Constitutionalism In Botswana

Tinashe Madebwe*

ABSTRACT

There is talk of constitutional reform, led by the incumbent President and the ruling party, in Botswana. This is to be celebrated considering that the President and his party hold the sort of majority in parliament which would allow them to easily subvert the constitution if they chose. Importantly though, the approach to constitutional reform preferred by President and the ruling party centres on drafting a new constitution. Based on the fact that global experience with constitutional reform efforts, which have met with varied levels of success, have established that attaining constitutional reform fundamentally requires more than the turn to a new constitution, this paper argues that the key to attaining constitutional reform is securing a recommitment to constitutionalism. Following from this, the paper argues that rather than focusing on drafting a codified constitution in the Botswana context, which would take long, if their goal is to secure constitutional reform, the incumbent President and the ruling party are better served by recommitting to constitutionalism in easily attainable ways that include changes to policy and legislation.

1. INTRODUCTION

Talk of constitutional reform, led by the incumbent President and the ruling party, is in the air in Botswana. Considering that the President and his party hold the sort of majority in parliament which would allow them to easily subvert the constitution if they chose, this approach they have taken is to be celebrated. Celebration aside, however, this paper highlights that global experience with constitutional reform efforts, which have met with varied levels of success, has established that attaining constitutional reform is a process that typically requires more than just the turn to a new constitution in the manner proposed by the incumbent President and the ruling party. Following this, the paper relies on

* LLB, LLM (Rhodes University), PhD (University of Strathclyde), Senior Lecturer, University of Seychelles, tinashe.madebwe@gmail.com.

an analysis of what it takes to secure constitutional reform, and the role of a new constitution in this endeavour, to explore what it will take to attain constitutional reform, and just how much turning to a new constitution would help in securing such reforms in Botswana. The paper concludes with some discussion on how effective constitutional reform, which the incumbent President and the ruling party have said they are looking to secure, can be secured in Botswana.

2. CONSTITUTIONAL REFORM IN GENERAL

The need for constitutional reform is a frequently explored issue in constitutional states which are considered as such because they base their governance approach on constitutionalism. Importantly, there are different conceptions of constitutionalism.[1] However, constitutionalism has compellingly been portrayed by Loughlin as republican or liberal. In the former, government action is contained through the creation of institutional arrangements that provide for limited government. The alternative, liberal constitutionalism, casts the constitution as a set of positive laws that are enforced by judicial bodies.[2] For the present purpose, suffice it to note that constitutionalism can be whittled down to the idea, traceable to state formation and function theory,[3] that once there is agreement to live in a society in which there is subservience to a state in which select individuals are given power to make decisions, constitutionalism is what ensures that these people are accountable to the people who put them in this position.[4]

Across different theories on constitutionalism, such accountability is

1 Mark Ryan, Unlocking Constitutional and Administrative Law (Routledge 2007). Anthony Wilfred Bradley and Keith Ewing, Constitutional and Administrative Law (Oxford University Press 2007).

2 Martin Loughlin 'What is Constitutionalisation' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press 2010); Eric Tucker, 'Labour's Many Constitutions (and capital's too)' (2012) 33 Comparative Labour Law and Policy Journal 355.

3 Robert L. Carneiro, 'A Theory of the Origin of the State' (1970) 1 Science 733. Andreas Wimmera and Yuval Feinstein, 'The Rise of the Nation-state Across the World, 1816 to 2001', (2010) 75 American Sociological Review 764. Hendrik Spruyt, 'The Origins, Development, and Possible Decline of the Modern State' (2002) 5 Annual Review of Political Science 127. Ramon Blanco, 'The Modern State in Western Europe: Three Narratives of its Formation' (2013) 7 Revista Debates 169. Gianfranco Poggi, 'Theories of state formation' in Kate Nash and Alan Scott (eds), *The Blackwell Companion to Political Sociology* (Wiley Blackwell Publishing 2004). Joseph R. Strayer *On the Medieval Origins of the Modern State* (Princeton University Press 1970). Patrick Carroll, 'Articulating Theories of States and State Formation' (2009) 22 Journal of Historical Sociology 553. Fred D'Agostino, John Thrasher and Gerald Gaus, 'Contemporary Approaches to the Social Contract', *Stanford Encyclopedia of Philosophy*, 31 May 2017, <https://plato.stanford.edu/entries/contractarianism-contemporary/> (accessed 1 August 2020).

4 Ernst-Ulrich Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' (1998) 20 Michigan Journal of International Law 1.

argued to be attained in different ways. However, it appears that the general rule or understanding is that accountability is attained through insisting on decision making being based on the rule of law.[5] This commitment to the rule of law is realised through the commitment to rule by law in the formalist tradition. In addition, drawing from state formation theory which, broadly stated, establishes that the function of the state is the protection of the person and the promotion of the person's growth, the commitment to the rule of law is also realised where there is a commitment to law which serves the greater good.[6] Generally, law serves the greater good in this way where it protects the interests of the individual, most commonly achieved through the provision of comprehensive unlimited fundamental rights with the only acceptable limitation of these rights occurring where it is done to advance the common good.[7] Further, and in the mould of Diceyan thought, the rule of law is also realised where individuals with their full complement of rights are treated equally before the law with no arbitrary exercises of power accepted.[8] Where any of this is violated, empowered individuals can challenge such treatment or such exercise of power.

Importantly, because the commitment to the rule of law is so important to securing constitutionalism, it has become apparent over time that securing it is critical to attaining accountability. And, based on the rule of law's qualities, it has emerged over time that it is best achieved when there is no excessive pooling of power in one person or institution, which necessarily limits the potential for arbitrary exercises of power. There is also value in diffusing power because it allows for specialisation of functions which leads to greater efficiency. Drawing from the rule of law, some power needed to be granted to lawmakers who would be charged with formulating, *inter alia*, clear, non-retrospective, and published

5 Paul Craig, 'Formal and substantive conceptions of the rule of law: An analytical framework' (1997) 1 Public Law 467; Johan Froneman, 'The Rule of Law, Fairness and Labour Law' (2015) 36 Industrial Law Journal 823.

6 Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 International Journal of Constitutional Law 86. Bradley (n 1) 4-5; Ryan (n 1) 13; Petersmann (n 4) 426-8. Richard Albert, 'Presidential Values in Parliamentary Democracies' (2011) 8 International Journal of Constitutional Law 207. Stephen Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2011) 8 International Journal of Constitutional Law 167.

7 Stephen Nathanson, 'Act and Rule Utilitarianism', *Internet Encyclopedia of Philosophy* <https://www.iep.utm.edu/util-a-r/#H4> (accessed 1 August 2020).

8 AV Dicey Introduction to the Law of the Constitution (ed) by Roger E. Michener (Liberty Fund 1982). Bradley (n 1) 96; Trevor R. S. Allan, Law, Liberty, and Justice (Clarendon Press 1993). Paul R. Verkuil, 'Separation of Powers, the Rule of Law and the Idea of Independence' (1989) 30 William and Mary Law Review 301. Hilaire Barnett, Constitutional and Administrative Law (Routledge 2009). Mark R. Rutgers, 'Public Administration and the Separation of Powers in a Cross-Atlantic Perspective' (2000) 22 Administrative Theory and Praxis 287.

laws to ensure people's rights were protected. Things agreed to in these laws would form the basis of development in the state. Importantly, once laws directing the form progress would take were made, it was apparent that, rather than the lawmaker proceeding to determine how development would be pursued on the ground, it was more expedient and consistent with diffusion of power to entrust that responsibility to others who would be charged with making policy to ensure that the law makers' vision was realised. While this made sense initially, in time it became apparent that laws could be poorly crafted, for an array of reasons. It also emerged that policy-makers could make arbitrary decisions that would adversely affect people's rights and interests. And so, it became essential to grant some power to an adjudicatory branch charged with remedying these issues where they arose.[9] Put simply, it became apparent over time that the key to attaining the rule of law was the separation of powers in terms of which power was split among the legislature, tasked with law making, the executive charged with policy making, and the judiciary charged with adjudication.

Drawing from the above therefore, when questions of constitutional reform arise, it is very often because there is dissatisfaction with the state's commitment to constitutionalism measured by its commitment to the rule of law which is, in turn, measured on the basis of the state's commitment to the separation of powers. Interestingly, while talk of constitutional reform often centres around the turn to a new constitution, experience has established that reform is only worthwhile when it secures tangible recommitment to constitutionalism realised through commitment to the rule of law, which is in turn realised through commitment to separation of power. A codified constitution can record this commitment. In addition, it guards against the danger that an unelected judiciary claiming to be looking to advance the pursuit of constitutionalism may betray the aspirations of the people. Despite this however, there is the drawback with codified constitutions that, being contained in a document, they limit the commitment to constitutionalism. For example, where a constitution provides for the imposition of death penalty judges have no alternative except to impose it.[10] And so, a codified constitution is not the

9 Saikrishna Prakash and John Yoo, 'The Origins of Judicial Review' (2003) 70 The University of Chicago Law Review 887. Louis Henkin, 'Revolutions and Constitutions' (1989) 49 *Louisiana Law Review* 1023; Vincent R. Johnson, 'The French Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris' (1990) 13 Boston College International and Comparative Law Review 1.

10 See generally, *S v Makwanyane* 1995 (3) SA 391 (C).

embodiment of the commitment to constitutionalism. It is only the symbolic glossy celebrated document indicating the commitment to constitutionalism. This is why some notable constitutional democracies such as the United Kingdom and New Zealand, have been successful, albeit with some hiccups, constitutionalism states. They have managed to do so based on a steady diet of legislation, convention, and an acceptance of the court's authority to review decisions. And so, rather than a codified constitution, the most reliable measure of a state's commitment to constitutionalism remains its commitment to the rule of law, which is in turn realised through commitment to separation of power.

3. CONSTITUTIONAL REFORM IN BOTSWANA

It is against this theoretical backdrop that, in Botswana, which has had a constitution and committed to constitutionalism since independence, the President and the ruling party have intimated that they see the need for constitutional reform. It is interesting though, following the preceding discussion, which has established that what determines the nature of the any constitutional reform where necessary, is the commitment to constitutionalism, through a commitment to the rule of law, which is in turn realised through commitment to separation of power, that the President and the ruling party have settled on the unusual determination that what is needed for reform to be realised is the turn to a new codified constitution.[11] As such, this section explores, first, whether there is a need for reform in Botswana, and, if so, the form that reform should assume.

In looking to determine if there is a need for constitutional reform, based on the above measure that constitutionalism is realised through a commitment to the rule of law, which is in turn realised through commitment to separation of power, it is useful to begin by noting that insofar as Botswana's commitment to constitutionalism, the state adheres to the basic rule of law. This is apparent from the fact that governance is based on different sources of law. The constitution is the leading law of the land and, among many things, it directs, in section 10, that 'if any person is charged with a criminal offence, then, unless the charge is

11 See too, Oagile Key Dingake, *Key Aspects of the Constitutional Law of Botswana* (Pula Press 2000) 165, where he argues that 'The Constitution must be a dynamic document, able to serve generations yet unborn….Thirty years in the life of a nation is too long. The time to fine tune the Constitution to serve the current generation, its needs and aspirations, is now. …Our Constitution needs radical reforms to entrench even further certain rights, making them even more difficult for the politicians to tamper with…'

withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.' Importantly, no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.[12] Further, no person shall be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law. In complement to this, as the leading law, the constitution empowers Parliament 'to make laws for the peace, order and good government of Botswana'[13] which most commonly assume the form of statutes. Further affirming commitment to the basic rule of law, other sources of law such as the common law and the customary law are recognised in Botswana.

Beyond the basic commitment to the basic rule of law detailed above, there is also an apparent effort to realise a deeper rule of law which serves the greater good.[14] To this end, sections 3 to 16 of the constitution makes provision for a wide range of civil and political rights which advance people's interests, including, such rights as the right to life,[15] the right to personal liberty,[16] the right to freedom of conscience,[17] and the right to freedom of expression.[18] In addition, and consistent with the deeper rule of law, these rights cannot be arbitrarily limited, with section 18 of the Constitution providing 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, and also consistent with the deeper rule of law, these rights empower people to hold the state accountable for its decisions. This is well illustrated in the 1992 *Attorney General v Unity Dow*[19] case where the respondent applied for an order declaring section 4 of the Citizenship Act *ultra vires* the Constitution because

12 Parliament may postpone the coming into operation of any law and may make laws with retrospective effect.
13 Section 86.
14 Bradley (n 1) 4-5; Ryan (n 1) 13; Petersmann (n 4) 426-8. Bellamy (n 6) 86. Albert (n 6) 207. Gardbaum (n 6) 167.
15 Section 4.
16 Section 5.
17 Sectrion 11.
18 Section 12.
19 (1992) BLR 119 (CA).

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. Faced with this situation, the court adopted a liberal approach to standing and accepted the argument that the respondent 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. In addition, the court accepted the argument that section 4 of the Citizenship Act *ultra vires* the Constitution because it precluded female citizens from passing citizenship to their children. Similarly, in *Tidimalo Jokase v Gaelebale Mpho Swakgosing*[20] 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 *Patson v Attorney General*[21] 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. Importantly though, it is recognised in Botswana law that rights can be limited to serve the greater good. Perhaps this is best exemplified in the 1994 *Botswana National Front v The Attorney General*[22] case where the nation's High Court affirmed that individuals who alleged that their suffrage rights had been violated had no status or standing to challenge the validity of anything done under an Act of Parliament unless they were specially affected or exceptionally prejudiced by such action.

In addition to the provision of rights detailed above, the effort to realise the deeper rule of law in Botswana also seems apparent from the fact that, while there is no express mention of separation of power in the constitution, there is clear separation of power from the manner in which the constitution is structured. To this end, Chapter IV of the constitution provides for a highly empowered Executive headed by the President elected in a manner prescribed by the constitution and limited to a term in office for an aggregate period not

20 Unreported, MAHLB-000661-10.
21 (2008) 2 BLR 66 (HC).
22 1994 BLR 385 (HC).

exceeding 10 years.[23] The constitution also details conditions under which the President can be removed from office[24] and details officers the President can appoint, such as ministers, assistant ministers, permanent secretaries and the Attorney General, to assist in executing executive functions. Separately, that there is a separation of power is apparent from the fact that Chapter V of the constitution makes provision for a Legislature, dubbed the Parliament of Botswana, with section 57 of the constitution providing that there shall be a Parliament of Botswana. In terms of its composition, Parliament features the President as an *ex-officio* member entitled to speak and to vote in all proceedings of the National Assembly. In addition to the President, Parliament is composed of 57 Elected Members and four Specially Elected Members. Beyond this, the legislative function is also influenced by the *Ntlo ya Dikgosi* (House of Chiefs) which, under constitutionally prescribed scenarios, must be consulted by Parliament when the legislative function is exercised.[25] In terms of its composition, the *Ntlo ya Dikgosi* consists of not less than 33 nor more than 35 Members drawn from certain chiefdoms in the country identified in the constitution, five persons who shall be appointed by the President, and persons, not being more than 20, elected by a Regional Electoral College for each region to serve in the House. Importantly with respect to the Parliamentary function, section 86 of the constitution notes that Parliament shall have power to make laws for the peace, order and good government of Botswana. And, section 89 of the constitution establishes that where constitutional procedure is followed, Parliament is also empowered to alter the Constitution. Aside from this, that there is a separation of power is apparent from the fact that Chapter VI of the constitution makes provision for a judicial branch, dubbed the Juridicature. Here, the constitution makes reference to two courts. Section 95 of the constitution makes provision for a High Court with 'unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other

23 Section 32.

24 Section 34.

25 Section 88 (2). The *Ntlo ya Dikgosi* cannot veto legislation. However, the constitution provides that the National Assembly shall not proceed upon any Bill (including any amendment to a Bill) that, in the opinion of the person presiding, would, if enacted, affect the designation, recognition, removal of powers of *Dikgosi* or *Dikgosana*, the organization, powers or administration of customary courts, customary law, or the ascertainment or recording of customary law, or, tribal organization or tribal property, unless a copy of the Bill has been referred to the *Ntlo ya Dikgosi* after it has been introduced in the National Assembly and a period of 30 days has elapsed from the date when the copy of the Bill was referred to the *Ntlo ya Dikgosi*.

jurisdiction and powers as may be conferred on it by this Constitution or any other law.'[26] The High Court is headed by the Chief Justice who leads a team of judges, the number of which, is determined by Parliament. In complement to this section 99 of the constitution makes provision for a Court of Appeal. This is headed by the President of the Court of Appeal. In addition, it is composed of such number, if any, of Justices of Appeal as may be prescribed by Parliament, and the Chief Justice and the other judges of the High Court.[27] Importantly, to ensure that all these judicial officers perform this function effectively, judges are given security of tenure and may only be removed from office only for inability to perform the functions of his or her office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of the constitution.[28]

Based on the above observations, it would appear as if there is some level of commitment to constitutionalism through a commitment to the rule of law, which is in turn realised through commitment to separation of power in Botswana. This could suggest that the fundamental commitment to constitutionalism is at a level where the turn to a codified constitution, as proposed by the President and the ruling party, would yield sufficient reforms. Importantly though, and despite the appearance of a commitment to constitutionalism through a commitment to the rule of law realised through commitment to separation of power, detailed analysis reveals that the extent of Botswana's commitment to constitutionalism is questionable for two reasons.

First, while the provision of a wide range of civil and political rights which advance people's interests signals some commitment to a deeper rule of law, the provision of the rights noted in the constitution is inadequate because there is exclusion of socioeconomic rights which, in the modern world, are a particularly important tool for empowering people to hold the state to account.[29] For the sake of completeness, it is worth noting that in a state that aspires to governance based on constitutionalism though, the exclusion of some things from the codified constitution is not catastrophic. They can still form part of the law through other ways, such as through the international law or judicial

26 See section 95 (1).
27 See section 99.
28 See sections 97 and 101.
29 Bonolo Ramadi Dinokopila, 'The Role of the Judiciary in Enhancing Constitutional Democracy in Botswana' (2017) 24 University of Botswana Law Journal 3.

interpretation. Importantly though, this is not the case in Botswana. If anything, there has been a systematic effort to stunt the provision 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[30] 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.[31]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.[32] For their part, courts have shied away from recognising these rights. Instead, they have adopted a restrictive interpretation of the constitution and have argued that these rights are not constitutionally protected in Botswana. For instance, in *Mosetlhanyane and Another v The Attorney General of Botswana*[33] 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.[34] Even more damningly, the court in *Attorney General v Mwale*[35] held 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.' And so, the result is that the provision of rights in Botswana is not sufficient to secure the deeper rule of law required to realise governance based on constitutionalism.[36]

30 United Nations, Treaty Series, vol. 993, p. 3.

31 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) 9 Human Rights Law Review 557.

32 The Rio Declaration 31 ILM 874 (1992). See however, *Attorney General v Unity Dow* (1992) BLR 119 (CA), where the court noted that 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.

33 2010 3 BLR 372 (HC).

34 See Bonolo Ramadi Dinokopila, 'The Justiciability of Socio-economic Rights in Botswana' (2013) 57 Journal of African Law 108.

35 CACGB-096-14, CACGB-076-15.

36 Bradley (n 1) 4-5; Ryan (n 1) 13; Petersmann (n 4) 426-8. Bellamy (n 6) 86. Albert (n 6) 207. Gardbaum (n 6) 167.

Second, despite the appearance of separation of power in Botswana, there is no real separation of power. This is because while rule should be by law made by the legislature, section 58 (1) of the constitution provides that the President shall be *ex-officio* a member of the National Assembly, and shall be entitled to speak and to vote in all proceedings of the National Assembly. Furthermore, the executive also has judicial power in the form of the prerogative of mercy which allows the President to grant to any person convicted of any offence a pardon, either free or subject to lawful conditions a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence; substitute a less severe form of punishment for any punishment imposed on any person for any offence; and remit the whole or part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Government on account of any offence. And outside of this, the Legislature is empowered to impose mandatory minimum sentences despite the fact that this is traditionally a function reserved for the Judiciary.[37]In addition, the constitution empowers the President, the head of the Executive, to appoint the Chief Justice of the High Court and the President of the or Court of Appeal. Further, the other judges of the High Court[38] and of the Court of Appeal[39] shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission. Notably, the Judicial Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this Constitution. This position was put to the test in *Law Society of Botswana and Motumise v The President of Botswana; The Judicial Services Commission and the Attorney General*[40] when the Judicial Service Commission advised the President to appoint Motumise to the bench in accordance with Section 96 (2) of the constitution and the President declined to act in accordance with the advice. When this decision was

37 In *Moatshe v The State; Motshwari & Another v The State* 2004 (1) BLR 1 (CA) 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.

38 See section 96 (2).

39 See section 107 (2).

40 *Law Society of Botswana and Motumise v The President of Botswana; The Judicial Services Commission and the Attorney General* CACGB-031-16.

brought to the courts for review, the Court of Appeal held that the President was bound to follow the advice of the Commission and could not disregard it. As such, the President's decision to refuse to appoint Motumise was set aside. This certainly creates the impression of independence of the Judicial Service Commission which the courts will enforce. Importantly though, the Judicial Service Commission consists of Presidential employees like the Chief Justice who shall be Chairman; the President of the Court of Appeal (not being the Chief Justice or the most Senior Justice of the Court of Appeal); the Attorney-General; the Chairman of the Public Service Commission[41]; a person of integrity and experience not being a legal practitioner appointed by the President; and a member of the Law Society nominated by the Law Society as the lone member not appointed by the President.

Granted, pure separation of power is far from ideal and some overlapping in power is inevitable and essential.[42] However, even after accounting for this fact, the overlapping of power in Botswana has led to the pooling of power in the President as the head of the executive. This is problematic because there are no compelling executive controls of such power such as by the ombudsman. In addition, exercises of executive power by the President cannot realistically be effectively be challenged by the legislature. This is because the President is the appointee of the majority party in parliament and looks to implement policies of that party. Inevitably, rather than check executive power, the legislature is more likely to make laws that align with executive interest in most circumstances. Not only that, the executive has power to check the legislature's actions when it implements policy, apportions resources for the implementation of policy, and in addition to this, can adapt statute law by the legislature to suit its purposes when it makes subsidiary legislation. Separately, pooling of power in the President is also problematic because such power cannot realistically be challenged by the judiciary. Indeed, courts have previously refused to rule against the President as the head of the executive, citing the pure separation of powers and noting that it is not for them to pronounce on executive decisions.[43] This was apparent in the *Kenneth Good v The Attorney General*[44] case, where

41 Section 109 of the constitution provides that members of the Public Service Commission, which shall consist of a Chairman and not less than two nor more than four other members, shall be appointed by the President.

42 Allan (n 8) 48-53.

43 *Attorney General v Mwale* (CACGB-096-14, CACGB-076-15) (2015) BWCA 1 (26 August 2015).

44 (2005) 1 BLR 462 (CA).

Professor Kenneth Good in 2005 was declared a prohibited immigrant under the provisions of the Immigration Act (1991)[45] by the President and the court accepted the validity of this decision.[46] Certainly, an argument could be made that executive power generally can be controlled by the courts where a member of the public challenges the legality, rationality, or procedural fairness of a decision. For example, in *Gaseitsiwe v Attorney General and Another*[47] the court considered whether a Minister of Local Government had acted irrationally in suspending the Chief of the Bangwaketsi Tribe by 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 believe that the appellant was not a fit and proper person to be chief, and therefore had not failed to exercise a proper discretion. Separately, in *Labbeaus Peloewetse v Permanent Secretary to the President and others*[48] which dealt with a situation where an advertisement for a vacancy for an appointment of a Director of Sports and Recreation but the position was given to a less qualified person, the court held that the appellant had a right to judicial review because he had a legitimate expectation, which had been thwarted, that the best candidate among persons qualified in terms of the advertisement for a vacant post would be appointed to it. In a similar way, in *John Evans Oranja v Carter Morupisi and Another*[49] 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

45 See sections, 36(1) and 11 (6).

46 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. Perhaps this is best exemplified in the *Smith's Transport v Index Motors* 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 in *Tsogang Investments (Pty) Ltd v Phoenix Investments (Pty) Ltd*. See too, *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).

47 (1996) BLR 54 (CA).

48 (2000) 1 BLR 79 (CA).

49 CVHLB- 001768-09.

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.

Importantly though, even though courts have granted judicial review of executive decisions, the reality is that challenges to executive decision making only succeed where the executive allows. This is because, at all times, the executive, working in concert with the legislature can create legislation which has the effect of removing people's status or standing to challenge the validity of anything done under the Act of Parliament unless they are specially affected or exceptionally prejudiced by such action.[50] Because of this, the reality is that there is pooling of power in the President, and executive. This does not necessarily mean such power will be abused. However, it is problematic that power could be abused, and where it is so abused, there is little opportunity to challenge this unless the executive allows it. That this state of affairs exists is contrary to the rule of law in the deeper sense.

Ultimately, the cumulative impact of the failure to establish commitment to a deeper rule of law through the provision of socioeconomic rights particularly, and, the failure to separate power and ensure that arbitrary exercises of power can be effectively challenged, is to establish that Botswana's approach to governance is presently not based a commitment to constitutionalism pursued through a commitment to the rule of law, which is in turn realised through commitment to separation of power. If the President and the ruling party are to achieve the sort of constitutional reform they seem to seek, what is needed is recommitment to constitutionalism pursued through a commitment to the rule of law, which is in turn realised through commitment to separation of power.

50 *Botswana National Front v The Attorney General* 1994 BLR 385 (HC).

4. CONCLUSION

This paper has argued that in states that adopt a governance approach based on constitutionalism, such as Botswana, the measure of successful governance is the state's commitment to the rule of law which looks to serve the greater good. This rule of law is necessarily realised through a separation of power. Importantly, this commitment to constitutionalism can be realised even when there is no codified constitution in place. As such, the need for constitutional reform arises whenever the commitment to the rule of law which looks to serve the greater good which is realised through a separation of power fails. It is addressing this, which matters, and not whether a new codified document is crafted.

Having established that, the paper argued that, in Botswana, a state which has a codified constitution, the fundamental commitment to the rule of law which looks to serve the greater good which is realised through a separation of power has failed. There is room for arbitrary exercises of power, particularly by the President as head of the executive, to go unchecked. Whether these arbitrary exercises of power occur is beside the point. The aesthetics are damning for a state that aspires to be taken as a constitutional democracy based on constitutionalism. And, presumably, it is the matter of the problematic aesthetics that prompted the President and the ruling party to identify the need for constitutional reform.

Importantly, and in conclusion, what it takes to secure constitutional reform in Botswana is recommitment to constitutionalism pursued through a commitment to the rule of law realised through commitment to separation of power. However, turning to such a constitution, which is a massive undertaking that takes a protracted period of time, is not an essential condition for achieving constitutional reform in Botswana. Instead, in light of the fundamental issue being that power is pooled in the President, the quickest, and likely most effective, way in which to realise reform would be through the executive formally divesting itself of legislative power by reserving creation of subsidiary legislation to instances in which this serves to ensure that legislative prescriptions are realised. This would have the effect of leaving law making power to the legislature. In addition, the practical pursuit of constitutionalism would also benefit from the executive establishing, in clear fashion, that it

does not influence judicial functions. This is attainable through insisting on the recognition of international laws that would import socioeconomic rights into law, empowering courts to review any action, and insisting on courts adopting a liberal approach to standing. This would lead to the realisation of a judiciary empowered to make decisions based on constitutionalism.

Importantly, there is some benefit to be had from eventually codifying this position in a new constitution. However, there is no need to wait for that. All these reforms can be attained in the present and with little fanfare through a steady diet of legislation, convention, and an acceptance of the court's authority to review decisions as has been successfully done in states that have attained governance based on constitutionalism despite not having codified constitutions.