argument will be further developed when dealing with the challenges to harmonisation.

The Advocates profession

The Admission of Advocates Act[25] provides for the eligibility criteria for admission to practice as an advocate in the following terms:

> 3(1) Subject to the provisions of any other law, any division shall admit to practice and authorize to be enrolled as an advocate any person who upon application made by him satisfies the court–
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> (a) that he is over the age of twenty-one years and is a fit and proper person to be so admitted and authorized;
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> (b) that he is duly qualified;
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> (c) that he is a South African citizen or that he has been lawfully admitted to the Republic for permanent residence therein and is ordinarily resident in the Republic;
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> (d) in the case of any person who has at any time been admitted to practise as an attorney in any court in the Republic or elsewhere, that his name has been removed from the roll of attorneys on his own application; and …

The subsequent subsection 3(2) makes provision for persons who are deemed qualified for the purposes of paragraph *(b)* of subsection (1).[26]

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constitutional principle that 'the State may not promote its own economic advantages by curtailment or burdening of interstate commerce'. See *HP Hood & Sons v Du Mond* 336 US 525 at 532 (1949). 'The clearest example of protectionism is a law that overtly blocks the flow of interstate commerce at a State's border.' See *City of Philadelphia v New Jersey* 437 US 617, 624 (1978). Some protectionist state measures block the flow of commerce into a state; others attempt to prevent the flow of commerce out of the state. *Baldwin v GAF Seelig Inc* 294 US 511 (1935), presents an example of the first type. In that case, the court invoked the dormant commerce clause to strike down a New York statute designed to insulate resident milk producers from out-of-state competition. In *Baldwin* the court stated that: 'What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation …. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another State or the labour of its residents.'

24 Gelb 'South Africa's role and importance in Africa and for the development of the African agenda' The Economic Development, Growth and Equity Institute, 2001 available at: http://www.sarpn.org.za/documents/d0000577/P467_RSA_role.pdf (last accessed 17 July 2011). See also Gumede n 1 above *at* 258–260.

25 Admission of Advocates Act 74 of 1964 as amended.

26 '(a) Any person who– (I) (aa) has satisfied all the requirements for the degree of *baccalaureus legum* of any university in the Republic after completing a period of study of not less than four years for that degree; or (bb) after he or she has satisfied all the

The Act further provides for the admission of advocates practising outside South Africa and elsewhere.[27]

From the foregoing South African legal framework regulating legal practice, it is clear that to practice law in South Africa, the individual must be either citizen or a permanent resident, and must ordinarily reside in the Republic.[28] Secondly, the applicant should preferably have acquired his or her legal education in South Africa. The bottom line is that it will be more difficult for non-citizens, non-permanent residents, and permanent residents who are not ordinarily resident in South Africa, than for South Africans, to access the South African legal profession given the stringent eligibility criterion outlined above.

This has given rise to the argument that these criteria are specifically engineered by the individual national legal systems, not as bulwarks against

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requirements for the degree of bachelor other than the degree of *baccalaureus legum*, of any university in the Republic or after he or she has been admitted to the status of any such degree by any such university, has satisfied all the requirements for the degree of *baccalaureus legum* of any such university after completing a period of study for such degrees of not less than five years in the aggregate; or (ii) has satisfied all the requirements for a degree or degrees of a university in a country which has been designated by the Minister, after consultation with the General Council of the Bar of South Africa, by notice in the Gazette, and in respect of which a university in the Republic with a faculty of law has certified that the syllabus and standard of instruction are equal or superior to those required for the degree of *baccalaureus legum* of a university in the Republic.'

27 Section 5(1) of the Admission of Advocates Act: '(1) Notwithstanding anything to the contrary in this Act contained but subject to the provisions of any other law, any division may admit to practise and authorize to be enrolled as an advocate any person who upon application made by him satisfies the court– (a) that he has been admitted as an advocate of the Supreme or High Court of any country or territory outside the Republic which the Minister has for the purposes of this section designated by notice in the *Gazette* (in the Act referred to as a designated country or territory); (b) that he resides and practises as an advocate in the designated country or territory in which he has been so admitted; (c) that he is a fit and proper person to be so admitted; and (d) that no proceedings are pending or contemplated to have him suspended from practice or to have him struck off the roll of advocates of the said Supreme or High Court. (2) Any person who is admitted and authorized to practise and to be enrolled as an advocate in terms of subsection (1), shall be enrolled as an advocate on the roll of advocates. (3) Any notice published in the *Gazette* under subsection (1) whereby any country or territory has been designated for the purposes of this section, may at any time be withdrawn by the Minister by a subsequent notice in the *Gazette*, and thereupon any country or territory referred to in such first mentioned notice shall cease to be a designated country or territory.'

28 Chapter 3, s 24(b)(ii) of the revised Legal Practice Bill does away with the double catch of permanent residence and ordinarily resident, by replacing that with 'permanent resident in the Republic'.The consequence of the status quo is that one may be a permanent resident and yet not ordinarily reside in South Africa, and will for that reason fail to meet the second requirement and be excluded.

external spillage and shields against a brain drain, but precisely to prevent the invasion of the national market, by foreign legal professionals. These are deliberate and protectionist measures against the free flow of legal services within the SADC.[29] The irony in the case of legal practice in South Africa, is that South African legal practice is well developed, highly specialised, has a rich jurisprudence, and is the leading regional 'skills exporter', when compared to its SADC counterparts. It will therefore, stand to benefit, even if the market is harmonised and liberalised. The further liberalisation will simply enhance South Africa's advantage, as there will be a freer flow of legal services within the region.

The fear among other SADC member states, including Botswana, that their legal markets will be swamped by the highly skilled South African legal practitioners in the event of a full harmonisation, is more realistic and reflects the reality of the great disparity in size and sophistication of the legal systems in the region. Given the advantageous position that the South African legal practice already enjoys over its counterparts, it is difficult to comprehend why it should be so resistant to harmonisation. Commendable calls for the reform of the rule excluding the admission of foreign legal practitioners, have long been mooted. The revised Legal Practice Bill of 2010[30] provides for a more liberal approach to the admission of qualified legal practitioners from other jurisdictions in South Africa. It, *inter alia*, proposes the establishment of a panel[31] to develop criteria for recognition of foreign and other qualifications, criteria for granting of permanent or temporary exemptions, and to consider applications for exemption from or amendments to, the terms of any exemption, and make recommendations on the merits of such application.[32]

The Bill further proposes that the Minister of Justice may, in consultation with this panel, determine categories of persons who may be exempted from the citizenship and residency requirements, as well as the qualification and training requirements, to give effect to reciprocal inter-governmental agreements regulating such matters, or, if it is in the public interest to permit

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29 This is a broad term which means, *inter alia*, government actions and policies that restrict or restrain international trade, often performed with the intention of protecting local businesses and jobs from foreign competition. Typical methods of protectionism are import tariffs, quotas, subsidies or tax concessions to local businesses, and direct state intervention.

30 The revised Legal Practice Bill of November 2010.

31 *Id* at s 3.

32 *Id* at s 31 (2).

the person or categories of persons to commence practice as a legal practitioner expeditiously by virtue of his or her academic qualifications or professional experience.[33]

The Botswana legal system

In Botswana, legal practice is governed by the Legal Practitioners Act.[34] The Act establishes the Law Society of Botswana to regulate the profession.[35] There is a major difference between the structure and fabric of legal practice in Botswana, and that in South Africa. Whereas the latter is a dualist system, the former is a monist system which recognises the attorneys profession as the primary profession. However, the advocates profession is making inroads into the formerly attorney-dominated market. This notwithstanding, in practice attorneys and advocates perform the same duties and both receive instructions directly from clients – or 'from the streets' as it is termed in popular legal parlance. Both professions are regulated and governed by a single Act[36] and by a single body.[37]

The Botswana Legal Practitioners Act provides for the admission and enrolment of legal practitioners as follows:

> (1) No person shall be qualified to practise as a legal practitioner unless–
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> (a) he has been admitted as a legal practitioner;
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> (b) his name is on the roll; and
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> (c) subject to subsection (2), he has in force a practice certificate issued by the Registrar under Section 30.

The Act specifically makes provision for the admission of citizens and permanent residents.[38]

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33 *Id* at s 30(2).

34 The Botswana Legal Practitioners Act of 1979 (Cap 61:01), as amended by the various Acts.

35 *Id* at s 55.

36 Legal Practitioners Act of 1979.

37 The Law Society of Botswana.

38 '(1) A person who is a citizen of Botswana shall be qualified to be admitted as a legal practitioner if he satisfies the court that – (a) he is a fit and proper person; (b) he has obtained by examination – (I) the degree of LL.B. from the University of Botswana, University of Lesotho, University of Swaziland or the former University of Botswana, Lesotho and Swaziland or Botswana and Swaziland referred to in section 8 of the Cap. 57:01 University of Botswana Act; or (ii) a bachelor's degree in law from any of the universities specified in the Second Schedule or such other prescribed university together with such additional qualifications, if any, as may be prescribed; and (c) he has passed such practical examinations as may be prescribed. (2) A person referred to in subsection

It is instructive, at this juncture, to point out that at the time of writing, there is no prescribed practical examination in terms of subsection 1(c) relating to graduates from the Universities of Botswana, Lesotho and Swaziland. Therefore, in these cases it is clear that the legal qualifications offered by these universities are given undue preferential status in the Botswana legal profession. This shows another contrast between the South African and the Botswana legal professions. Whereas both countries favour their domestic legal qualifications, the bar and the board examination prerequisite in South Africa is generalised and applies to all candidates regardless of the place of qualification.

It is conspicuous that the Act accords preferential treatment to a select category of citizens of Botswana, and non-citizens, who followed their legal studies at the Universities of Botswana, Lesotho, and Swaziland.[39] These universities used to work closely together, and even coined an acronym – BOLESWA, which represented Botswana, Lesotho, and Swaziland – to describe their alliance. LLB graduates from the BOLESWA Universities can enroll as attorneys immediately after graduation in any of the three cooperating countries.[40] The dilemma for a citizen of Botswana who has not studied in the preferred jurisdictions of BOLESWA, is that, for them to be admitted, they must pass a practical examination that may be prescribed,[41] or they must satisfy the court that they are qualified to practice in any prescribed country having an analogous system of law.[42]

The examination provision is discriminatory *per se,* in so far as it only applies to specific prospective entrants to the profession, such as those holding law qualification from any other jurisdictions within Southern Africa, *eg* South Africa. This selective application of the examination requirement, denigrates qualifications from other universities or jurisdictions.[43] It is unfairly discriminatory of citizens, and in some cases,

(1) may be exempted from the provisions of paragraphs (b) and (c) of subsection (1) if he satisfies the court that he is qualified to practise in any prescribed country having a sufficiently analogous system of law and that his qualifications are such as to render him suitable for admission and fulfils such conditions whether as to status or proficiency, as may be prescribed.'

39 The Botswana Legal Practitioners Act 1979 s 4.

40 Quansah 'The Legal Practitioners Act 1996, of Botswana' (2011) 1/41 *Journal of African Law* 1140–145.

41 Botswana Legal Practitioners Act 1979 s 1(b)(ii).

42 *Id* at s 2 relating to exceptions.

43 For instance, the High Court of Botswana turned down an application/petition for admission by a graduate educated in the United States of America in the case of *Dow v Law Society of Botswana*, MAHLB 000537/07.

non-citizens of Botswana, who obtained legal qualifications of no lesser standing, from universities not falling under the BOLESWA umbrella.[44]

Moreover, demanding a practical examination exclusively for aspirant legal practitioners from universities other than the BOLESWA group, creates a suspicion that their qualifications are in some way inadequate and need to be verified and evaluated by examination, whereas their fellow citizens who studied at home have open and free access to the legal profession. Reform is therefore needed to overcome this discrimination, and to ensure equal opportunity and benefit of the law for all prospective entrants to the profession.

This can be achieved through the so-called 'graveyard', as opposed to the 'vineyard' – to paraphrase Justice Albie Sachs.[45] This means that inequality can be eliminated by either levelling the playing field ('to the graveyard'), or upgrading the playing field ('to the vineyard') in a manner consistent with the Constitution. Therefore, in order to maintain the legitimate purpose served by the practical examination, it should be prescribed for every candidate across the board. This is attaining equality through the graveyard in that the privileged and advantageous position[46] which the law affords lawyers trained at BOLESWA universities, will be neutralised. It would be unrealistic and foolhardy to suggest that the inequality should be eliminated through the 'vineyard' as this would entail abolishing the prescribed bar

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44 The Constitution of the Republic of Botswana Cap 01:01 of 1967, s (15), prohibits the adoption of and forbids any law that is either of itself or in its effect, discriminatory. Section 15 (3) defines discrimination as follows: 'Subject to the provisions of subsection (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.' (3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. For the test, meaning and rationale behind prohibition of unfair discrimination, the South African case of *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 1 SA 300 (7 October 1997), is instructive. See also other cases in South Africa and Botswana such as *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC), *Attorney General v Unity Dow* [1992] BLR.

45 See Sachs *The strange alchemy of life and law* (2009) 249–251. This is an American Constitutional Law *modus operandi* of achieving equality. It means that inequality can be eliminated by either levelling down the playing field (to the graveyard), or up-grading the playing field (to the vineyard) in a manner that is consistent with the Constitution.

46 Section 15(3) of the Constitution of Botswana.

examination altogether, thereby affording everyone the privilege and advantage of wholesale enrolment into the legal profession.

For a citizen of Botswana to qualify for the exemption from the examination, he or she should have practiced law in prescribed jurisdictions with analogous legal systems. This means that such applicants should have been admitted to practice in those jurisdictions having fulfilled their requirements for admission to the legal profession. The uniform requirement in most jurisdictions is that one should be either a citizen or a permanent resident.[47] The challenge for the applicants will be to obtain citizenship or permanent residence as these remain long and onerous processes. This brings this discussion to the enquiry as to why the courts, the law societies, or the regulating bodies of the legal profession, must satisfy themselves of the competency of an applicant, before he or she can be admitted into the legal profession.

The legal profession, like all other professions,[48] has regulating bodies in every jurisdiction. The profession is a noble one which demands fitness and propriety, and a high level of professionalism and competency, as practitioners are required to deal with sensitive and confidential matters relating to their clients, not to mention the large sums of money they hold in trust.[49] International best practice is that for such professions, every candidate's competency should be tested by the respective regulating body, by means of; *inter alia*, a prescribed examination – regardless of where the applicant studied. This means that in Botswana, even graduates from the preferred BOLESWA universities, should sit for the prescribed examination. A further argument, is that universities, as academic institutions, must be recognised as separate from, and entirely independent of, the legal profession(s).

The examination also serves as a quality assurance 'check and balance' mechanism between the universities and the profession. It helps minimise

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47 This is the case in both South Africa and Botswana.

48 There are other similarly self-regulated professions, such as chartered accountants, quantity surveyors, architects, and the medical professions.

49 The practical manner in which the courts exercise their disciplinary powers is trite as explained in cases like *Jasat v Natal Law Society* 2000 3 SA 44 (SCA) at 51B–I and *Law Society of the Cape of Good Hope v C* 1986 1 SA 616 (A) at 637E–G. The nature and nobility of the legal profession was well articulated in the South African decision of *Prince v President, Cape Law Society, and Others* 2000 3 SA 845 (SCA); 2000 7BCLR 823 (SCA), where the candidate attorney's application for registration of contract of community service was declined because of his lack of fitness and propriety.

the possibility of incompetent and or otherwise unreliable individuals, gaining access to the profession, and so posing a huge risk to their unsuspecting clientele and the public at large. There are regularly cases of practitioners who are struck off the roll for having fraudulently obtained the Bachelor's Degree demanded for admission to the profession. A post-university practical examination can, therefore, help at least to minimise such risks, as it exposes the candidate to further scrutiny.[50]

The irony of the prescribed examination *vis-à-vis* graduates, from South African Universities, is that the law curriculum of the University of Botswana is still heavily dependent on South African legal literature and jurisprudence, rather than on the locally written and developed legal literature. Given its relatively small population and modest economy, Botswana is not a highly litigious society. This is also the main reason why legal practice in Botswana is not specialised, and is in many respects, underdeveloped. The University of Botswana has some three unaccredited journals for the department of law.[51]

An individual jurisprudence is still developing in Botswana, and there is a pressing need for research in many areas of the law. The procedural law of Botswana is a carbon copy of the South African law, which is borne out by the fact that the materials prescribed – text books, journal articles, etcetera – are in the main South African. With very few exceptions, the Botswana and South African legal systems are congruent.

Having highlighted the legal frameworks of the subjects of this research, the next section addresses the challenges these present to the regional integration agenda.

CHALLENGES FACING HARMONISATION

A plethora of challenges are raised by the legal framework involved in the harmonisation of the Southern African legal profession. These include problems inherent to both jurisdictions, and some that are self-inflicted.

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50 In Botswana, for instance, the courts have decided a number of cases where practitioners were struck off the roll of attorneys because they had fraudulently been admitted as such by a counterfeit bachelor's degree.

51 Booi *Botswana's legal system and legal research* (2011) as updated by Fombad 2011 available at: http://www.nyulawglobal.org/globalex/Botswana1.htm (last accessed 19 July 2011).These are the *University of Botswana, Lesotho and Swaziland Law Journal*, *Botswana Notes and Records* (which carries all articles on Botswana, irrespective of the subject), 1986 and the University of *Botswana Law Journal.*

However, this distinction is largely semantic, as both challenges militate equally against integration and cooperation. In other words, the categorisation of the challenges is unimportant in a consideration of the factors impeding regional integration and cooperation.

Citizens in the jurisdictions discussed, are accorded preferential treatment in their home countries – as it is the case elsewhere in Southern Africa, and in fact the world over. Potential foreign entrants to the professions are, all but barred from penetrating the jealously protected national markets, and this does not augur well for the envisaged regional and sub-regional integration.[52] Whereas the aim of these measures is to protect and preserve the national market for locals, a part of the same local people is prejudiced if they study law in other jurisdictions not falling within the nationally preferred category. Such applicants find themselves unfairly discriminated against and excluded by the very law that was intended to benefit them. Research shows that at the time of the promulgation of such laws, these situations were not envisaged, and where they were, they were regarded as highly unlikely and far too remote to warrant due consideration.

The different requirements for admission to the legal professions in South Africa and Botswana, are informed by an intention to empower and benefit the local people by putting them in stronger position as regards admission to the legal profession in their own country, than 'foreign' nationals seeking admission. This phenomenon is, in turn, informed by the interests of the 'atomistic nation state'.[53] The main challenge to regional integration and cooperation in the African context, is the reluctance of African nations to discard their nationalist mentalities, and to embrace, first, the Africanist, and in the secondly, the global mentality.

As members of the World Trade Organisation, Botswana and South Africa are also party to the General Agreement on Trade in Services (GATS).[54] For the purposes of this discussion, the GATS is important in that it addresses the liberalisation of the global trade in services. The GATS contains the

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52 Seamon 'The market participant test in dormant commerce clause analysis – protecting protectionism?' 1985 *Duke Law Journal* 697–741. Available at: http://scholarship.law.duke.edu/dlj/vol34/iss3/6 (last accessed 29 September 2013).

53 Gelb 'South Africa's role and importance in Africa and for the development of the African Agenda, the Economic Development, Growth and Equity Institute' 2001 available at: http://www.sarpn.org.za/documents/d0000577/P467_RSA_role.pdf (last accessed 17 July 2011). See also Gumede n 1 above at 258–260.

54 The General Agreement on Trade in Services (GATS) was signed on 15 April 1994.

most-favoured-nation clause,[55] which provides that each member state must, immediately and unconditionally, accord services[56] and service suppliers of any other member, treatment no less favourable than that it accords to like services and service suppliers of any other country. This means that if a state allows legal advisers or legal practitioners from a specific foreign state to practice within its territory, it must also allow the legal practitioners of all the other GATS members to do likewise. Unfortunately, the municipal laws of both Botswana and South Africa governing the admission of foreign lawyers and local graduates from foreign universities, do not correspond to these countries' obligations under GATS. The municipal laws in both jurisdictions are protectionist and infringe on their obligations under GATS.

The legal obligation is not to discriminate between member states, and not to grant specific treatment in the first place. Certain exemptions are allowed in the case of economic or labour integration between specific states.[57] The bottom line is that a state should administer its measures affecting trade in services in a reasonable, objective, and impartial manner. According to GATS, states may recognise only the education and qualifications obtained in a particular country. However, this recognition should not be done in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorisation of service suppliers.[58]

Their obligations under GATS, enjoin Botswana and South Africa to give other jurisdictions, signatory to the GATS, the same favourable treatment they give to countries such as Lesotho and Swaziland. This means that Botswana and South Africa are in breach of their legal obligations under the GATS by not affording one another the same favourable treatment they afford other member states.

Another challenge raised by the legal framework, is the one premised on legal education. According to GATS, states may recognise only the qualifications obtained in a specific country. However, this recognition must

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55 See art II (1) of the Agreement.

56 Article 1 par (2) defines the scope of services covered by the agreement in the widest terms, They include the supply of s service supplier of one member, through the presence of natural persons of a member in the territory of any other member.

57 See art V of the Agreement.

58 Booysen *International transactions and the international law merchant* (1995) at 95.

not constitute a means of discrimination between countries in the application of its standards or criteria for the authorisation of service suppliers.[59]

A further scrutiny of the statutes reveals that whether or not one will be eligible to practice law in either jurisdiction, depends on where legal education was acquired. The South African system prefers applicants who studied at South African Universities. Botswana has similar prvisions. This local nature of legal practice means that the challenge of educating lawyers to work in a global economy cannot be simply resolved by teaching global law. It can neither be resolved by teaching the law of each nation, as they are too numerous and too diverse. It is also impossible accurately to anticipate, which national legal regimes will be important in the career of any particular student.[60] This problem is exacerbated by the fact that there is no meaningful cooperation between the professional governing bodies – such as Law Societies in these jurisdictions.

The research shows that some of the challenges are self-inflicted, and stem from reluctance and resistance to change in certain legal professions. Some professions have embraced globalism. For example, accounting has undergone a reorientation with the emergence of global accounting standards and standard setters.[61] Law, in large part, has resisted this trend. It remains essentially nationalistic and reliant on sovereign rulemaking structures. Nevertheless, the force of globalisation with regard to law, must typically meet the power of national sources to which law is firmly tied.[62] For instance, within legal practice – as oppsed to academics – there is not much talk of harmonistion of the legal professions. Many of the talking points are on reciprocity within the legal professions. The Botswana Legal

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59 *Id* at 95.

60 Silver 'Regulatory mismatch in the international market for legal services' (2003) 23 *Journal of International Law & Business* 487 available at: http://works.bepress.com/carole_silver/2 (last accessed 20 July 2011).

61 Ruder, Canfield & Hollister 'Creation of world wide accounting standards: convergence and independence' (2005) 25 *Nw J Int'l L & Bus* 513. See also Bratton & Cunningham 'Treatment differences and political realities in the GAAP-IFRS Debate' (2009) 95 *Va L Rev* 989.

62 Tushnet 'The inevitable globalization of constitutional law' (2009) 49 *Va J Int'l L* 985, 987 (describing processes of convergence but noting 'differences in detail, which means that globalization does not entail uniformity'); Chao Xi 'In search of an effective monitoring board model: board reforms and the political economy of corporate law in China' (2006) 22 *Conn J Int'l L* 1. See generally Dezalay & Garth *Dealing in virtue* (1996) (describing the influence on one another of international and national institutions and participants in the field of international commercial arbitration).

Practitioners Act,[63] recognises reciprocity as the basis for opening up the legal market for a reciprocating jurisdiction.

Therefore, it is a case of reciprocating the courtesy extended to another – rather than harmonisation – which offers a sustainable solution to regional integration in the area of regional legal services. More than integration, it is a case of mere expediency. The challenge with making reciprocity a sole motivation for integration is that reciprocity can only be an effective tool for integration where the jurisdictions are symmetrical, in terms of both economy and expertise. This is not the case here: there are, as has been shown, vast asymmetries.

This symmetry will present clear advantages of reciprocal and mutual demand for legal expertise in both jurisdictions. But a well developed legal system with a vast legal market such as is found in South Africa, will see no need to reciprocate. This is explained in part by the position of strength enjoyed by the South African legal fraternity in the SADC market for legal services. The South African legal fraternity has been so successful in leveraging this expertise, that there is no obvious need to complicate its approach.[64] Therefore, whereas there is a high demand for South African legal expertise, especially advocates, in Botswana and other SADC neighbouring countries, there is no such corresponding reciprocal demand of legal expertise from the SADC neighbourhood in South Africa. Botswana imports legal expertise for most high profile litigious matters from South Africa and abroad, hence the exception in respect of certain foreign advocates[65] in the Legal Practitioners Act.

On the other hand, as a developing legal market, Botswana needs the South African expertise because of its rich jurisprudence and academic value. The rich South African jurisprudence developed due to the dynamic historical metamorphosis of the jurisdiction which culminated in the establishment of the Constitutional Court as the highest court in the country when it comes to constitutional issues. The Constitutional Court has enriched the South African jurisprudence in a profound way. Appointment to the bench of the

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63 Legal Practitioners Act s 5 (g) (cap, 61:01).

64 This is a similar stance and approach adopted by American Law firms. See Silver 'The case of the foreign lawyer: internationalizing the US legal profession' (2002) 25 *Fordham Journal of International Law* 25 1039 available at: http://works.bepress.com/carole_silver/4 (last accessed 19 November 2011).

65 Quansah n 39 above at 140–145.

court is for South African citizens only.[66] In Botswana there is no Constitutional Court. The highest court in the land is the Court of Appeal.

The appointment of the judges of the Court of Appeal of Botswana is not the preserve of Botswana citizens.[67] Until recently, there has only been one Botswanan citizen who served as a member of the full bench of the Court of Appeal of Botswana. Similarly, three of the five judges constituting the full bench of the court, have, until recently, been retired South African judges or former practitioners. This illustrates Botswana's over-reliance on South African expertise.

CONCLUDING REMARKS AND RECOMMENDATIONS

In conclusion, the discussion above has shown that despite the political and intellectual rhetoric around regional integration and the globalisation of trade in services, the legal profession remains essentially a domestic and nationalistic enterprise.[68]

Renewed and earnest efforts at integration should start at the universities in order to obviate the challenges and excuses of 'foreign law' discussed above. In the case of Botswana and South Africa, this exercise should be relatively easy as Botswana relies heavily on South African jurisprudence and legal literature. The same is the case on the legal practice front where Botswana again draws heavily on South African advocates for litigation in high profile cases.

The profession's regulating bodies, such as the law societies, must revisit their governing laws in order to synchronise them into the regional and global hinterland. It goes without saying that the Southern African state must embrace the reality of integration in this time of globalisation. This will, as a corollary, translate into freer and more open markets, not only for the legal profession, but also for other fields demanding economic integration.

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66 Section 174 of the Constitution of South Africa provides that: '(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.'

67 See s 100 of the Constitution of Botswana.

68 Silver n 63 above.