Justiciability of Children’s Economic, Social and Cultural Rights in Botswana

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Abstract

Children are a vulnerable group, hence, they need special protections. Ratifying children-protecting instruments including the Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child (ACRWC) provide these protections. Botswana acceded to the CRC and ACRWC in 1995 and 2001 respectively. Beyond ratification and domestication of these instruments, however, rights must be asserted through justiciability mechanisms including State reports. Otherwise, they remain paper rights. This exploratory study investigated the question; ‘is Botswana complying with its reporting obligations?’ by interviewing key actors involved in meeting the reporting obligations on behalf of the government of Botswana. While the study consultants confirmed that Botswana is presently in breach of complying with reporting requirements for both the CRC and the ACRWC, the context for reporting is complex and important to consider. With enhancements to elements in this context that impact on reporting, this paper argues that it is not enough to merely ratify child-protecting conventions without ensuring their justiciability. The paper ends with recommendations for moving forward in Botswana to ensure child-friendliness, enforceability and justiciability of child-protecting conventions.

Keywords: Children; Economic, social and cultural rights; Justiciability; Inquisitorial; Botswana.
Introduction

This paper is concerned with children’s Economic, Social and Cultural (ESC) rights, therefore, it is important to define these key terms. In Botswana, the legal definition of a child is any person under the age of 18 (see Children’s Act, 2009 - RoB, 2009). ESC rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education (Office of the United Nations High Commissioner for Human Rights, 2014). According to Roodt (2008), rights can be organized into the following classes: (i) first generation (civil and political rights); (ii) second generation (ESC rights); and (iii) third generation (developmental and environmental rights). Economic Rights include the right to food, shelter, work and income; Social Rights include the right to social security, physical and mental health; and Cultural Rights include the right to education and the rights of minority groups (Shultz, 2002). ESC rights are considered to be humanitarian and aim at providing human beings with a right to basic subsistence needs and thus, have a dignified life (Mapulanga-Hulston, 2002). The main objective of ESC rights is “to put a state under a legal obligation to utilise its available resources maximally in order to redress social and economic imbalances and inequalities” [italics in original] (ibid, p. 34). Under the rubric of international human rights law, the duty of governments to guarantee ESC rights have three important elements: (i) respect; (ii) protection; and (iii) fulfilment (ibid). Furthermore, like other human rights, ESC rights contain dual faces: freedom from the state and freedom through the state. To illustrate, the right to adequate housing covers a right to be free from forced evictions carried out by State agents [freedom from the State] as well as a right to receive assistance to access adequate housing in certain situations [freedom through the State] (Office of the United Nations High Commissioner for Human Rights, 2014).

ESC rights find expression in national, regional and global legal systems, laws and regulations, national constitutions and in international treaties. Such examples are: Universal Declaration of Human Rights (1948) and United Nations human rights treaties (for example, International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Economic, Social and Cultural Rights [ICESCR] (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention on the Rights of the Child (1989); International Convention on
the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); and Convention on the Rights of Persons with Disabilities (2006). Particularly, the ICESCR enjoins States Parties to ensure ESC rights in their jurisdictions. In this regard, Article 2 of the ICESCR states that governments are obligated to

[...] take steps, individually and through international assistance and co-operation, [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant [...] , without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (OHCHR [Office of the UN High Commissioner for Human Rights], 2007).

In a related vein, there are regional treaties including, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [and its First Protocol (1952)]; European Social Charter (1961) and Revised European Social Charter (1996); American Convention on Human Rights (1969), and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988); African Charter on Human and Peoples’ Rights (1981); African Charter on the Rights and Welfare of the Child (1990); Protocol to the African Charter¹ on Human and Peoples' Rights on the Rights of Women in Africa (2003); and Southern African Development Community’s Convention on Socio-Economic Rights.

The question of the divisibility between Civil and Political Rights (CPR) and Economic, Social and Cultural Rights (ESCR) emerges in debates regarding conceptualizing international human rights in a holistic manner that emphasizes universality, interdependence, indivisibility and justiciability of CPR and ESCR (Petersmann, 2003; Arambulo (1999); Merali and Oosterveld (2001); Nowak (2005); and Skogly (2001). The currency of the argument is that CPR and ESCR are indivisible and the indivisibility is interpreted in many ways. For example, scholars argue that “they are complementary, mutually reinforcing and best realised when implemented together”; CPR and ESCR sit on the same pedestal; and they are “the same and without grounds for distinction, or as constituting inseverable parts of a complete form of rights” (Anthony, 2010, p. iv). Others argue against the indivisibility of CPR and ESCR (Whelan 2010) and stress that there is a significant divide between the two sets of human rights.
In addition to debates regarding indivisibility of rights, there is another long-standing debate in the literature regarding the justiciability, legitimacy and legality of ESC rights (Addo, 1992; Christiansen, 2007; Dennis and Stewart, 2004; Hill, 1992; Langford, 2009; Mapulanga-Hulston, 2002; Mbazira, 2009; Mubangizi, 2006; Nolan et al., 2007; Pieterse, 2004; Porter, 2008; Sachs, 2000; Wiles, 2006). Fundamental to the debate is whether ESC rights fall under the realm of rights and, as Vierdag (1978, p. 69) asks, “what is the legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights (ICESCR)?” Relatedly, are they justiciable? In response to this question, then UN High Commissioner for Human Rights, Louise Arbour, offered the following response “[i]t is now widely recognized that there is nothing inherently non-justiciable about economic, social and cultural rights” (United Nations, 2007). Similarly, some contend that even if the ESCR are justiciable, they are open-ended and indeterminate (see Dennis and Stewart, 2004). Added to these questions are issues of terminology regarding enforceability and justiciability. Mapulanga-Hulston (2002: 37) defines enforceability and justiciability as; “the enforcement of human rights deals with the identification of the entitlements and duties created by the legal regime, which have to be maintained and executed”. For justiciability, she notes that it “presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime”. Although these are distinctively different concepts, justiciability and enforceability are related in the sense that justiciability is a direct follow-up of enforceability (2002:37). For expositional clarity, this paper is concerned with justiciability.

Justiciability of Children’s ESC Rights

While ratifying conventions and charters is laudable, it is important that rights be asserted through enforceability and justiciability. Justiciability comes in two variants; (i) adversarial; and (ii) inquisitorial (Addo, 1992). Under adversarial justiciability, whose enforcement is done through the courts, the beneficiary of ESC rights must file a complaint in court alleging that his/her rights have been violated. Afterwards, the violator, for example the State, will be afforded an opportunity to provide a defence. In the end, a determination will be made as to whether a violation occurred and remedial action will be
recommended (ibid). Therefore, if one can successfully argue in court that such rights have been denied, therefore, one suffered injury, the courts can compel the government to remedy the situation. On the other hand, inquisitorial justiciability involves the institution of an enquiry mechanism and involves an examination of state reports (Addo, 1992). This is an obligation-based type of justiciability that involves review mechanisms such as those undertaken by independent bodies, for example Human Rights Watch and UN Committee on Economic, Social and Cultural Rights, when they examine state reports (Riedel, 1999). The purpose of inquisitorial justiciability is to judge the extent to which States Parties have complied with their human rights undertakings (ibid). Therefore, if the States Parties fall short of their undertakings, they are informed and remedial action is recommended.

In terms of both the CRC and ACRWC, the applicable justiciability is inquisitorial. With regard to the CRC, the Committee on the Rights of the Child adopted reporting procedures in October 1994 (UN Committee on the Rights of the Child, 1994). The Committee has designed reporting processes and dialogues with States Parties in such a manner that the latter deals with principal concerns in a methodical and informative manner (ibid). Since States Parties are enjoined to submit initial reports and subsequent ones, the Committee has prepared guidelines regarding the form and content of these reports under Article 44, paragraph 1(a) of the CRC. The procedures include some of the following: (i) general guidelines for reporting; (ii) examination of States Parties’ reports; (iii) procedures for follow-up action; and (iv) procedure in relation to overdue reports (ibid).

Similarly, Article 42 of the ACRWC [Reporting Procedure] provides for inquisitorial justiciability (OAU, 1990). It provides that; (a) States Parties must submit a report to the Committee of Experts on the Rights and Welfare of the Child within two years of the entry into force of the Charter for the State Party concerned; and (b) and thereafter, every three years. Reports made to the Committee of Experts on the Rights and Welfare of the Child under Article 38 shall contain sufficient information on the implementation of the ACRWC to provide the Committee with a comprehensive understanding of the implementation of the Charter (OAU, 1990). Furthermore, the Report should indicate factors and difficulties, if any, affecting the fulfillment of the obligations contained in the Charter. Finally, States Parties that submitted initial reports
with comprehensive information need not repeat the same in subsequent reports to the Committee (ibid).

While the question of the justiciability, legitimacy and legality of ESC rights is yet to be conclusively settled, some countries have enshrined these rights into their constitutions including, for example, South Africa [chapter two of the Constitution of South Africa contains the Bill of Rights that protects ESC rights] and Uganda (ESC rights were enshrined into the 1995 constitution). In this regard, South Africa has developed case law on the justiciability of ESC rights and its courts of law have handed down judgements that affirm the justiciability of ESC rights (see Government of the Republic of South Africa and Others v Grootboom and Others [2000]: SAFLII, 2000). In this case, a group of residents who were living on the edge of a sports field successfully filed a claim that their right to housing was being violated.

A second group of African countries including Lesotho, Ghana, Uganda and Nigeria have socio-economic rights expressed as directive principles of state policy [DPSP] (Dinokopila, 2013). A third group of countries including Botswana have neither entrenched ESC rights into their national constitutions nor expressed them in a manner similar to DPSP (ibid). Despite unresolved questions surrounding the justiciability, legitimacy and legality of ESC rights, there is a consensus that the State must provide social services as advocated by the ESC rights regime. Thus, ignoring ESC rights can result in dire consequences such as disease, poverty and death.

ESC Rights in Botswana

In Botswana, children’s ESC rights are provided through the Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child [ACRWC] (see OAU, 1990; UNICEF-Botswana, 2005) as well as the Children’s Act, 2009 (RoB, 2009).

Children’s Act

The Children’s Act was passed in 2009 and came into effect on 19 June 2009. In August 2006, Cabinet approved the drafting of a Bill to amend the Children’s Act of 1981 (MLG & RD, 2012a). After Cabinet’s approval, a thorough analysis of then Children’s Act
The overarching aim of the amendment was to make children’s laws “compliant with the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, to which Botswana is signatory” (ibid). The Children’s Act aims to protect, promote and fulfill children’s ESC rights in Botswana. It is commendable that Botswana amended the 1981 Children’s Act with a view to “give effect to Botswana’s obligation in terms of the United Nations Convention on the Rights of the Child” (BOPA, 2009, p. 4). In accordance with best practices, the Children’s Act enjoins individuals and courts to act in the best interest of the child. Section 5 provides that “a person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration” (RoB, 2009). In addition, section 6 spells out factors that are used in determining the best interest of the child, principally, the need to protect the child from harm. The Children’s Bill of Rights is provided in sections 9 through 26 and it is important to note that this supplements the rights that are set out in chapter II of the Constitution of Botswana (see RoB, 1997). The Children’s Bill of Rights provides for some of the following: right to life; right to a name; right to nationality; right to health; right to shelter; right to clothing; right to education; right to leisure, play and recreation, right to freedom of expression and right to protection against harmful labour practices.

The Children’s Act guides the work of the Government’s Division of Child Protection Services. Child protection is the portfolio responsibility of the Ministry of Local Government and Rural Development (MLG & RD) under the Department of Social Protection (DSP). The Department is divided into eight divisions, including Community Development, Specialised Services, Family Welfare and Child Protection Services. However, this paper focused on the Child Protection Services. As the name says, the Division of Child Protection Services is charged with providing services to children, including promoting, enforcing and ensuring their ESC rights (MLG & RD, 2011). The Child Protection Services is charged with legislation and policies relevant to child protection with international obligations with respect to children and providing psychological support [training and coordination of psycho-social support services] (MLG & RD, 2012b). Within the Division of Child Protection Services, there are six services:
Orphaned and Vulnerable Children Programme Coordination; NGO Coordination; Child Protection; Monitoring and Evaluation; Special Projects; and Information.

**CRC and ACRWC**

It is important to note that both the CRC (Convention on the Rights of the Child) and ACRWC (African Charter on the Rights and Welfare of the Child) are international child-friendly and child-protecting instruments. The CRC is the first legally-binding international instrument [see article 50] (Butler, 2012) and incorporates a full range of human rights: civil, cultural, economic, political and social rights (UNICEF-Botswana, 2005). It has been called “a landmark in the history of childhood” (Freeman, 1996, p. 1). The ACRWC entered into force on 29 November 1999 (OAU, 1990) and is based on the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.l) that was adopted by then Organization of African Unity during the 16th Ordinary Session in Monrovia, Liberia (17 to 20 July 1979). The Declaration recognised the need to take appropriate measures to promote and protect the rights and welfare of the African Child (ibid). Remarkably, Africa is the only continent with a region-specific child rights instrument (ACERWC, 2012). The ACRWC is an important tool for advancing children’s rights and it is built on the same basic principles as the CRC. Importantly, the ACRWC “highlights issues of special importance in the African context” (ibid, paragraph 1).

Ratification and signing are voluntary. According to the latest ratification table on the ACRWC, 41 African Union member states have signed and ratified while nine have signed but not ratified, and four have not ratified (African Commission on Human and Peoples’ Rights, 2015).

The ACRWC is premised on the fact that African children face a host of problems due to a combination of ESC and traditional factors, coupled with developmental circumstances, natural disasters, armed conflicts, exploitation and hunger (OAU, 1990). Largely due to physical and mental immaturity, they need special safeguards and care (ibid). The ACRWC is composed of 48 articles; Article 1 states that

Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the
provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter (OAU, 1990).

In order to ensure the justiciability of children’s ESC rights in Botswana, both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) have been domesticated into the Children’s Act (see BOPA, 2009). In this regard, Botswana acceded to the CRC in 1995, with a reservation on Article 1, and acceded to the ACRWC in 2001 (UNICEF-Botswana, 2011). In addition, it acceded to the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography in 2003 and also ratified the Optional Protocol to the CRC on the involvement of Children in Armed Conflict in 2004 (ibid).

In carrying out its CRC mandate, the Ministry of Local Government and Rural Development’s Department of Social Protection is assisted by non-state actors, particularly, the United Nations Children’s Fund (UNICEF). In carrying out its job, UNICEF-Botswana is guided by provisions and principles of the CRC (ibid). Currently, UNICEF-Botswana provides technical support in the form of a consultant (interview with UNICEF officer, 25 April 2012). The officer, who is at the Director level and whose salary is paid by UNICEF, is tasked with helping the Department of Social Services to implement the Children’s Act. In addition, UNICEF-Botswana undertakes studies of children’s issues in Botswana and presents their results to law-makers in order to lobby on children’s issues. To illustrate, in 2011, UNICEF-Botswana did a situation analysis of children and their families in Botswana (UNICEF-Botswana, 2011). The study analysed disparities in child well-being, the causes of such disparities, and the capacities required to respond and “was undertaken from the perspective of both the children themselves and of those who have duties and obligations towards them” (ibid, p.vi). In addition, it made policy recommendations to improve children’s wellbeing. On 29 March 2012 the local UNICEF-Botswana representative, Doreen Mulenga, made a presentation to Parliament on the implementation of the CRC. Mulenga stated that statistics “pointed to an ‘unfinished’ development agenda for children” and that “there is a need to expedite the harmonization of all laws and regulations on children which are in conflict with the Children’s Act, 2009 to reflect the principles and provisions of the CRC” (UNICEF-Botswana, 2012, paragraph 5). In addition, she urged the government to submit
outstanding CRC reports.

**The Current Study**

This exploratory study investigated the current state of Botswana’s compliance with its reporting obligations given that it acceded to the CRC and ACRWC in 1995 and 2001 respectively. Six interviews were conducted in April 2012, two with Child Protection specialists at UNICEF-Botswana, four with officers at the Division of Child Protection Services and one in May 2012 with a UNICEF officer seconded to the Division of Child Protection Services. A follow-up email inquiry was sent on September 9, 2014 to the Department of Social Protection for updated information on the current status of information gleaned from the earlier interviews. Telephone and email interviews were also conducted as a follow-up to the personal interviews and also as a validation measure. The interviewees were purposely chosen on account of their unique expertise as Child Protection specialists who deal specifically with the implementation of the CRC, ACRWC and the Children’s Act on a day-to-day basis. The interviews were anonymised. In addition to interviews, secondary data were collected from various sources, for example, books, government reports and newspapers.3

**Discussion**

One of the issues that emerged from the interviews was that asserting ESC rights necessitated their justiciability. That is, all the interviewees agreed that it was futile for the government to grant rights that were not justiciable, either on an adversarial or inquisitorial note. Hence, the interviewees expressed a consensus position that timely and periodic reporting was an essential accountability and justiciability mechanism by contracting member States. Both the CRC (see Article 44, paragraph 1a) and ACRWC (see article 42) provide for reporting mechanisms. Interviewees noted that the government of Botswana was in serious breach of its reporting obligations to both the UN Committee on the Rights of the Child and African Committee of Experts on the Rights and Welfare of the Child. To illustrate, with regard to the CRC, one interviewee stated that the government of Botswana submitted the initial CRC report on 10 January 2003. However, since it acceded to the CRC in 1995, the initial report was submitted late, hence, in contravention of article 44 of the CRC (for confirmation, see UN
Committee on the Rights of the Child, 2004). Further, when the government submitted the initial CRC report, it was advised that in order to help it to catch up with its reporting obligations and to be in full compliance, it had to submit the second and third reports as a consolidated report by 15 April 2007. The interviewees, without variation, stated that the government of Botswana was yet to give effect to the advice. Interviewees noted that the second and third reports, produced in January 2009, were still in draft form. In a related vein, one interviewee stated that then Assistant Minister of Local Government, Maxwell Motowane, promised Parliament on 29 March 2012 that the outstanding CRC reports would be submitted in August 2012. Furthermore, it was pointed out that the fourth States Party report on the CRC was long overdue. In this respect, one of the interviewees stated that work on the fourth report was yet to begin “since the focus is on the 2nd and 3rd reports that were due on 15 April 2007” (interview, 26 April 2012).

With regard to reporting obligations to the African Committee of Experts on the Rights and Welfare of the Child, once again, the initial report has yet to be submitted since it acceded to the ACRWC in May 2001. Notably, Article 38 of the ACRWC specifies that within two years of the entry into force of the Charter, the State Party must submit the initial report. Hence, the government of Botswana should have submitted the initial report in May 2003. All the interviewees expressed the view that the government of Botswana’s failure to be in full compliance with reporting requirements of both the CRC and ACRWC negatively affected the inquisitorial justiciability of children’s ESC rights. However, one interviewee pointed out the importance of considering this compliance issue in context. He stated that this was a systemic problem as sufficiently instanced by failure to produce reports on the implementation of instruments such as the International Labour Organisation’s Conventions (e.g., C138 and C182, which set minimum employment age at 15 and prohibits children below 18 from involvement in hazardous work, respectively) and the UN Convention on the Elimination of all Forms of Discrimination Against Women (ratified in 1996). This interviewee stated that the examples offered did not justify the government’s failure to be in full compliance with reporting requirements of both the CRC and ACRWC. He put it concretely saying that “the failure to report on the implementation of the both the CRC and ACRWC means that
we are failing children in Botswana” (Interview, 26 April 2012).

Other interviewees offered explanations regarding the government’s non-compliance with reporting requirements of both the CRC and ACRWC. Notably, the Department of Social Protection (DSP) interviewees stated that the reporting protocol demanded data that the Ministry of Local Government and Rural Development [MLG & RD] did not have. In this regard, they stated that children’s programmes were implemented by many Ministries. At the same time, there are no desk officers who specifically deal with children’s issues and, therefore, data collection was problematic. They explained that there is a poor culture of record-keeping and reporting (including their parent Ministry). Hence, in some instances, some Ministries either submitted unsatisfactory reports or did not submit at all without consequence. In fact, one of the interviewees stated that the poor quality of the initial CRC report, submitted on 10 January 2003, could be attributed “to the quality of data that was [sic] submitted and we were ordered to provide more data in a follow-up report” (Interview, 26 April 2012). They noted the difficulty in obtaining data from other sources and from other Ministries.

In addition to difficulty in obtaining data and problematic record keeping systems, interviewees from the Department of Social Protection noted that both the CRC and ACRWC reporting formats required specific budget information on children’s programmes. They noted that obtaining this information was problematic because Ministerial budgets were largely aggregated. Thus, it was impossible to isolate children’s programming budgets. In addition, the interviewees stated that they were asked to provide information on budget allocations for categories of people including Indigenous children and AIDS orphans. They stated that that was equally problematic because no specific data were collected on these groups. In a related vein, one interviewee stated that “collecting information on AIDS orphans could be problematic given the stigma that is attached to HIV in Botswana” (interview, 26 April 2012). Similarly, the term indigenous people was a controversial one and also lacked legal definition therefore further complicating gathering information about them. As a result responding accurately according to both the CRC and ACRWC reporting formats was nearly impossible.

Revealingly, the interviewees noted that the Children’s Act was yet to be fully implemented, largely due to lack of regulations (see BOPA, 2012 for confirmation).
According to one interviewee, “the Act is a blue print, hence, the need to develop guidelines to operationalise it” (Interview, 25 April 2012). They explained that the MLG & RD developed regulations in 2009 and forwarded them to the Attorney General’s Chambers for input and final drafting. The regulations have yet to be finalised, submitted to Cabinet and Parliament. Since the regulations were drafted in 2009, one interviewee noted that “there is a danger that they will be out-dated by the time they are released for implementation and also out of touch with recent developments. Hence, they may need to be updated” (interview, 25 April 2012). However, as another interviewee explained, despite the absence of regulations, the Children’s Act is being implemented although in an un-coordinated fashion. Similar to the difficulties noted above regarding reporting mechanisms for the CRC and ACRWC, there is no defined reporting format for the implementation of the Children’s Act yet the Department of Social Protection is expected to produce annual reports on its implementation. The UNICEF-Botswana officer seconded to the Department of Social Protection stated that the absence of the format did not obviate the need to produce these annual reports. He stated that “we are intending to submit the first report to Parliament in July” (interview, 15 May 2012). At the time of this writing, this report has yet to be submitted.

Apart from the difficulties surrounding reporting mechanisms, interviewees noted that troublingly, some public officers were yet to be conversant with the new Children’s Act. As much as the Department of Social Protection continually educates both officers and members of the public on the Act, one interviewee reported that some social workers, police officers, and judicial officers are unfamiliar with it. This becomes problematic given that they must use the Act in their daily dealings with children’s issues, especially social workers. In fact, some service providers still refer to the old Children’s Act (1981) when dealing with children’s issues. To illustrate, during the 2011 public sector strike in which some students rioted in support of their striking teachers and were subsequently arrested, one interviewee stated that “a senior police officer stated that the provisions of the Children’s Act of 1981 relating to children in conflict with the law will be applied in court” (Interview, 25 April 2012).
Follow up Interview

On 12 September 2014, an email was sent to the Department of Social Protection to request an update on the status of the outstanding reports and whether there had been progress regarding complying with reporting requirements of both the CRC and ACRWC since the initial interviews for this research. The Department replied confirming that “CRC and ACRWC reports have not been submitted and we are currently working with UNICEF to incorporate the fourth report on the implementation of the CRC as well as the initial report on the ACRWC” (email, 12 September 2014). Furthermore, it was stated that “a consultant has been engaged to finalise the reports by end of December 2014” (ibid). At the time of this writing (spring 2015), the situation remains unchanged and reports remain outstanding.

Further Thoughts

It is futile to grant rights that are not justiciable. Both the CRC and ACRWC provide for inquisitorial justiciability through Articles 44 and 38 respectively through reporting mechanisms. The government of Botswana has yet to submit requisite reports on time and is in breach of its reporting obligations. While there are a number of systemic issues that emerged from the interviews conducted for this exploratory study involving the quality and accessibility of data, cooperation between departments to share data, and problems with distinguishing children’s programming data in existing budgets, the implications for children’s ESC rights remain. As Matias (2011: 365) argues “rights are tools of empowerment.” Without country reports regarding how children’s ESC rights are being respected and upheld, children can suffer disempowering effects. Moving forward, a few key recommendations are offered in view of the urgency of this point.

First, in order to produce reports in a timely manner, it is a pre-requisite that accurate and up-to-date records be kept. It was apparent from the interviews that poor record-keeping was a systemic problem that made the production of reports impossible. Hence, it is imperative that there be a culture of good record-keeping in the public sector and government officials must build capacity for both recording-keeping and archiving training.

Second, while the implementation of the Children’s Act is an onerous task beyond
the Ministry of Local Government and Rural Development that involves many service providers including social workers, police officers and judicial officers, training is required to enable them to implement the Children’s Act in their everyday activities. It is worrying from preliminary information gleaned from interviews that some of these implementing officers are not conversant with the amended Children Act (2009) while others still refer to the 1981 Act (see Interview, 25 April 2012).

Third, there is a need to educate officers as to the importance of their responsibilities to comply with reporting processes and to provide data to those seeking to complete reports. It appears from this exploratory research that the quality of the reporting process needs to be significantly improved, including compiling information in a timely and efficient manner so that they can be used in CRC and ACRWC reports. While there are no consequences at this time for non-action on compliance as per the Botswana Public Service Customer Service Standards, this might be a consideration in future.

Fourth, Botswana should be encouraged to ratify the third Optional Protocol to the CRC on a communications procedure approved by the UN General Assembly on 19 December 2011. This allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. Ratification will force the government to comply with reporting obligations because children will report it to the UN Committee on the Rights of the Child if it continues to fail to report.

Fifth, for children’s ESC rights to enjoy ultimate legal protection and justiciability, they must be enshrined in the constitution. Hence, Botswana can utilize lessons learned from approaches implemented in South Africa, Namibia, Ghana and Uganda (see Mubangizi, 2006). South Africa, in particular, is the pioneer in this regard (see Verma, 2005) and its courts often affirm ESC rights (see Liebenberg, 2002). Alongside entrenching children’s rights in the constitution, it would be important for Botswana to establish a proper Monitoring and Evaluation (M&E) mechanism such as the results-based M & E tool called SMART (Specific; Measurable; Attainable; Realistic; and Time-bound).

Finally, a Children’s Rights Ombudsperson must be appointed in order to audit the implementation of children’s ESC rights by drawing from best practices (e.g., see Kilkelley,
In terms of benchmarking, Botswana can benchmark from the region including Mauritius (the first county to establish a Children's Rights Ombudsperson in Africa), Namibia, and South Africa and further afield from the European Network of Ombudspersons for Children and Norway (the first government in the world to establish an office of a children's ombudsperson in 1981).

**Conclusion**

The promulgation of the Children’s Act in 2009 ushered in a new era regarding children’s ESC rights in Botswana. The Act incorporates both the CRC and ACRWC. However, for rights to have a meaning to the grantee, they must be asserted. Thus, rights must lend themselves to justiciability. Regarding the CRC and ACRWC, inquisitorial justiciability is effected through reporting obligations. States Parties are enjoined to submit an initial report and subsequent ones. Unfortunately, Botswana is presently in breach of its reporting obligations. Moving forward, Botswana must achieve oft-repeated assertions that it is child-friendly by speedily and fully implementing the Children’s Act and also fulfilling its CRC and ACRWC reporting obligations. When it does so, it will burnish its credentials as a child-friendly nation.

**Acknowledgments**

This paper draws from and expands on research and data used in previous work by the author;

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**Notes**

1 The African Commission hears cases relating to the violation of socioeconomic rights protected by the African Charter.

2 The author also interviewed the said officer.

3 The secondary data sources refer to books, government reports, publications by organisations such as UNICEF and newspapers. Most of the information on reporting obligations was gleaned from these reports, for example, UNICEF-Botswana (2011); *The Situation Analysis of children and their families in Botswana; Summary Report: Findings and Recommendations to Policy Makers, 2010/11*; UNICEF-Botswana. 2012. *Botswana Parliament discusses the “unfinished” development agenda for children, the implementation of the Children’s Act (2009) and the role of the National Council for Children; and newspapers (BOPA, 2009; 2012).*

4 Indeed, on 29 March 2012, then Assistant Minister of Local Government, the late Maxwell Motowane, told parliament that State Party Reports on the CRC would be submitted to the UN Committee on the Rights of the Child by August end 2012. As of the time of this writing, these reports have not been submitted.