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ACCOUNTABILITY IN GOVERNMENT AND REALIZATION OF HUMAN RIGHTS IN BOTSWANA

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I. Introduction

The Republic of Botswana, formerly the British Protectorate of Bechuanaland, became an independent state on 30 September 1966. At independence, Botswana adopted a written Constitution, which, though tailored on the Westminster Parliamentary system, provided for an executive President who is both head of state and government. The guiding principle to the founding fathers was the need to create a constitutional or limited government out of the ashes of the colonial order. Since then, Botswana has remained faithful to the ideals of liberal democracy and prides herself as one of the very few countries in Commonwealth Africa with a relatively well-functioning multi-party democracy.

The basic features of government are as follows: First, the executive power of the Republic is vested in the President. He exercises this power in his own deliberative judgment, directly or through his subordinates.¹ Second, the legislative power of the Republic is vested in Parliament, a unicameral chamber consisting of the President and the National Assembly.² The overwhelming majority of members of Parliament are elected under universal adult suffrage. A small proportion of the members is elected under a special procedure by elected members. Third, the Constitution provides for an independent judiciary. Although the Constitution does not expressly vest the judicial power of the republic in the courts, nevertheless the courts have asserted their power to review and if necessary strike down executive actions that are *ultra vires* the

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1. Section 47 of the Constitution.

2. Sections 57 and 86 of the Constitution.

Constitution or are illegal. The power of judicial review extends to legislative acts which are *ultra vires* the Constitution.³

In this article, we are principally concerned with constitutional and legal arrangements designed to secure accountability, basic human rights and fundamental freedoms of the people of Botswana. The main thrust of our inquiry will be on the following interrelated issues:

First, the extent to which the government is accountable to the governed. How does the existing setup ensure a representative and responsible government under the rule of law? Are there other channels, outside the electoral system, through which the people of Botswana can actively and meaningfully participate in decisions that affect them?

Second, there is the question of the realization of the basic human rights and fundamental freedoms with particular reference to the satisfaction of the basic needs of the most vulnerable groups in society.

II. Electoral Democracy

Botswana is one of the few countries in English-speaking Commonwealth Africa with an unsullied record of parliamentary democracy. The basic features of the system have been “free and fair elections” regularly held; majority rule; protection of minorities, and openness in government.

At the central level, members of Parliament are elected every five years under universal adult suffrage.⁴ This system enables the people to choose representatives of their choice to represent them in the legislature and also to recall them if they are not satisfied with their performance.

The Cabinet is collectively answerable to Parliament and ultimately to the people. Individual Cabinet Ministers are also accountable to Parliament. Parliament has the power of the purse. It

3. See *The State v. Petrus*, Criminal Appeal No. 34 of 1983, [1985] L.R.C. 699.

4. See Sections 61, 62, 63, 64, 67 and 68 of the Constitution.

can also remove the party in office by passing of a vote of no confidence in the government.⁵

The present electoral system has some advantages and disadvantages. The system guarantees that there is a link between the Member of Parliament and his Constituency and that one Party *usually* obtains an absolute majority of seats in the National Assembly, thus avoiding a situation where small parties may hold the balance of power, thus exerting influence out of proportion to their popular support in the country. On the other hand, the system where the "winner takes all" has been criticized in that it does not accurately reflect voters' preferences. There is no correlation between the number of votes cast nationally for a particular party and the number of seats allocated to that party. The system discriminates against small parties (Motswagole, 1988).

The other equally disturbing factor about Botswana's Parliamentary democracy is that of the weakness of the opposition parties. In the 1989 parliamentary elections, the ruling party, the Botswana Democratic Party, almost obliterated the opposition. Out of a total of thirty-four contested seats, the ruling party won thirty-one seats, leaving the main opposition Party, the Botswana National Front with three seats. The other motley collection of Parties could not win any seats. Given this state of affairs, it is apparent that Parliamentary checks on the exercise of executive powers are largely formalistic. All in all, the overwhelming preponderance of the ruling party over the opposition has meant that the party in office has been able to muster parliamentary support for the implementation of almost any policy that it is in practice likely to adopt. This does not augur well for a young democracy.

At the local level, there is a one-tier system of city, township and district councils. Local councillors are also elected under universal adult suffrage. The franchise in local government elections is open to all adults resident in a given polling ward. Representative local authorities are relied upon to reflect the needs, interests, and

5. See Section 92 of the Constitution.

aspirations of the people in the policies which they formulate and the issues upon which they deliberate.

Opposition parties have been able to establish themselves and hold their say at this level. They have managed to win and hold on to some of the councils, including the Gaborone City Council which has been held by the opposition Botswana National Front for quite some time now.

At village level, there are two grass-roots organizations which play vital roles by providing a local framework within which the people can influence local decision-making, upwards to government as well as downwards to the people. The first of these is the *Kgotla*, a traditional assembly. By tradition every *Motswana* is a member of a regiment or "*morafe*" and associated with a local political unit or ward. Decision-making by traditional authorities was based on broad consultations with adult members of a given ward assembled in their *Kgotla*.

This traditional system has survived the vicissitude of independence and underpins today's democratic practices. The *Kgotla* system plays an invaluable role in the elucidation and articulation of matters of concern to the local people. Chiefs use *Kgotla* meetings as sounding boards and as a means of gathering popular opinion on matters affecting their people. Cabinet Ministers, Members of Parliament and Councillors also make use of the *Kgotla* system. The usual practice is to hold a *Kgotla* meeting before a session of Parliament or Council meeting. At the *Kgotla*, the Member of Parliament or Councillor calls for community complaints and demands. These are tabled at the next sitting of the House or Council meeting, in the form of motions or questions. At the next *Kgotla* meeting the Member of Parliament or Councillor reports back on the progress he made with the Government or his council colleagues. In this way, the *Kgotla* system provides a vital communication link through which ordinary people, Members of Parliament, local Councillors, Chiefs and elders discuss matters of mutual interest.

The other equally significant organ is the Village Development Committee. Village Development Committees have been conceived as part of the strategy to decentralise power to grass-roots

organisations and in the process involve ordinary people in running their own affairs and in issues which directly affect their lives.

Village Development Committees are elected by the *Kgotlas*. They are responsible for articulating the needs of their villages through consultations. They are responsible for coordinating developmental efforts in their respective villages either through mutual cooperation and self-help efforts or by formulating projects for onward transmission to local authorities for consideration and possible inclusion in district development plans. It is envisioned that such involvement in identifying problems and in formulating solutions is in itself an important strategy for development and social integration.

It must be emphasized here that while elections guarantee periodic accountability, they do not guarantee popular participation in decision-making. It is therefore imperative to strengthen grass-roots organisations such as *Kgotlas*, Village Development Committees, Womens' Organisations, etc. with a view to providing for inputs into the polity, outside the electoral system. It is now proposed to look at the second part of the paper.

III. Realization of Human Rights

The Constitution of Botswana enshrines a justiciable bill of human rights modelled on the Universal Declaration of Human Rights and the European Convention on Human Rights. Part II of the Constitution provides for the protection of the basic human rights and fundamental freedoms of the people of Botswana.

These may be enumerated as follows: (a) life, liberty and security of the person and the protection of the law; (b) freedom of conscience and of expression; (c) freedom of assembly and of association; (d) protection for the privacy of home and other property and from deprivation of property without compensation; (e) freedom of movement; (f) freedom from slavery and forced labour; (g) right to personal liberty; (h) protection from torture and inhuman or degrading punishment or other treatment; and (i) protection from discrimination on the grounds of race, tribe, place of origin, political opinion, colour or creed etc.

In the bill of rights, the founding fathers sought to guarantee *Batswana* the fullest possible opportunity to enjoy basic human rights and fundamental freedoms. The Constitution of Botswana provides for an independent judiciary. In the area of protection of human rights, the courts have the primary responsibility and duty of giving force and effect to the basic human rights and fundamental freedoms enshrined in the Constitution.

Under Section 18(1) of the Constitution, if a person feels that any of the protective clauses, that is, Sections 3 to 16 (inclusive) of the Constitution has been or is being or is likely to be contravened *in relation to him*, he should apply to the High Court for redress. Under subsection 2, clause (a) the High Court has original jurisdiction to hear and determine such an application.⁶ Furthermore, when in any proceedings in any subordinate court any question arises as to contravening of Sections 3-16 of the Constitution, the person presiding in the court *may and shall* if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious.⁷ The High Court has jurisdiction to determine such a referral.

The phrase "in relation to him" under Section 18(1) indicates that the applicant must have *locus standi*. The courts in Botswana have taken a rather liberal approach to the standing requirement.⁸ One of the most striking features of Botswana's human rights record is the paucity of constitutional litigation. Apart from a few cases involving the constitutionality of corporal punishment in "instalments," there are virtually no cases in the law reports of Botswana concerning human rights violations.

In the *State v. Clover Petrus and Another*⁹ the two applicants were convicted in the Magistrates Courts for the offences of housebreaking and theft, contrary to Section 305(1)(a) of the Penal Code.¹⁰ They were each sentenced to three years imprisonment and

6. Section 18, subsection 2, Clause (a).

7. Section 18, subsection 3.

8. See, for example, *Tsogang Investments (Proprietary) Limited v. Phoenix Investments (Proprietary) Limited*. Case No. 213/1987 (unreported).

9. *The State v Petrus supra* note 3.

10. Cap 08:01. See also Act No. 20 of 1982.

to receive corporal punishment in terms of an amended section to the Criminal Procedure and Evidence Act,¹¹ which was intended to prescribe, among other things, stiffer and very harsh punishment in respect of certain offences.

On review, Hannah J., in the High Court, suspended two years of the imprisonment but reserved for the Court of Appeal the question of law as to whether corporal punishment was mandatory in addition to a term of imprisonment. Thereafter, learned counsel for the accused sought to raise the additional question whether corporal punishment as prescribed in Section 303 (3) of the Criminal Procedure and Evidence Act was *ultra vires* as being in conflict with Section 7 of the Constitution of Botswana.

Generally Section 303 (3) of the Criminal Procedure and Evidence Act prescribed the method of execution of corporal punishment on the persons sentenced to corporal punishment under certain sections of the Penal Code. The relevant part of the section reads as follows:

Such person shall be given four strokes each quarter in the first and last years of his term of imprisonment and such strokes shall be administered in traditional manner with traditional instruments at such places as may be specified by the Minister.

Learned counsel for the accused argued that any law which made it compulsory for both a term of imprisonment and corporal punishment to be imposed in respect of a single offence must *ipso facto* be inhuman and therefore *ultra vires* Section 7(1) of the Constitution. He submitted that mandatory corporal punishment tacked on to a term of imprisonment was inhuman since it did not take account of circumstances of the accused or circumstances of the offence. Furthermore, he submitted that corporal punishment of an adult was inhuman.

Section 7 of the Constitution of Botswana reads as follows:

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

11. Cap 08:02. See also Act No. 21 of 1982.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorized the infliction of any description of punishment that was lawful in the former Protectorate of Bechunaland immediately before coming into operation of the constitution.

Maisels J.P., writing for the majority (Kentridge and Amissah J.J.A., concurring) had no hesitation in upholding the view that corporal punishment in “instalments” was repugnant to Section 7(1) of the Constitution. He reasoned that because of the factors of repetition and delay, administration of corporal punishment in stages was inhuman and degrading. He also rightly observed that Botswana was a member of the community of civilised nations and the rights and freedoms of its citizens were entrenched in its constitution which was binding on the legislature.

Baron J.A. read a separate concurring opinion in which he regretted that the court did not pronounce on the question of corporal punishment “in traditional manner with traditional instrument....” In his view, this was an issue of great moment in the field of human rights. After a review of the authorities on the meaning of the phrase he was convinced that the “traditional manner with traditional instrument” contravened Section 7 of the Constitution.

Aguda J.A., who delivered a powerful dissenting opinion, was “entirely in agreement” with learned counsel for the accused that corporal punishment administered by “instalments” when tacked unto a term of imprisonment could not but bring about aggravated torture upon the victim. In his view, to describe such a type of punishment as degrading was perhaps the very least that could be said about it. The learned Justice of Appeal also opined that subject to the derogation provided for under subsection 2, the prohibition against torture or inhuman or degrading punishment or other treatment was absolute. He also pointed out that the people of Botswana formed an integral part of the modern civilised world community now used to the enjoyment of the usual democratic freedoms under humane governments. He cited several international and regional human rights instruments prohibiting the infliction of torture, cruel, inhuman or degrading punishment.

It is instructive to point out here that the case of *Petrus and Another v. The State* is of seminal importance in that it shows the role that the courts can play in the enforcement of international human rights norms. The court here was prepared to strike down an Act of Parliament which offended against international human rights norms.

The constitutionality of corporal punishment "in instalments" was again in issue in the cases of *Desai and Another v. The State*,¹² *Mooi and Ors. v. The State*¹³ and *Kgomanyane v. The State*.¹⁴

The issue in the three cases was whether a combination of mandatory custodial sentence, a fine and corporal punishment was violative of Section 7 of the Constitution. With the exception of the third appellant who was convicted on certain additional charges, all the appellants were charged with unlawful possession of habit-forming drugs. They were tried separately and were found guilty in the Magistrates Court. Their appeals, save in a comparatively minor respect with regard to the sentence imposed on the second appellants, were dismissed by the High Court but leave was granted to appeal to the Court of Appeal.

The first of the first appellants was sentenced to ten years imprisonment plus a fine of P15,000 or, in default of payment, to undergo imprisonment for three years. The second of the first appellants received the same sentence but with the addition of three strokes with a cane. The first two of the "second appellants" were sentenced to ten years imprisonment and a fine of P15,000 or to undergo five years imprisonment (reduced to three years in the High Court) and to receive six strokes with a cane. The third appellant was sentenced to ten years imprisonment and fine of P15,000 or in default of payment a further three years imprisonment and to undergo six strokes with a cane. The sentences passed on all the appellants for contravention of the Habit-Forming Drugs Act¹⁵ were mandatory and the question raised by all the appellants was whether such mandatory

12. Criminal Appeal No. 9 of 1986 (unreported).

13. Criminal Appeal No. 21 of 1986 (unreported).

14. Criminal Appeal No. 25 of 1986 (unreported).

15. Cap 64:04.

sentences were not in conflict with the provisions of Section 7 (1) of the Constitution of Botswana.

Maisels, J.P., who delivered the majority opinion, was of the view that any one of the mandatory sentences standing by itself, despite one's dislike of the form of punishment, was not inhuman or degrading, but that the combination of all the three sentences was inhuman and degrading and thus *Ultra Vires* Section 7 (1) of the Constitution.

Aguda J.A. dissented from certain observations which were *obiter* to the effect that the mere imposition of corporal punishment on an adult was not per se inhuman or degrading in all circumstances. Aguda was "convinced beyond any shadow of doubt" that the mere imposition of corporal punishment was under any circumstances "at this time and age" certainly degrading if not inhuman. He opined that the main purpose of the criminal process was to reduce if not totally eliminate the incidents of crime and that that purpose was not served by the imposition of corporal punishment.

The other equally remarkable feature of Botswana's human rights record is that Botswana has acceded to very few international covenants and conventions on human rights. As at 1 December 1990, Botswana has only ratified the following international human rights instruments:

- (a) International Convention on the Elimination of all forms of Racial Discrimination;
- (b) Convention Relating to the Status of Stateless Persons;
- (c) Convention Relating to the Status of Refugees; and
- (d) Protocol Relating to the Status of Refugees.

The immediate and direct consequence of Botswana's non-ratification of major international human rights instruments has been that local legislation in such major areas as industrial relations, child care, maternity benefits, housing and social security is either outdated or non-existent. It is therefore absolutely necessary that Botswana as a member of the United Nations Organisation and the Organisation of African Unity (where the country's Attorney-General sits on the African Commission on Human Rights) should be encouraged to ratify major human rights instruments such as the International Covenant on

Economic, Social and Cultural Rights; the International Covenant of Civil and Political Rights and the Optional Protocol to the latter instrument and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It must be pointed out that membership in the United Nations whose basic concept is the promotion and satisfaction of human rights and fundamental freedoms, ought to be coupled with formal recognition and assumption of international legal obligations. As was rightly observed in *Clover Petrus and Another v. The State, supra*, Botswana, as a proud member of the Organisation of African Unity and of the United Nations, must be presumed to be willing to abide by all the protocols of all those bodies which it has agreed to.

The other equally important point is that although Botswana has an excellent record on political and civil rights and a democratic polity which engenders respect for and observance of these rights, she must address the more difficult question of the realization of social, economic and cultural rights. It is now widely accepted that the sphere of human rights comprises an indivisible, interdependent and complementary whole. No right has its own independent existence. Civil and political rights cannot be fully implemented without the realization of economic and social rights. Take the hallowed ideas of equality before the law and access to justice for all. For example, the Constitution of Botswana entitles anyone accused of criminal offence to be represented by a lawyer of his choice — but at his expense. Now, Botswana does not have a government-run legal aid scheme (except in capital offences). This means that there can be no equality between those who can afford the services of a lawyer and those who cannot.

The Legal Clinic at the University of Botswana has attempted to address this problem by providing free legal services to the needy. The Legal Clinic also contributes to the awareness, enhancement and protection of human rights in general, and the right to legal representation in particular. But the resources available to the clinic are severely limited. The clinic is currently catering for clients mostly in and around Gaborone. What is required is a legal aid scheme that would not only help the urban population but also reach out to the rural population where the majority of the *Batswana* live. The Bar

could also draw on the experiences of other countries such as Zambia and devote part of their time to legal aid work.

All in all the government should take the lead and address the monumental task of the interrelationship between the elimination of social inequalities and the full enjoyment of economic, social and cultural rights, for social progress and economic development are key factors in the full promotion of such rights and fundamental freedoms.

IV. Summary

This paper has been concerned with accountability in government and the question of realization of the basic human rights and fundamental freedoms as enshrined in the Constitution of Botswana. We have looked, albeit briefly, at the constitutional and legal arrangements aimed at securing answerability in government and the guarantees necessary towards the realization of human rights. We have seen that although Botswana has a good record as regards protection of civil and political rights, much remains to be done in ensuring for all *Batswana* the full range of economic and social rights, especially the well-being of "Remote Area Dwellers" who live in absolute poverty. Absolute poverty is a state of continuous violation of human rights, both civil and political rights and economic, social and cultural rights.