State Accountability in Botswana

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ABSTRACT

In light of the importance that attaches to state accountability in modern governance, the paper evaluates the extent to which the state can be held to account for its decision-making in Botswana. It first proposes a tool by which to measure the quality of state accountability in states which purport to be constitutional democracies such as Botswana. Applying the tool, the paper finds that quality of state accountability in Botswana could be enhanced, for example, through better accommodation of socioeconomic rights under Botswana's constitutional framework.

1. INTRODUCTION

This paper evaluates the extent to which the state can be held to account for its decision-making in Botswana. The paper seeks to do so, first, by establishing a tool by which to measure the quality of state accountability in states which purport to be constitutional democracies such as Botswana. Following this, the paper uses this tool to evaluate the extent to which the state can be held to account in Botswana. The paper concludes with a discussion on the extent to which the state can be held to account in Botswana. It also proffers recommendations on how state accountability could be enhanced.

2. MEASURING THE QUALITY OF STATE ACCOUNTABILITY

Constitutional democracies, being based on constitutionalism, have broadly looked to secure state accountability in two interconnected ways.[1] First, such democracies have looked to secure state accountability through the turn to the rule of law, which incorporates both the concept of

[1] Anthony W Bradley and Keith D Ewing *Constitutional and Administrative Law* (14 edn, Longman, 2007) 107; Mark Ryan *Unlocking Constitutional and Administrative Law* (2 edn, Routledge, 2007) 13. Hilaire Barnett *Constitutional and Administrative Law* (4 edn, Cavendish Publishing, 2003) 9-11. Ernst-Ulrich Petersmann, 'How to Reform the UN System? Constitutionalism, International Law and International Organizations' (1997) 10 *Leiden Journal of International Law* 421, 426-428.

rule by law, and, the more comprehensive rule of law concept.[2] In both versions of the rule of law, accountability stems from the fact that adherence to this rule of law requires states to commit to a governance approach based on respect for the law and, also, on the basic premise that no one, whatever the condition or rank, is above the law and so, any action by any person can be challenged in court by any party aggrieved by the impact of that action. Second, constitutional democracies have looked to secure state accountability through the separation of state power among three institutions: the Legislature; the Executive; and the Judiciary. These institutions are expected to contribute to the attainment of state accountability through 'checking' and 'balancing' each other's exercises of power.[3]

Importantly though, as different types of so-called constitutional democracies have emerged, proliferated, and aged, it has become apparent that different states commit to constitutionalism, and by implication, the rule of law and the separation of powers, to very varied degrees. It has also become apparent that the determinant of whether any of these constitutional democracies actually secure accountability is not simply the fact that they commit to constitutionalism, the rule of law, and the separation of powers. Instead, experience suggests that once these democracies make a commitment to constitutionalism, the rule of law and the separation of powers, securing state accountability depends on them going beyond this and doing three other things, which, for the present purpose, will serve as the indicators of a state's commitment to accountability.

The first indicator of a state based on constitutionalism's commitment to securing accountability is the extent to which the state provides statutory remedies which are crafted specifically for securing accountability, and which are automatically activated, or, can be easily engaged by anyone looking to hold the state to account. To this end, one of the most notable statutorily provided remedies for securing state accountability is the turn to tribunals.[4] These are best described as bodies, other than courts of law, which are given the power to resolve disputes and to decide cases.[5] Insofar as securing state accountability is concerned, these tribunals carry obvious advantages which include offering expert dispute resolution that is quick, flexible, and cheaper than that offered by ordinary courts. However, their value insofar as securing accountability is concerned can be compromised where they are a prominent part

[2] Albert Venn Dicey *The Law of the Constitution* (10 edn, Liberty Fund, 1959). Bradley and Ewing (n 1) 96. On the rule of law generally, see, TRS Allan *Law, Liberty, and Justice* (Clarendon Press, 1993) 20-47.
[3] Ryan (n 1) 60-92. Allan (n 2) 48. Bradley and Ewing (n 1) 81-92.
[4] Andrew Le Sueur, Javan Herberg, and Rosalind English, *Principles of Public Law* (Cavendish Publishing, 1999) 194-196.
[5] Leslie Basil Curzon *Dictionary of Law* (5 edn, Trans-Atlantic Publications, 1998) 387.

of the executive framework which would make them susceptible to damaging perceptions of bias, as well as to real bias.[6] Aside from tribunals, another statutorily provided remedy which is useful for securing accountability where maladministration occurs is the office of the Ombudsman, or, the Public Protector as this figure is known in some jurisdictions.[7] The Ombudsman, or the Public Protector, typically contributes to securing the accountability of states by investigating maladministration which causes dissatisfaction but may not always be subject to legal challenge either before the courts or in tribunals because there will not have been technical breach of the law.[8] Importantly though, while the Ombudsman, or the Public Protector, enhances accountability where they are empowered to prosecute perpetrators of maladministration, they are not always empowered to do so, which can compromise their capacity to contribute to securing state accountability. Alternatively, another statutorily provided remedy which is designed to secure state accountability is the provision of inquiries to serve as independent *fora* convened to deal with a specific instance of maladministration with the objective of fact-finding so that information gathered can be relied on to hold central state actors involved in maladministration to account. Importantly though, the value of these inquiries insofar as securing accountability is concerned, is dependent on the willingness of empowered actors in the state convening the inquiries and subsequently acting on the findings. Yet another statutorily provided remedy used to enhance state accountability incorporates the different techniques used by Legislatures across the world to ensure that subsidiary laws by the Executive which are intended to advance policy and give effect to statutes are *intra vires* the laws made by these legislatures.

The second indicator of a state based on constitutionalism's commitment to securing accountability is the extent to which the state empowers people to hold the state to account for its actions and omissions.[9] Empowering the people to hold the state to account in this way is best done when people are granted fundamental human rights which are constitutionally entrenched.[10] This includes both classic civil and political rights such as personal liberty and freedom of expression and socioeconomic rights such as the right to education, employment, and to an adequate standard of living. In addition, effectively empowering people to hold the state to account for its decisions requires broadening the scope of standing in rights

[6] Indira Gandhi National Open University Block-5 Citizen and Administration: Unit-23 Administrative Tribunals http://hdl.handle.net/123456789/19134
[7] Le Sueur, Herberg, and English (n 4) 203-223. Tebogo Titose Mapodisi 'Ouster Clauses, Judicial Review and the Botswana Ombudsman: A Need Reform?' (2014) *University of Botswana Law Journal* 117.
[8] Le Sueur, Herberg, and English (n 4) 203.
[9] Le Sueur, Herberg, and English (n 4) 359.
[10] Bradley and Ewing (n 1) 83, 103-104.

jurisprudence and allowing people to act in protection of rights in the public interest.[11] Separately, empowering people to hold the state to account is also attained through ensuring that people's rights are justiciable. This allows the Judiciary the opportunity to grant people, whose rights have been infringed, by state action or omission, access to court where they can exercise their rights individually, collectively, and in the public interest, to hold the state to account for such actions or omissions.[12]

The third indicator of a state based on constitutionalism's commitment to securing accountability is the extent to which the Judiciary in the state ensures that people, adversely affected by illegal, irrational, and procedurally improper decisions by the state, can approach the courts to have such decisions reviewed and, if appropriate, set aside.[13] Just how committed the Judiciary is to doing this can be discerned in two ways. First, it can be discerned in those instances where the Judiciary commits to affording people access to judicial review even in the face of efforts to oust this review jurisdiction by the Legislature or the Executive.[14] Second, it is discernible in those instances where the Judiciary commits to a liberal approach to standing and generously grants people who claim to be aggrieved by state decision-making access to court so that they may challenge, and possibly overturn, those state decisions which are illegal, irrational, or have been made in a procedurally improper way.

3 MEASURING STATE ACCOUNTABLITY IN BOTSWANA

Following from the above, in looking to measure the extent to which state accountability is secured in Botswana, it is useful to begin by noting that Botswana has a Constitution which is recognized as the leading law of the land. Importantly though, there is no explicit reference to the rule of law in this Constitution.[15] However, it is quite clear that there is real commitment to the rule of law in several ways. For instance, no one is regarded as being above the law in Botswana[16] and, section 10 of the Constitution entitles everyone to due process. Furthermore, sections 3 to 16 of the Constitution make provision for the fundamental rights that empower

[11] Bradley and Ewing (n 1) 104-105, 419.
[12] Bradley and Ewing (n 1).
[13] Saikrishna B Prakash and John C Yoo 'The Origins of Judicial Review' (2003) 70 *The University of Chicago Law Review* 887. Le Sueur, Herberg, and English (n 4) 225.
[14] Le Sueur, Herberg, and English (n 4) 315. Mapodisi (n 7) 117.
[15] Constitution of Botswana, 1966.
[16] Importantly though, the exception is section 41 of the Constitution which grants the President immunity for the duration of the term. See *Motswaledi v Botswna Democratic Party and Others* [2009] 2 BLR 269 (HC) and [2009] 2 BLR 284 (CA)

any person adversely affected by a decision made arbitrarily[17] to challenge that decision regardless of who made the decision.[18] Separately, while there is no explicit reference to a separation of powers in the Constitution, such separation of power is provided for to the extent that Botswana's Constitution separates state power based on Executive, Parliament (Legislature), and Judicial functions.[19] For the sake of completeness, it is worth noting that in Botswana, as in other states, the actual separation of powers is not perfect.[20] For instance, in section 96 of the Constitution, the President, as head of the Executive, is charged with appointing the Chief Justice of the High Court. And outside of the overlaps in the Constitution, another example of the overlap in state functions entrusted to each of the three institutions is the fact that the Legislature is empowered to impose mandatory minimum sentences despite the fact that this is traditionally a function reserved for the Judiciary.[21] Importantly though, as in other states, these overlaps in the functions of Botswana's state institutions are acceptable on the basis that they serve instrumental purposes which secure effective governance without compromising accountability.[22]

Against this backdrop, it is clear when looking to measure the extent to which state accountability is secured in Botswana, that the country is a constitutional democracy based on constitutionalism which looks to secure state accountability through the rule of law and the separation of powers.[23] Drawing from the preceding discussion, this necessarily means that the measure of the quality of state accountability in Botswana depends on three separate but

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[17] See section 16 of the Constitution which provides in part: 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 or 15 of this Constitution to the extent that the law authorizes the taking during any period when Botswana is at war or any period when a declaration under section 17 of this Constitution is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.'

[18] See section 18 which provides in part: 'if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.'

[19] See the provision of fundamental rights that advance the attainment of the rule of law in sections 3-15 of the Constitution. Also see relevant chapters of the Constitution dedicated to the Executive (Chapter IV), the Parliament (Chapter V), and the Judiciary (Chapter VI).

[20] See Tebbutt JP in *Moatshe v The State; Motshwari and Another v the State* [2004] 1 BLR 1 (CA) and Bonolo Ramadi Dinokopila, 'The Role of the Judiciary in Enhancing Constitutional Democracy in Botswana' (2017) *University of Botswana Law Journal* 3.

[21] In *Moatshe v The State; Motshwari & Another v The State* 2004 (n 20 above) the court held that 'the imposition of mandatory minimum sentences by the legislature was a legitimate function of the Legislature in a modern democracy and had been recognised as such in courts in other liberal democracies. The Legislature was aware of the necessity to take such steps to prevent the structure of its society from being undermined by those who commit prevalent offences and to ensure that law-abiding citizens did not take the law into their own hands. The intention of the legislature by enactment of the mandatory minimum sentences was in the public interest to curb the incidence of particular offences. The sections imposing such sentences were accordingly not in contravention of section 95 of the Constitution.

[22] Allan (n 2) 48-53.

[23] See *Mzwinila v The Attorney General* (2003) 1 BLR 557. And see Dinokopila (n 20) 20-21.

interconnected indicators, that is: the extent to which such a state provides quality statutory remedies and controls which ensure the accountability of the state; the extent to which a state grants people justiciable civil and political rights and socioeconomic rights which they can exercise in their personal, or the public's, interest to hold the state to account for its actions; and, the extent to which courts commit to the provision of judicial review to people by overriding ouster clauses and adopting a liberal approach to standing. Each of these three is discussed in detail in the following sub-sections.

3.1 The Quality of Statutory Remedies and Controls

Considering that the quality of state accountability depends on the provision of statutory remedies and controls, it is useful to note that in Botswana, most of the remedies and controls needed in order to ensure that a framework based on constitutionalism, the rule of law, and the separation of powers, secures accountability are provided for by statute. For instance, several statutes provide for tribunals with some of the most notable statutorily provided tribunals in Botswana being the Land Tribunal,[24] the Public Service Commission,[25] and the Parole Board.[26] In addition, the Ombudsman, a well-regarded statutory institution relied on by constitutional democracies to secure state accountability across the world, is established in terms of Botswana's Ombudsman Act of 1995.[27] Separately, in terms of the Commission of Inquiry Act,[28] the President is empowered to establish public inquiries as an investigative and fact-finding tool that will lead to the amassing of information that can be used to hold the state to account. Aside from these remedies, state accountability is also pursued in terms of the Statutory Instruments Act[29] which looks to secure state accountability in Botswana by compelling the Legislature to consistently and automatically review subsidiary legislation made by the Executive which assumes the form of Statutory Instruments.

Importantly though, when looking to measure the quality of these remedies and controls as tools for securing accountability, it is worth noting that, while the review of Statutory Instruments by the Legislature secures accountability by ensuring that laws are *intra vires* the original statute, pertinent flaws attach to each of the other remedies. For instance, while

[24] Land Tribunal Act of 2014.
[25] Section 109 of the Constitution.
[26] Prisons Act Cap 21:03.
[27] Ombudsman Act of 1995.
[28] Commission of Inquiry Act Cap 05:02.
[29] Statutory Instruments Act Cap 01:05.

tribunals serve a critical function, they are undoubtedly part of the Executive. To illustrate, section 3 (2) of the Land Tribunal Act provides that it is the Minister who constitutes the Land Tribunal. Alternatively, section 109 (2) of the Constitution empowers the President to appoint members of the Public Service Commission. Similarly, section 84 of the Prisons Act, gives the Minister the responsibility of convening Parole Boards. This connection to the Executive necessarily brings into question issues of these tribunals' objectivity when hearing particular issues, and this naturally lessens their value as a tool for holding the state to account. Alternatively, while the office of the Ombudsman may be an institution dedicated to empowering citizens to hold the state to account, the financial and operational independence of the institution in Botswana is compromised.[30] Separately, the Ombudsman's jurisdiction does not extend to some central state actors involved in security, such as Police and the Defence forces despite the fact that these actors should, ideally, be held to account in very transparent ways.[31] Lastly, the quality of this remedy for purposes of accountability in Botswana is compromised by the fact that the Ombudsman is not empowered to enforce laws.[32] The Ombudsman can only bring findings of maladministration to the principal officer in the department concerned, or, where the officer does nothing, to the attention of the Legislature. Quite separately, insofar as the quality of statutory remedies is concerned, it is worth noting that while the inquiry system is a useful tool for ensuring state accountability when used regularly, Botswana Presidents rarely use this tool. No inquiry was initiated by the immediate past President during his two five-year consecutive terms of office; and, so far, the current President, elected into office in 2019, has not found it necessary to initiate one.

3.2 The Quality of Rights to Hold the State to Account

Insofar as the extent to which a state committed to constitutionalism, the rule of law, and the separation of powers, provides justiciable civil and political rights and socioeconomic rights, which people can exercise in their personal, or the public's, interest to hold the state to account is an indicator of that state's commitment to accountability, it is interesting to note that sections 3 to 16 of Botswana's Constitution make provision for civil and political rights.[33] These include

[30] See sections 2 and 13 of the Act. Emmanuel Kwabena Quansah, 'The Ombudsman Arrives in Botswana: A note on the Ombudsman Act' (1995) *Journal of African Law* 220. Charles M Fombad, 'The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act' (1995) 27 *Journal of Southern African Studies* 57, 57-77.
[31] See section 3 and 4 of the Act.
[32] Fombad (n 30) 55, 57-77. Mapodisi (n 7) 117.
[33] See sections 3-18 of the Constitution. Dinokopila (n 20) 8.

such rights as the right to life,[34] the right to personal liberty,[35] the right to freedom of conscience,[36] and the right to freedom of expression.[37] Further to this, section 18 of the Constitution provides that 'if any person alleges that any of the provisions in sections 3 to 16 of the Constitution have been, are being, or are likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.'

Effectively then, Botswana law provides people with justiciable civil and political rights. And, for their part, courts have established that they will not shy away from allowing people to rely on these rights to hold the state and central state actors, except for the President while she or he is in office,[38] to account for their actions, omissions, and decisions.[39] In *Tidimalo Jokase v Gaelebale Mpho Swakgosing*[40] for instance, the court allowed contest to a law which prohibited women from representing themselves before the courts on account of their status as women, on the grounds that such law was contrary to the provisions of the Constitution. Separately, in *Kanane v State*[41] the Court of Appeal heard an appeal to a case in which the lower court had allowed the matter of whether gay men and lesbian women constituted a group or class which required protection in terms of the Constitution to be heard. And, in *Patson v Attorney General*[42] the High Court allowed Patson access to the court to protect his right to movement and hold the state to account for infringing upon the right by not processing his application for the renewal of his passport nearly three years after his initial application to the Department of Immigration and Citizenship.

For all the value that the provision of justiciable civil and political rights and the willingness of courts to afford people the opportunity to exercise these rights holds for accountability, it is worth noting, insofar as securing accountability is concerned, that

[34] Section 4.
[35] Section 5.
[36] Section 11.
[37] Section 12.
[38] *Motswaledi* (n 16).
[39] See *Ngope v O'Brien Quinn* [1986] BLR 335 (CA) where the court dealt with Order 4, r. 14 of the Rules of the High Court which provided that, 'no summons or other civil process of the court could be sued out against the President or the Government of Botswana, or against any Judge of the High Court without the leave of the court upon motion made for that purpose' and section 23(1) of the High Court Act (Cap. 04:02) which provided that 'no judge shall be liable to be sued in any court for any act done or ordered to done by him in the discharge of his judicial duty whether or not done within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have the jurisdiction to do or order the act complained of' but still found that the Judge was liable to a civil suit of defamation.
[40] Unreported, MAHLB-000661-10.
[41] [1995] BLR 94.
[42] [2008] 2 BLR 66.

Botswana's Constitution does not entrench socioeconomic rights as fundamental rights.[43] Not only that, it also appears as if Botswana has embarked on a systematic and organized effort to stunt the provision to people of socioeconomic rights to people. This can be inferred from the manner in which Botswana has ensured that it is not a signatory to the International Convention on Economic Social and Cultural Rights[44] despite wide-spread recognition of the importance of the rights enshrined in this Convention and recognition of the fact that fully enjoying benefits bestowed on people by civil and political rights is only possible when their socioeconomic rights are protected.[45] It can also be inferred from the fact that Botswana has actively worked to avoid giving effect to treaties that the state has ratified, which would import socioeconomic rights into state law, such as the Rio Declaration.[46] In the same vein, the courts have also been reluctant to contribute to the recognition of socioeconomic rights. In *Mosetlhanyane and Another v The Attorney General of Botswana*[47] for example, it seemed as if headway was going to be made in this regard when the court interpreted the constitutional provisions relating to freedom from inhuman and degrading treatment as encompassing the right to water. However, the court failed to conclusively hold that the Government was under the obligation to provide Basarwa with water.[48] And since then, the court, in *Attorney General v Mwale*,[49] has held, more assertively with respect to socioeconomic rights, that 'any attempt by the Courts to confer socioeconomic rights, such as universal access to health care, by the overbroad construction of sections of the Constitution such as section 4 (the right to life) and section 7 (the prohibition on inhuman or degrading punishments or other treatment) … would … be overstepping the bounds of judicial discretion.' Importantly, this approach to socioeconomic rights has had the effect of depriving the framework of one of the most potent tools that could be used by people to effectively hold the state to account.

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[43] Dinokopila (n 20) 3.
[44] United Nations, Treaty Series, vol. 993, p. 3.
[45] Manisuli Ssenyonjo 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 2 *Netherlands International Law Review* 259. Amrei Müller 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 4 *Human Rights Law Review* 557.
[46] The Rio Declaration 31 ILM 874 (1992). See however, *Attorney General v Unity Dow* (1992) BLR 119, where the court noted that due to its dualist nature, international conventions would be used an aid towards interpretation only in instances of ambiguity in the domestic laws and the application of such international conventions does not offend against domestic laws.
[47] [2010] 3 BLR 372 (HC).
[48] See Bonolo Ramadi Dinokopila, 'The Justiciability of Socio-economic Rights in Botswana' (2013) 57 *Journal of African Law* 108.
[49] (CACGB-096-14, CACGB-076-15) (2015) BWCA 1 (26 August 2015).

3.3 The Commitment to Judicial Review

In looking to measure Botswana's commitment to securing accountability through assessing the extent to which the state provides for judicial review even in the face of efforts to oust this review jurisdiction by the Legislature and the Executive, and, through assessing the extent to which the Judiciary has adopted a liberal approach to standing, it is useful to begin by noting that, with the exception of the *Kenneth Good v The Attorney General*,[50] where Professor Kenneth Good was in 2005 declared a prohibited immigrant under the provisions of the Immigration Act (1991),[51] and the court accepted ouster of its review jurisdiction, courts have generally secured judicial review on the traditional grounds of judicial review.[52]

For instance, judicial review has previously been allowed in instances where people alleged that decision-making was based on an illegality. Perhaps this is best illustrated by the *Clover Petrus v The State*[53] and *Desai and others v The State*[54] cases where the constitutionality of corporal punishment was challenged on the grounds that this manner of punishment was an inhumane and degrading form of punishment in conflict with section 7 of the Constitution. In the *Clover Petrus* case the court resolved to declare quarterly lashing in the final year of imprisonment unconstitutional but shied away from declaring corporal punishment unconstitutional altogether. And, in the *Desai* case the court argued that the imposition of long terms of imprisonment and minimum terms with additional mandatory corporal punishment for such offences, while they are harsh punishments, must be looked at in the light of the gravity of the offences in respect of which they have been passed, and if there is no torture or similar forms of punishment legislated for in respect of them, they cannot be said to be such as could be termed punishments that are inhuman or degrading. As such, the court held that mandatory corporal punishment is not an inhuman and degrading form of punishment and is thus not unconstitutional by virtue of section 7 of the Constitution.

Separately, judicial review has also been allowed in those instances where people have alleged irrationality in decision making. This was the case, for example, in *Gaseitsiwe v Attorney General and Another*[55] where the court dealt with the allegation that a Minister of Local Government had acted irrationally in suspending the Chief of the Bangwaketsi Tribe,

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[50] [2005] 1 BLR 462A.
[51] See sections, 36(1) and 11 (6).
[52] *Daniel Kwelagobe* (n 34). *Mogwera v University of Botswana* [2007] 3 BLR 756. *State v Moyo* [1988] BLR 113. *State v Maunge* (2) [1972] 1 BLR 6. Rules of the High Court, Statutory Instrument No. 116 (2011).
[53] [1984] BLR 14.
[54] [1987] BLR 209.
[55] [1996] BLR 54.

appointing his son as Chief of the tribe pending the completion of an inquiry into the appellant's fitness as chief, and withholding fifty percent of the Chief's salary. The court found that the Minister had acted conscientiously and with scrupulous fairness and was fully entitled to rely on allegations for his belief that the appellant was not a fit and proper person to be chief, and therefore had not failed to exercise a proper discretion.

Courts have also reviewed decisions where allegations of procedural impropriety have been made. In *Labbeaus Peloewetse v Permanent Secretary to the President and others*,[56] for example, an advertisement of a vacancy for an appointment of a Director of Sports and Recreation was issued by the Directorate of Public Service Management inviting suitably qualified persons to apply for that position in the Ministry of Labour and Home Affairs. The qualifications and experience required of applicants for the post were stated as 'Master's degree or Bachelor's degree in Physical Education or its equivalent, previous experience in management of Sports with a minimum of twelve years' post-graduate experience, and prior involvement in sports activities.' Of the applicants who responded to the advertisement, four persons were short-listed and interviewed and the third respondent was appointed to the post.

The appellant was informed by letter that he had not been successful in his application for the post and eventually sought to challenge the appointment on the grounds that he was not qualified in terms of the advertisement inviting applicants for the post. The court held that, the appellant had a right to judicial review because he had a legitimate expectation, as a member of the public relying upon a representation made by government, that the best candidate among persons qualified in terms of the advertisement for a vacant post would be appointed to it, which had been thwarted. Government, had therefore, not acted fairly or predictably in accordance with its own representation.

Alternatively, in *Phirinyana v Spie Batignolles*[57] where the respondent had fired the applicant without any form of a hearing, the court affirmed that there was a procedure to be followed when dismissing employees. This included, *inter alia*, granting reasonable notice of the time and place the employer intended holding a disciplinary enquiry, informing the employee of the charge or charges against her or him, affording the employee the option to have legal representation, the option to call her or his own witnesses, and to question any witnesses. Because this procedure had not been followed, the court awarded the applicant, who

[56] [2000] 1 BLR 79 (CA).
[57] [1995] BLR 1.

the court found would have been fairly dismissed had notice been given, compensation equal to two months' pay for compensation for procedural unfairness.

This position was reaffirmed in *John Evans Oranja v Carter Morupisi and Another*[58] where the plaintiff, an expatriate, had signed a two to three year contract of employment to serve as a Senior Mechanical Engineer. The contract was in pre-printed standard form, and among its many clauses was the provision that the Government could terminate the contract without giving any reasons for such termination by giving the employee three months written notice or paying the employee one month's basic salary *in lieu* of such notice. Upon being summarily dismissed, and paid one month's salary as stipulated in the contract, the plaintiff objected to dismissal without notice. The Government argued that terminating the plaintiff's employment in this manner was lawful because, by signing the contract, the plaintiff had waived his rights to be notified in advance of intended termination, to be given reasons therefor, and to make representations thereon before a decision was taken. In response, the court held that no one can renounce a right contrary to law, or a right introduced not only for his own benefit, but in the interests of the public as well.

Following from this, it is clear that courts in Botswana have certainly exercised their review jurisdiction on the established grounds of illegality, irrationality, and procedural impropriety. In addition, the courts have done so regardless of the myriad ouster clauses in primary and subsidiary legislation that the legislature and the executive have deployed in an effort to exclude review jurisdiction.[59] Perhaps this is best exemplified in the *Smith's Transport v Index Motors*[60] case where the court noted that, despite the fact that section 21 (7) of the Road Transport (Permits) Act ousted its review jurisdiction the provision did not deprive the court of the power to review the proceedings of the Tribunal where a gross irregularity had occurred. As such, the court heard the matter and held that proper notice had not been given and so the decision to grant the license was set aside on the grounds of procedural impropriety. A similar approach to an ouster clause in section 27 of the Chieftainship Act was adopted in *Gaseitsiwe v Attorney General and Another* and with respect to section 44 of the Trading Act[61] in *Tsogang Investments (Pty) Ltd v Phoenix Investments (Pty) Ltd*.[62]

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[58] CVHLB- 001768-09.

[59] See for example: section 34 (2) of the Botswana Postal Services Act Cap 72:01; section 22 of the Arms and Ammunition Act Cap 24:01; section 11 of the Births and Deaths Registration Act Cap 30:01; section 12 of the Town and Country Planning Act Cap 32:09; section 20 of the Acquisition of Property Act Cap 32:10; and section 12 of the Atmospheric Pollution (prevention) Act Cap 65:03.

[60] [1981] BLR 167.

[61] Cap 43:02.

[62] [1989] BLR 512.

Importantly for the present purpose, however, this commitment to judicial review, even in the face of an extensive array of ouster clauses, only holds value where courts adopt a liberal approach to standing. Interestingly, the Judiciary in Botswana appears to have flirted with the idea of a liberal approach to standing. This can be inferred from the Court of Appeal's approach to standing in the 1989 *Tsogang Investments (Pty) Ltd v Phoenix Investments (Pty) Ltd* case, where it was held that it was not only the applicant for a licence or any objector before the licensing authority who could appeal a decision but anyone who had a right which might be infringed by a wrong decision of the licensing authority. This turn to a seemingly liberal approach to standing can also be inferred from the approach adopted by the same Court of Appeal in the 1992 *Attorney General v Unity Dow*[63] case where the respondent applied for an order declaring section 4 of the Citizenship Act *ultra vires* the Constitution because it precluded female citizens from passing citizenship to their children with the result that her two children were aliens in her own land and the land of their birth. The court accepted the argument that she had standing because the respondent had substantiated her allegation that the Citizenship Act circumscribed her freedom of movement given by section 14 of the Constitution. Importantly, the court accepted her argument that she had standing to bring the matter because, as a mother of young children, her movements were determined by what happened to her children. If her children were liable to be barred from entry into or thrown out of her own native country as aliens, her right to live in Botswana would be limited because she would have to follow them.

Since then, however, the Judiciary has seemingly gravitated toward a more restrictive approach to standing. Perhaps this is best exemplified in the 1994 *Botswana National Front v The Attorney General*[64] case where the High Court, despite being an inferior court to the Court of Appeal, relied on the law to deviate from the seemingly liberal approach to standing adopted in *Tsogang Investments* and *Unity Dow* and, instead, reaffirmed the general rule, which still stands to this day, that 'everyone has a right to be heard in his or her own cause and no one, save a qualified practitioner, has a right to be heard in the cause of another.' The court also noted that this rule was qualified by the principle that an individual has no status or standing to challenge the validity of anything done under an Act of Parliament unless she or he is specially affected or exceptionally prejudiced by such action. Based on this position, the court accepted the standing of the Botswana National Front Party to bring an action seeking an order declaring

[63] [1992] BLR 119.
[64] [1994] BLR 385 (HC).

the election roll null and void based on the fact that it had a vested interest in the smooth running and the proper administration and application of the Constitution and the Electoral Act and related legislation. And so, the party was specially and directly affected by the electoral process and as such, had standing to the Constitution, the Electoral Act and all other legislative enactments which would impact the electoral process. The court also denied standing to respondents who wished to be allowed to vote despite being outside the country on the basis of the fact that they had not established that they had been personally, specifically adversely affected over and above other members of the Botswana community in order to warrant the court affording them standing.

4. CONCLUSION

Botswana, a constitutional democracy based on constitutionalism, the rule of law, and the separation of powers, has looked to secure state accountability through the turn to statutorily provided remedies, the provision of justiciable rights, and the provision of judicial review mechanisms. While these are the techniques that constitutional democracies which aspire to the rule of law and the separation of powers commonly rely on to secure state accountability, it is worth noting that in Botswana, the provision of these remedies, justiciable rights, and judicial review, has not been matched by adequate levels of commitment to seeing these measures effectively utilized so that state accountability may be secured. The result is that despite the fact that Botswana is a constitutional democracy which aspires to the rule of law and the separation of powers, there is limited state accountability in Botswana.

In drawing this discussion to a close, it is useful to consider, based on the preceding discussion, that securing state accountability in Botswana is dependent upon a push to secure three developments. First, there is the need to ensure that statutorily provided remedies and controls become more effective. This is possible through securing greater independence for tribunals. It is also possible through empowering the Ombudsman to prosecute perpetrators of maladministration. By the same token, inquiries could be convened more regularly and procedures on how to proceed after the inquiry should ideally be clarified and codified to ensure that maladministration is tackled, and the state held accountable. Second, while the provision of justiciable civil and political rights is to be celebrated, securing state accountability hinges on making socioeconomic rights part of the state accountability framework. Ideally, this would be best achieved through the explicit provision of these socioeconomic rights in a re-worked Constitution. This, however, would be a significantly difficult and protracted undertaking.

Until that is achieved some more attainable ways of injecting socioeconomic rights into the state accountability framework should be explored. For instance, it is possible to sign and ratify international laws which protect socioeconomic rights such as the International Convention on Economic Social and Cultural Rights. Following this, it would then be possible to import socioeconomic rights into the country's laws by giving effect to these new laws, as well as laws already signed but not given effect to such as the Rio Declaration. Courts can also import these rights into law by reading them into existing and entrenched civil and political rights. Third, securing state accountability in Botswana depends on the Judiciary adopting a more liberal approach to standing where people approach the courts seeking to have illegal, irrational, and procedurally improper decisions reviewed. Considering judicial reluctance to do so, it is quite difficult to see how the Judiciary could be motivated to embrace such an approach to standing aside from concerted drives to encourage them to do so using workshops and seminars. It may also be possible to sway the Judiciary by swaying public opinion in the first instance, through educational drives, and then getting the public to apply pressure on the Judiciary to adopt a more liberal approach to standing.