

The Justiciability of Socio-Economic Rights in Botswana

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Abstract

The judicial enforcement of socio-economic rights remains a challenge in many countries. This is generally attributable to the inadequacy of a particular country's legal framework, in particular its constitutional framework. Given the importance of judicial remedies in litigation, in particular public interest litigation, this article considers possibilities for the judicial enforcement of socio-economic rights in Botswana. It discusses the institutional, legal and constitutional framework for the promotion, protection and fulfilment of socio-economic rights in the country. It also tackles the issue of whether the judicial enforcement of socio-economic rights is easily achievable when those rights are not constitutionally entrenched. The article also considers whether the absence of directive principles of state policy within Botswana's Constitution is a hindrance to the judicial enforcement of socio-economic rights in Botswana. Within that context, it highlights the possible means of judicial enforcement of socio-economic rights in Botswana.

INTRODUCTION

The judicial enforcement of economic, social and cultural rights (socio-economic rights) in Africa has been fraught, to a large extent, with a web of complex issues; as a result, the protection and enforcement of these rights remain elusive in many countries. This is due to a large number of factors, chief among them being the non-entrenchment of these rights in national constitutions. When commenting on socio-economic rights in Africa, South Africa stands out as the most progressive country as regards the judicial enforcement of these rights. Perhaps this is due to its egalitarian and progressive constitution. However, the South African experience has also not been without its challenges. Uganda follows suit, having included a number of socio-economic rights in its 1995 constitution. These are countries which Aolain and McKeever described as a “substantive model of enforcement” which affords direct and substantive protection for socio-economic rights.¹

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1 F Ni Aolain and G McKeever “Thinking globally, acting locally: Enforcing socio-economic rights in Northern Ireland” (2004) *European Human Rights Law Review* 158 at 158.

Other African states, including Lesotho, Ghana, Uganda and Nigeria, have socio-economic rights expressed as directive principles of state policy (DPSPs) to guide the state in the adoption of policies and possibly the courts in the interpretation of government obligations in relation to these rights. Aolain and McKeever described that approach as amounting to “minimal enforcement” of socio-economic rights: another level of judicial enforcement of socio-economic rights.²

Then there are other African countries which have neither entrenched socio-economic rights in their constitutions nor expressed them as DPSPs. Such an anomaly has made the judicial enforcement of socio-economic rights in these countries almost impossible. Botswana falls into this last category of countries as its 1966 constitution contains an extensive list of civil and political rights with no mention of socio-economic rights.

Against this background and after an analysis of the status of socio-economic rights in Botswana, this article takes a look at the justiciability of these rights in Botswana. It also assesses the manner in which the Botswana High Court dealt with the issue of socio-economic rights when the opportunity presented itself. It then makes a case for the courts to interpret cross-cutting rights to enforce socio-economic rights in the light of jurisprudence from other jurisdictions. The article closes by summarising what the courts’ role could be in the judicial enforcement of socio-economic rights in Botswana.

AN OVERVIEW OF THE LEGAL AND INSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN BOTSWANA

It is worth noting that, since independence in 1966, Botswana has been hailed as a shining example of democracy in Africa where individuals’ rights and freedoms relating to race, colour or creed, tribe, place of origin, national or ethnic identity, social origin, political opinion, sex, language and religion are guaranteed under the constitution, and respected and fulfilled by the government. It has been consistently argued that Botswana has maintained a good human rights protection record,³ a myth largely perpetuated by scholars from Botswana. This is despite the fact that Botswana’s Constitution (the Constitution) offers insufficient human rights protection⁴ and that Botswana has an unimpressive record of ratifying and reporting on international treaties and conventions, an unimpressive record regarding the

2 Ibid.

3 RA Kumar “Constitutional rights and judicial activism: Bridging the gaps in Botswana” in E Quansah and W Binchy (eds) *The Judicial Protection of Human Rights in Botswana* (2009, Clarus Press) 119 at 121.

4 Stakeholders’ information on Botswana, submitted by the Centre for Human Rights, University of Pretoria, South Africa, 13 June 2008, available at: <http://www.upr-info.org/IMG/pdf/Centre_for_Human_Rights_University_of_Pretoria_Botswana_E_2008.pdf> (last accessed 15 April 2009).

domestication of ratified instruments,⁵ as well as the absence of effective human rights protection monitoring bodies.⁶

Be that as it may, the Constitution makes provision, under chapter II, for the protection of first generation rights. At more than 40 years old, the Constitution is largely influenced by the European Convention on Human Rights and perhaps remains the only constitution that has retained its independence bill of rights. Sections 3 to 15 of the Constitution provide for most of the civil and political rights. Section 3 is the umbrella provision for the rights embodied in chapter II.⁷ It provides that every person is entitled to the rights and freedoms under the Constitution without any discrimination on the grounds listed in the Constitution.⁸ Sections 4 to 15 provide for specific rights. These include the right to life,⁹ the right to personal liberty,¹⁰ protection from slavery and forced labour,¹¹ protection from torture and other cruel, inhuman or degrading treatment or punishment,¹² freedom of expression,¹³ protection from discrimination,¹⁴ the right to privacy,¹⁵ protection from deprivation of property,¹⁶ freedom of conscience,¹⁷ as well as protection of the law.¹⁸ The effective promotion, protection and fulfilment of these rights has been subjected to intense scrutiny over the years by scholars

5 Ibid.

6 Ibid.

7 EK Quansah "Law, religion and human rights in Botswana" (2008) 8/2 *African Human Rights Journal* 486 at 491.

8 Ibid. See a purposive interpretation of the Constitution in *Dow v Attorney General* [1992] BLR 119 where the court interpreted the Constitution to have prohibited discrimination on the basis of sex despite that not being included in the grounds of discrimination under the Constitution.

9 The Constitution, sec 4.

10 Id, sec 5.

11 Id, sec 6.

12 Id, sec 7. See *Petrus and Another v The State* [1984] BLR 14, addressing the issue of corporal punishment and holding that corporal punishment was inhuman and degrading treatment contrary to internationally acceptable standards.

13 The Constitution, sec 12.

14 Id, sec 15. See generally CM Fombad "The constitutional protection against discrimination in Botswana" (2004) 53 *The International and Comparative Law Quarterly* 139.

15 Id, sec 9. See *Kanane v The State* [2003] 2 BLR 67 where the Court of Appeal was of the view that gay men do not represent a group or class which requires protection. Refusing to decriminalize same sex relations or declaring relevant sections of the penal code as constitutional, the court held further that the time had not arrived for the adoption of progressive trends taking place elsewhere. See further EK Quansah "Same-sex relationships in Botswana: Current perspectives and future prospects" (2004) 4/2 *African Human Rights Law Journal* 201; KN Bojosi "An opportunity missed for gay rights in Botswana: *Utjiwa Kanane v The State*" (2004) 20 *South African Journal on Human Rights* 466; MM Chilisa "Two steps back for human rights: A critique of the *Kanane* case" (2007) 1 *The Botswana Review of Ethics, Law & HIV/Aids* 45.

16 Id, sec 8.

17 Id, sec 5. See Quansah "Law, religion and human rights", above at note 7.

18 Id, sec 10.

and courts alike, with scholarly works focusing on the judicial enforcement of these rights by the courts.

Botswana is party to several international and regional human rights instruments. These include the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the African Charter on Human and Peoples' Rights (African Charter). The Constitution is silent on the status of these international instruments. However, due to the fact that Botswana is a dualist state, treaty provisions do not become part of the laws of Botswana unless specifically incorporated into the laws of Botswana through an act of Parliament.¹⁹ As such, treaties creating rights and obligations ratified by Botswana do not create rights and obligations enforceable by the courts immediately upon ratification. However, section 24 of the Interpretation Act (1984) provides that such treaties may be used in the interpretation of the law where the wording of the statute is ambiguous.²⁰ Customary international law is applicable in Botswana in so far as it is not inconsistent with any domestic legislation.²¹

The Botswana High Court is constitutionally mandated to protect the rights entrenched under the Constitution.²² Hence, any person who alleges that any provision of sections 2 to 16 of the Constitution has been, is being or is likely to be contravened in relation to him may apply to the High Court for redress.²³ The High Court has original jurisdiction in respect of human rights matters brought under section 18 of the Constitution.²⁴ It may make such orders, issue writs and give direction it considers necessary for the purpose of enforcing and securing the enforcement of the fundamental rights under the Constitution.²⁵

Botswana has not established an independent national human rights institution in terms of the Principles Relating to the Establishment of National Human Rights Institutions (Paris Principles).²⁶ It has the office of the Ombudsman and the Directorate on Corruption and Economic Crime.²⁷ The few non-governmental organisations that actually try to do work on human rights, understandably place more emphasis on the rights contained in the Constitution and more often than not are focused on issues relating to

19 *Attorney General v Dow* [1992] BLR 119; *Kenneth Good v The Attorney General* [2005] 1 BLR 462.

20 *Ibid.*

21 *Amadou Oury Bah v Libyan Embassy* 2006 (1) BLR 22 (IC) 25.

22 The Constitution, sec 18.

23 *Ibid.*

24 *Id.*, sec 18(2).

25 *Ibid.*

26 E Keoreng "Ombudsman calls for human rights commission for Botswana" (17 April 2009) *Mmegi*, available at: <<http://www.mmegi.bw/index.php?sid=1&aid=13&dir=2009/April/Friday17>> (last accessed 9 January 2010).

27 See generally CM Fombad "The enhancement of good governance in Botswana: A critical assessment of the Ombudsman Act, 1995" (2001) 27/1 *Journal of Southern African Studies* 57.

HIV / AIDS. This is mainly due to the fact that Botswana is one of the countries heavily affected by the pandemic. There is, as a result, less focus on socio-economic rights issues by civil society in Botswana.

SOCIO-ECONOMIC RIGHTS AT THE INTERNATIONAL AND REGIONAL LEVELS

Socio-economic rights were recognized under the 1948 Universal Declaration of Human Rights (UDHR). Though non-binding in nature, the declaration initiated the protection and promotion of socio-economic rights by listing a number of these rights. The UDHR was followed later by the International Covenant on Economic, Social and Cultural Rights (ICESCR). Socio-economic rights are also protected under a number of thematic international instruments, such as CEDAW, the Convention on the Rights of Persons Living with Disabilities, as well as the Convention on the Rights of the Child (CRC). Socio-economic rights are also protected under various regional human rights treaties such as the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol).

The protection and promotion of socio-economic rights in Africa received tremendous support from the adoption of the African Charter. This charter makes no distinction as to the type of rights, makes no indication as to which of the rights are of less importance than others and theoretically made no distinction as to their implementation.²⁸ Thus it did not create any hierarchy of rights and this is seen as a leap beyond the ideological cleavages and disputes that led to the subjugation of socio-economic rights as being of lesser value than civil and political rights.²⁹ The charter protects a wide range of socio-economic rights³⁰ and is supplemented by thematic regional instruments such as the African Women's Protocol³¹ and the ACRWC.³² Socio-economic rights are protected under articles 15 to 24 of the African Charter. They include the rights to health,³³ education,³⁴ self-determination,³⁵ and economic social and cultural development,³⁶ as well as

28 See the African Commission decision in *Purohit and Another v The Gambia* [2003] AHRLR 96 where the African Commission, in acknowledgement of the lack of resources in Africa, read into the right to health the qualification of availability of resources: F Viljoen *International Human Rights Law in Africa* (2007, Oxford University Press) at 240.

29 C Mbazira "Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years redundancy, progression and significant strides" (2006) 6/2 *African Human Rights Law Journal* 333 at 338.

30 Id at 340.

31 African Women's Protocol, arts 12–18.

32 ACRWC, arts 11, 12, 14 and 18.

33 African Charter, art 16.

34 Id, art 17.

35 Id, art 20.

36 Id, art 22.

a satisfactory and stable environment.³⁷ These rights are free of claw-back clauses³⁸ as they are unequivocally justiciable like all other rights enshrined under the Charter,³⁹ and states are enjoined to implement these rights immediately.⁴⁰ The normative content of these rights has been set out in several decisions of the African Commission on Human and Peoples' Rights (African Commission).⁴¹

Understandably, the debate on the justiciability of socio-economic rights has received sufficient attention from scholars and as such does not merit detailed attention in this article.⁴² Suffice it to point out that there is growing acknowledgement of the indivisibility and interdependence of rights. This dates back to the position adopted by world leaders at the 1993 Second World Conference on Human Rights in Vienna, where human rights were described as "universal, indivisible and interdependent and interrelated".⁴³

THE STATUS OF SOCIO-ECONOMIC RIGHTS IN BOTSWANA

As noted above, Botswana is party and signatory to several international instruments, including the ICCPR, the African Charter, CEDAW, the CRC and the ACRWC. However, Botswana is neither a party nor signatory to the ICESCR. The Constitution also does not make any reference to socio-economic rights and, as such, socio-economic rights are not given the same protection under the Constitution as civil and political rights. Botswana is a dualist state and treaty obligations do not form part of the law unless expressly

37 *Id.*, art 24.

38 S Ibe "Beyond justiciability: Realising the promise of socio-economic rights in Nigeria" (2007) 7/1 *African Human Rights Law Journal* 229.

39 Viljoen *International Human Rights Law*, above at note 28 at 237.

40 Mbazira "Enforcing the economic, social and cultural rights", above at note 29.

41 *Social and Economic Rights Centre and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998); *Free Legal Assistance Group and Another v Zaire* (2000) AHRLR 74 (ACHPR 1995); *Purohit*, above at note 28; *Union Interfricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997); *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

42 Mbazira "Enforcing the economic, social and cultural rights", above at note 29 at 338; OC Odinkalu "Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights" in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002, Cambridge University Press) 178 at 181.

43 Vienna Declaration and Programme of Action: UN GABOR world conference on human rights, 40th session, 2nd plenary meeting, part 1, 5: UN doc A/CONF.157/24 (1993), reprinted in (1993) 32 *International Legal Materials* 1661. HJ Steiner, P Alston and R Goodman *International Human Rights In Context: Law, Politics, Morals* (3rd ed, 2008, Clarendon Press) at 263; S Harris-Short "International human rights law: Imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child" (2003) *Human Rights Quarterly* 131.

incorporated through an act of Parliament. Due to this dualist nature of Botswana's legal system, it is difficult to enforce rights under the various international instruments to which Botswana is a party.

Botswana does not have constitutionally protected socio-economic rights; on the face of it, these rights can therefore not be enforced under the Constitution. As already mentioned socio-economic rights are not listed as DPSPs as is the case in some jurisdictions. It thus becomes necessary to ascertain whether these rights are justiciable in Botswana, as well as to suggest ways in which such rights could be enforced before the courts. These two issues, as well as discussion of whether the absence of socio-economic rights as DPSPs in the Constitution is of relevance to the judicial enforcement of socio-economic rights, form the basis of the following discussion.

THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN BOTSWANA

Minority ethnic groups such as the indigenous Basarwa continue to be marginalized by the current policies adopted by Botswana's government. Although the government officially considers all of the country's ethnic groups to be equally "indigenous",⁴⁴ the earliest inhabitants of the country, the Basarwa, have from time immemorial proven that theirs was a special situation which needed special consideration and policies specifically tailored to meet their needs. Of all the vulnerable groups in Botswana, the Basarwa have been the most economically and politically marginalized.⁴⁵ Their isolation, limited access to education, ignorance of civil rights and lack of political representation hinder their progress.⁴⁶ As will be shown later in this article, the protection of their rights, in particular their socio-economic rights, remains elusive, as the government's policies and decisions are not cognizant of their special situation.

The severity of this detrimental situation is underscored by two decisions of the Botswana High Court: *Roy Sesana and Others v The Attorney General (Sesana)*⁴⁷ and *Matsipane Moseithanyane and Others v The Attorney General of Botswana (Matsipane Moseithanyane)*.⁴⁸ In *Sesana* the applicants sought, among other

44 See generally: Ditshwanelo - The Botswana Centre for Human Rights "Shadow report to the United Nations Committee on the Elimination of Racial Discrimination" (68th session, Geneva, 3-6 March 2006) at 10.

45 Ibid.

46 Ibid.

47 MISC A no 52 of 2002 reported as *Sesana and Others v The Attorney General* 2002 1 BLR 452 (HC). For the purpose of this article, reference will be made to the original judgment. For a detailed discussion of this case, see C Ng'ong'ola "Sneaking the aboriginal title into Botswana legal system through a side door: Review of *Sesana and Others v The Attorney General*" (2007) 6 *University of Botswana Law Journal* 108.

48 Court of Appeal, CALB-074-10 (unreported). For a detailed discussion of this case, see BR Dinokopila "The right to water in Botswana: A review of the *Matsipane Moseithanyane case*" (2011) 11/1 *African Human Rights Law Journal* 282.

things, an order declaring the termination by the government of the provision of certain basic and essential services in the Central Kalahari Game Reserve (CKGR) to be unlawful and unconstitutional. The basic and essential services forming the crux of the request for this order were the provision of drinking water on a weekly basis, maintenance of the supply of borehole water, the provision of rations to the registered destitute, the provision of food rations for registered orphans, the provision of transport for the applicants' children to and from school, and the provision of healthcare to the applicants through mobile clinics and ambulance services.

The court held that the termination of these services by the government was neither unlawful nor unconstitutional. Hence, the government was under no obligation to restore the provision of the services.⁴⁹ The High Court's decision was largely based on the principles of legitimate expectation under administrative law. On the contrary, Justice Unity Dow (as she was then) concluded in her separate judgment that the services terminated were indeed basic and essential for the survival of the applicants. Hence, the termination endangered life and was an infringement of the constitutionally guaranteed right to life.⁵⁰

In *Matsipane Moselelhanyane*, the applicants sought, among other things, an order declaring that the refusal or failure by the government to permit them to re-commission, at their own expense, the borehole in the CKGR was unlawful and unconstitutional.⁵¹ The Court of Appeal held that that the government's refusal to grant the appellants permission to re-commission, at their own expense, the Mothomelo borehole for domestic purposes amounted to inhuman and degrading treatment. According to the court, this was contrary to the provisions of section 7 of the Constitution, provisions of which were absolute, unqualified and not subject to any limitations. As will be shown later, these two cases not only highlighted the challenges faced by the Basarwa in so far as their enjoyment of socio-economic rights is concerned, but also brought to light challenges that are inherent in the judicial enforcement of socio-economic rights in Botswana.

Sesana and Matsipane Moselelhanyane: An opportunity missed?

As noted above, the High Court held in *Sesana* that the stoppage by the government in 2002 of essential services to the inhabitants of the CKGR was neither unlawful nor unconstitutional. This contention was endorsed by the High Court in *Matsipane Moselelhanyane* and to a certain extent by the Court of Appeal in the same case. These decisions, as will be discussed below, highlight the position that socio-economic rights have not fully found favour with Botswana's Courts in so far as their judicial enforcement is concerned.

49 *Sesana*, above at note 47 at para 121 with Justice Unity Dow dissenting.

50 *Id* at paras 137–38.

51 *Matsipane Moselelhanyane*, above at note 48 at para 1.

In *Sesana*, Justice Dibotelo (now chief justice) highlighted that the thread running through the applicants' contentions that the termination of services was unlawful and unconstitutional, was that they were not consulted before the decision to terminate the services provided to them was taken. Such a decision was made, the applicants alleged, notwithstanding that they had a legitimate expectation that the government would consult them before making a decision which was likely adversely to affect them or their interests or better still likely to prejudice them. The learned judge found as a matter of fact that the government had consulted the applicants before it made the decision to terminate the provision of services inside the CKGR. He therefore dismissed as without merit the applicants' argument that the termination by the government of the provision of the basic and essential services to the applicants was both unlawful and unconstitutional. The learned judge's decision was based on principles relating to legitimate expectation under administrative law, as this was the argument put forth by the applicants in their founding papers.⁵²

The decision by Justice Phumaphi was also based on principles of legitimate expectation.⁵³ He rightly held, after a discussion of the circumstances leading to the stoppage of the services, that the simultaneous stoppage of the supply of food rations and of the issue of special game licences (SGLs) is tantamount to condemning the remaining residents of the CKGR to death by starvation.⁵⁴ He also went on to find that not only was the refusal to issue SGLs to the applicants contrary to the Wildlife Conservation and National Parks Act, but also violated the applicants' constitutional right to life.⁵⁵ Despite his reference to the simultaneous stoppage of the issue of SGLs and of the supply of food rations to the inhabitants of the CKGR and the consequent impact of such a drastic step on the right to life, Justice Phumaphi's concluding paragraph on the issue does not make any reference to the stoppage of those services as a violation of the right to life. Supporting the position adopted by Justice Dibotelo, Justice Phumaphi concluded that the applicants did not establish a case of legitimate expectation based on either promise or practice,⁵⁶ hence the termination of services was not unlawful or unconstitutional.⁵⁷ Consequently, the government was not obliged to restore the basic and essential services to the applicants in the CKGR.⁵⁸

52 The applicants contended that the termination of services was both unlawful and unconstitutional on two grounds, that: the applicants enjoyed a legitimate expectation that they would be consulted before their services were terminated, but they were not consulted; and the termination was in breach of the National Parks and Game Reserve Regulations 2000.

53 C Forsyth "The protection of legitimate expectations: The pitfalls for Botswana to avoid" (2006) 3 *University of Botswana Law Journal* 5.

54 *Sesana*, above at note 47 at para 137.

55 *Id* at para 138.

56 *Id* at para 48.

57 *Id* at para 49.

58 *Id* at para 57.

Justice Dow rightly held that the termination of the services endangered life and was tantamount to a violation of the applicants' right to life,⁵⁹ further that the government was under an obligation to restore basic and essential services to those residents who were in the reserve.⁶⁰ Justice Dow held that the issues in the case before the court were so connected that making a determination of the issues as stand-alone issues would have been too narrow and simplistic.⁶¹ After holding that the termination of services was unlawful and unconstitutional, Justice Dow then proceeded to order the restoration of those services to the CKGR and made an award of damages to those applicants who might have sustained loss. It is this separate opinion that was and remains a glimmer of hope for the judicial enforcement of socio-economic rights in Botswana. The decision could perhaps have benefited more from the jurisprudence of other jurisdictions, in particular and as will be shown later in this article, case law from the Indian Supreme Court. It nonetheless remains a bold and progressive interpretation of the Constitution. The approach adopted by Justice Dow was not only progressive but also conformed with international human rights standards, in particular Botswana's obligations under the African Charter. Justice Dow deliberately chose, it appears, to adopt a rights based approach and did not decide the case on the basis of legitimate expectation as the other two justices did.

Given the courts' general reluctance regarding the adjudication of matters involving socio-economic rights, it is not at all surprising that Justice Phumaphi, quoting Forsyth,⁶² opined that:

"It seems to me that, if this Court were to decide that the services should be restored, in the face of admitted evidence to the effect that provision of services in the reserve is unsustainable on account of costs, the import of the Court's decision would be to direct the Respondent to re-prioritise the allocation of national resources. In my view, the Court should be loathe to enter the arena of allocation of national resources unless, it can be shown that the Respondent has, in the course of its business transgressed against the Supreme Law of the land or some other law."⁶³

Despite that the learned judge expressed these sentiments in the context of legitimate expectation under administrative law, it is evidence of the erstwhile position by courts elsewhere that adjudication over matters concerning socio-economic rights essentially amounts to directing the executive to reprioritize. This is because there are policy considerations involved that render the courts

59 Id at para H13.

60 Id at para H16.

61 Id at para H1.2.

62 Forsyth "The protection of legitimate expectations", above at note 53.

63 *Sesana*, above at note 47 at para 55.

incapable of making pronouncements over such matters,⁶⁴ a position rejected by the South African Constitutional Court⁶⁵ and the English courts.⁶⁶ Justice Phumaphi's opinion might be interpreted as endorsing the position held by courts in other jurisdictions that courts are not competent to adjudicate over issues pertaining to socio-economic rights even where the government's minimum core obligations are in issue.

The South African Constitutional Court has shown that the courts can make decisions pertaining to socio-economic rights without dwelling too much on the details of budgetary allocation by the state.⁶⁷ It is acknowledged that the courts' role in that regard is uncertain and they should proceed with caution. At stake are issues of the courts' ability to pass enforceable judgements as well as the institutional legitimacy of the courts. However, that should not be a bar to the courts playing a critical role in the enforcement of socio-economic rights.

In the main, *Sesana* presented to the High Court a window of opportunity to establish a precedent regarding the judicial enforcement of socio-economic rights in Botswana. The decision, even though it is considered by some as a valiant attempt to adopt an expansive and purposive interpretation of the right to life, remains unquestionable evidence of the court's failure to adopt a purposive interpretation of the Constitution in the wake of globalization and an era of human rights culture. This was to a large extent confirmed by *Matsipane Mosetlhanyane* in so far as the issue of the government's obligations to provide essential services to the Basarwa residing in the CKGR is concerned.

Sesana also indicates the problems associated with the enforcement of socio-economic rights through the administrative law principles of legitimate expectation. Such problems include the undeniable fact that, even though the government might have consulted on the termination of essential services, this does not remove the unjust nature of such an act. This would be particularly true in the case where it is eventually held, in the light of extensive consultations, that the government is under no obligation to restore such services.

With respect to *Matsipane Mosetlhanyane*, one would expect that the Court of Appeal decision would bring succour to the litigants. However, cognizance should be taken of the fact that the government was not compelled to provide the Basarwa staying within the CKGR with water. Instead, the court ordered the government to allow the Basarwa to re-commission the borehole at

64 T Eisenberg and S Yeazell "The ordinary and the extraordinary in institutional litigation" (1980) 93 *Harvard Law Review* 465.

65 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (*Grootboom*); *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (*Treatment Action Campaign*).

66 *R v East Sussex ex parte Tandy* [1998] AC 714, [1998] 2 All ER 769; *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429, 2002 SCC 84.

67 *Treatment Action Campaign*, above at note 65.

their own expense. Having held that the denial of the Basarwa to water amounted to inhuman and degrading treatment, one would have expected that the court would have made a corresponding order compelling the government to provide residents of the CKGR with water. However, that was not the case and as such one cannot confidently conclude that *Matsipane Moselelhanyane* is an authority for the proposition that one can assert one's right to water before Botswana's courts. It is therefore compelling to come to the inescapable conclusion that the case may only be applied to cases brought by residents of the CKGR with the right to live and reside within the reserve. One should not however lose sight of the fact that the court has categorically held, in this case, that the denial of the litigants to access water was inhuman and degrading, contrary to section 7 of the Constitution. This conclusion is not desirable and may appear as a contradiction of sorts.

It is thus apposite to point out several factors for consideration before reaching a conclusion on the justiciability of socio-economic rights in Botswana. First, it is beyond doubt that *Sesana* was largely based on principles of legitimate expectation under administrative law and denying the litigants basic amenities was based on the fact that the withdrawal of such services was made known to them in advance. That knowledge accordingly extinguished their legitimate expectation that the services would continue, hence the court's decision. Secondly, the approach taken by the majority in *Sesana* did not attract any substantive constitutional law arguments. To that end, it would be wrong to rely on *Sesana* as an authority for the proposition that the Botswana government is under no obligation, especially under the Constitution, to provide citizens with essential amenities like water, health and education. Thirdly, *Matsipane Moselelhanyane* is indicative of the fact that the implied rights doctrine has been welcomed in Botswana. Nevertheless, the decision is weak, as the remedies in *Matsipane Moselelhanyane* do not seem to suggest that the court intended to hold as a matter of finality that the government is under an obligation to provide citizens with socio-economic rights.

Admittedly the two cases do not bring clarity to the issue of the judicial enforcement of socio-economic rights in Botswana. In fact, one may be tempted to conclude that the justiciability of socio-economic rights has not been tested in Botswana. However, it is beyond doubt that the two cases involved issues of socio-economic rights regardless of the manner in which they were couched in the pleadings. It is submitted that these two decisions provide unsettling evidence of how the courts might approach the issue of judicial enforcement of socio-economic rights in Botswana. There follows a discussion of how the Botswana High Court should treat socio-economic rights in the light of decisions from other jurisdictions such as India and South Africa.

A PRACTICAL RESPONSE TO THE QUESTION OF THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN BOTSWANA

As mentioned earlier, Botswana falls into a category of states with no constitutionally guaranteed socio-economic rights. The practice in other jurisdictions

without constitutionally guaranteed socio-economic rights has been to use civil and political rights to achieve the judicial enforcement or protection of socio-economic rights. Rights such as the right to life and dignity as well as the right to non-discrimination have been used to imply socio-economic rights.⁶⁸ The position in those countries is thus similar to the one adopted by Justice Dow in her separate opinion in *Sesana*.

The Indian Supreme Court has over the years come to adopt a broad interpretation of the right to life guaranteed by article 21 of the Indian Constitution. The right has been interpreted as including “the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head”.⁶⁹ In *Paschim Banga Khet Mazdoor Samity v State of Bengal*,⁷⁰ the Indian Supreme Court held that: failure by government hospitals to provide timely treatment to a person in need of treatment violated the right to life;⁷¹ and providing medical facilities for the people is an essential state obligation, which cannot be avoided by pleading financial constraints.⁷² This order came after an agricultural labourer was taken to as many as seven government hospitals in Calcutta as a result of suffering severe head injuries, but was turned away simply because there were no empty beds to admit him.

In *Unni Krishnan JP v State of Andhra Pradesh*,⁷³ the court held that the right to education is part of the right to life enshrined under the Indian Constitution and on that basis a child is entitled to free education up to the age of 14 years.⁷⁴ The Indian Supreme Court has also interpreted the right to life as protecting environmental rights.⁷⁵ This expansive interpretation of the right to life has helped the Indian courts to overcome the justiciability debate and the courts’ legitimacy in adjudicating on socio-economic rights.⁷⁶ The Indian Supreme Court in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*,⁷⁷ while adopting an expansive interpretation of the right to life, held that the extent of the right will largely depend on the extent of the economic development of the country but must nonetheless include the bare necessities of life.⁷⁸ This is evidence of

68 P Miamingi “Inclusion by exclusion? As assessment of the justiciability of socio-economic rights under the 2005 Interim Constitution of the Sudan” (unpublished LLM thesis, University of Pretoria, 2008) at 17.

69 *Francis Coralie Mullin v Union Territory of Delhi* AIR (1981) SC (2) 516 at 529.

70 (1996) 4 SCC 37.

71 *Id* at 38.

72 *Ibid*.

73 (1993) 1 SCC 645 at 730.

74 *Id* at 735.

75 *MC Mehta v Union of India* (1987) 4 SCC 463; *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647.

76 S Muralidhar “Economic, social & cultural rights: An Indian response to the justiciability debate” in Y Ghai and J Cottrell *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004, Interights) 23 at 25.

77 (1981) SCR 516.

78 *Id* at 529 B–F.

the fact that the Indian approach is cognizant of the underlying financial implications of enforcing socio-economic rights and acknowledges that the extent of any right will be limited accordingly.

The Botswana High Court is not the first actually to fail to adopt the Indian approach of a purposive interpretation of the right to life. Perhaps this is largely because the litigants in both *Sesana* and *Matsipane Mosetlhanyane* chose not to pursue their quest for the restoration of essential services through the right to life argument. In *Baitsokoli and Another v Maseru City Council and Others (Baitsokoli)*,⁷⁹ an attempt by an association of traders and an individual to evoke the right to life was unsuccessful. The litigant had a stall in the centre of Maseru and was removed by the city council to a market some 200 metres away or to the new market known as the Old Local Government premises. The challenge to the relocation was squarely founded on the right to life guaranteed under section 5 the Constitution of Lesotho. The litigants essentially argued that their right to a livelihood was put at risk by their removal to a new market. They relied most on the jurisprudence of the Indian Supreme Court and urged the court to hold that the right to life encompassed the right to a livelihood. The court concluded that “the right to life guaranteed under section 5 ... cannot be defined and interpreted - even *most expansively and purposively* to include [the] right to livelihood”.⁸⁰

The matter was accordingly taken on appeal. After an attempt to distinguish the facts of the case from the Indian cases, the Lesotho Court of Appeal upheld the decision of the court of first instance and held that the right to life did not encompass a right to a livelihood. According to the Court of Appeal, this was on the basis that the right to a livelihood formed the subject matter of a specific and separate provision: section 29 of the Constitution of Lesotho. The court held further that, since the right to a livelihood was included as a DPSP under section 29, it could not be enforced within the ambit of the right to life. The learned judge sought support from the reasoning of Chasklson P in *Soobramoney v Minister of Health (KwaZulu Natal)* when rejecting an attempt by the litigants to extend the interpretation of the right to life to cover the right to medical treatment in South Africa. Chasklson had held in his judgment that:

“In our Constitution the right to medical treatment does not have to be inferred from the nature of the State established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant’s contention it would make it substantially more difficult for the State to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to ‘everyone’ within its available resources...”⁸¹

79 (2004) AHRLR 195 (LeCA 2004).

80 Id at 196 (emphasis added).

81 Para 19, (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

Certainly the judge's position was not that, since the right to life is wide in nature, it is not advisable that it be interpreted to include the right to medical treatment. He was pointing out that, since section 27 provided for the right to health, there was no need to infer that right from the right to life. Again, it becomes necessary to point out that the right to medical treatment is included under section 27 of the South African Constitution as a separate and specific right, not as a DPSP. On the other hand, the right to a livelihood in Lesotho is provided for in section 29 of the Lesotho Constitution as a DPSP and not as a right. The argument by the Lesotho Court of Appeal (that, since the Lesotho Constitution envisages the right to a livelihood as a DPSP, the court is barred from inferring the right to a livelihood from the right to life) is therefore erroneous.⁸² This is mainly because the proposition does not take into account the fact that the DPSPs are non-justiciable or are not enforceable before the courts of law. They are usually used for interpreting the provisions of a constitution. It has been pointed out that DPSPs "relate to policy or goals or directions rather than to the existence or extent of legal rights vested in any individual or group normally subject to the jurisdiction of courts of law".⁸³ The effect of the decision in *Baitsokoli* has the effect of elevating DPSPs to a position where they are justiciable. The question that follows is therefore whether or not it matters that the Constitution of Botswana does not have DPSPs or, essentially, whether the Indian position is rendered irrelevant in Botswana because the Constitution does not have socio-economic rights embodied in it as DPSPs.

The right to life is often described as a cross-cutting right and has been described by the African Commission in *Forum of Conscience v Sierra Leone* as "the fulcrum of all other rights and the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life".⁸⁴ It therefore follows that, since the right to life is a self-standing right, there is no need for the Constitution of Botswana to have DPSPs for the courts to adopt a purposive and expansive interpretation of the right to life. The decision of the Lesotho Court of Appeal in *Baitsokoli* could be viewed as an indication that the absence of DPSPs in the Botswana Constitution leaves room for an easier use of civil and political, or cross-cutting, rights to secure the judicial enforcement of socio-economic rights.

It is therefore submitted that the expansive and purposive interpretation of the right to life by the Indian Supreme Court is very relevant to Botswana and other countries in a similar position. As shown above, it matters little whether

82 See a detailed discussion of this case in Viljoen *International Human Rights Law*, above at note 28 at 579 where he highlights, among other things: "By suggesting that its approach is superior or 'logically correct', the Lesotho Court of Appeal displays an arrogant lack of insight into the contingency of its own finding."

83 BO Okere "Objectives and directive principles of state policy under the Nigerian Constitution" 1983 (32) *The International and Comparative Law Quarterly* 214 at 221.

84 (2000) AHRLR 293 (ACHPR 2000) at para 19.

a constitution does or does not have DPSPs. It is therefore within the courts' discretion to adopt a purposive and expansive interpretation of the right to life entrenched in their constitutions to include a variety of socio-economic rights.

THE ROLE OF THE COURTS AND THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS: LESSONS FOR BOTSWANA

The question that remains therefore is what should be the role of Botswana's courts in the judicial enforcement of socio-economic rights, considering their noticeable absence from the Constitution. It is submitted that it is incumbent upon the courts to ensure that there is sufficient judicial protection of socio-economic rights within a particular state. To that end it can be argued that the Indian courts have shown that it is possible to adjudicate over socio-economic rights despite their absence from the constitution as fully fledged rights or rights properly so called. The jurisprudence of the South African Constitutional Court has also shown that the courts may be in a position to adjudicate over issues pertaining to the protection and fulfilment of socio-economic rights. The South African Constitutional Court has since come to the conclusion that a reasonable government policy must cater for different groups and their needs in society.⁸⁵ To that end there is enough evidence to suggest that socio-economic rights can be legally enforced in national systems.⁸⁶

The courts are certainly not in an envious position when it comes to the judicial enforcement of socio-economic rights and their position becomes even less enviable if socio-economic rights are not constitutionally protected. Unenviable as it may seem, Botswana's courts are under an obligation to protect the rights of Botswana be they civil and political or economic, social and cultural. One may be tempted to argue that the task of Botswana's courts is less daunting because of the absence of socio-economic rights in the Constitution and that their absence means that there should not be any talk about the judicial enforcement of socio-economic rights in Botswana. However, such a view would be too narrow and show a lackadaisical approach to matters of rights and in particular socio-economic rights.

Courts have several options as regards their role in the judicial enforcement of socio-economic rights in Botswana. First, the courts can adopt what has now come to be known as the implied rights doctrine where certain civil and political rights are used as a means of enforcing socio-economic rights. The discussion of the Indian Supreme Court jurisprudence above shows that

85 S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) 21 *South African Journal of Human Rights* 1 at 16.

86 See generally AP James "The forgotten rights: The case for the legal enforcement of socio-economic rights in the UK national law" (2007), available at: <www.ucl.ac.uk/opticon1826/archive/issue2/VfPLAW_SE_rights.pdf> (last accessed 3 March 2011).

this is possible, provided that the courts are able to adopt a purposive interpretation of cross-cutting rights to enforce socio-economic rights.

Secondly, the principle of legitimate expectation under administrative law may also be used to enforce socio-economic rights. In *R v North and East Devon Health Authority ex parte Coughlan*⁸⁷ the local authority's decision to close an old persons' home was reversed using standard judicial review grounds of legitimate expectation. This can be used to ensure that a government's decisions are not adverse to the interests of the citizenry. The problem with this approach is that it does not take into account the human rights implications of the government's decision. As evidenced by *Sesana*, where there are no grounds for setting aside an administrative act of government, the court is likely to find in favour of the government. To that end a litigant would have to be confident of the grounds upon which they are praying for judicial review to avoid the pitfalls that come with approaching the court using standard judicial review.

Within that ambit, the High Court can craft the test with which to decide upon such matters. The South African Constitutional Court has used the reasonableness test to determine whether government acts are cognizant of an individual's dignity, while it appears that the African Commission has adopted the minimum core obligation approach. Granted, this would not be an easy task but it is a task that the High Court has to undertake so as to ensure that all are protected. It is also clear that the court will have to make orders pertaining to socio-economic rights; judging from the South African experience, that is bound to be a daunting task. For example, the South African courts have had to make use of structural interdicts to enforce socio-economic rights. As Mbazira rightly points out, this "has enabled the judges to discard their positions as mere umpires and to assume positions which make them active participants in the dispute".⁸⁸ The use of structural interdicts in South Africa has been controversial to say the least.⁸⁹ While the High Court has embraced the use of interdicts, the Constitutional Court has emphasized the need for the courts to desist from getting embroiled in what it considers to be policy issues.⁹⁰

Botswana's High Court should not be reluctant to infuse some sense of judicial activism in its decision-making process.⁹¹ This is particularly so that the laws and rules leave enough room for them to manoeuvre and reach decisions that are alive to the needs of society. Such judicial activism is indeed necessary in relation to the judicial enforcement of socio-economic rights because it might be needed to "provoke or spur the political system into addressing

87 (2000) 2 WLR 622.

88 C Mbazira *Litigating Economic and Social Rights in South Africa: A Choice between Corrective and Distributed Justice* (2009, Pretoria University Law Press) at 165.

89 *Ibid.*

90 *Ibid.*

91 See generally the following articles on judicial activism: Kumar "Constitutional rights and judicial activism", above at note 3; BO Okere "Judicial activism or passivity in interpreting the Nigerian Constitution" (1987) 36 *The International and Comparative Law Quarterly* 788.

questions of social exclusion".⁹² Furthermore, judges should be made aware of, endeavour to recognize and apply international norms and standards in the protection of human socio-economic rights in Botswana. The High Court should not be stifled by over-adherence to judicial precedent but should act assertively in order to ensure that socio-economic rights in Botswana are sufficiently protected. This is important not only for the protection of these rights in Botswana but also for the legitimacy of the courts for, as has been rightly pointed out, a judicial pronouncement will command more respect if it is in line with international norms accepted by many jurisdictions.⁹³

CONCLUSION

Socio-economic rights in Botswana are not judicially enforceable to the extent that they are not provided for in the Constitution. To that extent, and in line with the jurisprudence of the High Court, rights which are discernible from international instruments such as the African Charter may be used by the court in the interpretation of other legislation. Additionally some may argue that the High Court has not really pronounced on the justiciability of socio-economic rights in *Sesana* and *Matsipane Mosetlhanyane* and therefore that they are non-justiciable. However, this article has sought to indicate that, where socio-economic rights are not included in the Constitution as substantive rights or as DPSPs, they are still justiciable. An interpretation of cross-cutting constitutional rights, such as the right to life and freedom from inhuman and degrading treatment, should be used to enforce such rights. The robust approach taken by the Indian courts and, to some extent, the Irish courts allows Botswana to draw from the manner in which they have judiciously and effectively used cross-cutting rights to protect socio-economic rights. Therefore, the fact that the Botswana Constitution does not specifically provide for socio-economic rights does not mean that such rights cannot be effectively protected by the courts. Recognition by Botswana's courts that socio-economic rights are about the equitable allocation of resources is therefore necessary. The approach taken by Justice Dow in *Sesana* and the Court of Appeal in *Matsipane Mosetlhanyane* should be nurtured and followed in the adjudication of disputes concerning socio-economic rights. Other methods to enforce these rights, even though fraught with challenges, include the use of the administrative law principles of legitimate expectation. In the end, it is incumbent upon those adjudicating such disputes to learn from other jurisdictions and embrace their duty to protect the rights of the marginalized.

92 G Whyte (Law School, Trinity College Dublin) "Socio-economic rights in Ireland: Judicial and non-judicial enforcement" (draft paper presented at the Irish Human Rights Commission Conference on Economic, Social and Cultural Rights, 9 December 2005), available at: <www.ihrc.ie/download/doc/ecrgerardfwhyte.doc> (accessed 6 January 2010).

93 AR Gubbay "The protection and enforcement of fundamental human rights: The Zimbabwean experience" (1997) 21 *Human Rights Quarterly* 227 at 254.