

Social Assistance and Legal Aid in Botswana

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How to cite this paper: Solo, K. (2022). Social Assistance and Legal Aid in Botswana. *Beijing Law Review*, 13, 111-118. <https://doi.org/10.4236/blr.2022.131007>

Received: February 16, 2022

Accepted: March 8, 2022

Published: March 11, 2022

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Abstract

This paper considers social assistance rendered to indigent persons in various forms in Botswana. It considers and explores the role of Legal Aid Botswana and that played by the University of Botswana Legal Clinic. Although the role of the Legal Aid Botswana is significant and extensive in coverage, it has a limitation in that it does not generally cover criminal matters. An attempt is made in the paper to explore other methods of assistance to indigent clients. The role of Non Governmental organisations is also explored. Legal Aid programmes linked to University law clinic in South Africa are considered for comparative purposes.

Keywords

Legal Aid, Social Assistance, Legal Representation, University Law Clinics, Pro Bono, Pro Deo

1. Legal Aid in Botswana

Legal Aid denotes a situation where indigent persons are provided with legal aid for free. It is a means of providing legal services to persons who are unable to pay fees for legal services (Olivier et al., 1999). It is a form of social assistance. It is a safety net for those who support in terms of the system, in general is insufficient (Olivier et al., 1999). Such provision of legal aid makes it impossible for any person to be denied equal protection of the law on account of poverty (Olivier et al., 1999). In the past legal aid was generally provided by attorneys to indigent persons as a contribution on their part towards the charitable service to the community. Attorneys were not obliged to do so but did it out of their charitable conscience (Olivier et al., 1999). They were giving back to the community what they got from it. This empowered people to overcome their barriers to equality and justice (Olivier et al., 1999).

The paper explores the role of Legal Aid Botswana and the extent to which it

is committed to providing legal services to indigent members of society in Botswana. The paper also explores the extent to which the University of Botswana Legal Clinic fills the gap left by the Legal Aid Botswana in the provision of Legal Services in the country.

An attempt is made in this paper to explore other methods by which indigent persons may be assisted which include the Judicare System, Salaried employees system and the part played by Non Governmental Organisations in the country.

Other methods of assistance include the Small Claims Court, the ProDeo System and Informa Pauperis Proceedings. These methods ensure that some form of assistance whether means tested or not would in one way or another be available to an indigent person.

Legal aid is a form of social assistance. It is one of the segments of social security. While other countries have provided it in their constitutions that certain individuals should be entitled to legal aid in certain circumstances, others do not do that. The objective of social assistance is to alleviate poverty through amongst other things, the provision of minimum income support or assistance in kind.

2. Bill of Fundamental Rights and Freedoms of the Individual

Botswana has a bill of rights entrenched in the constitution. Section 10(2) of the Bill of Rights in the Botswana constitution provides that if any person is charged with a criminal offence, he shall be given adequate time and facilities for the preparation of his defence; and shall be permitted to defend himself before the court in person, or at his own expense by a legal representative of his own choice. The above provisions have been interpreted to mean that the state is not obliged to pay for the accused's legal representation or indeed any indigent person. In *Lazarus Marumo V The state*, High Court Crim. Appeal F32 of 1990, Livesey Luke proceeded to state that this subsection clearly conveys on every accused person a fundamental right to be given adequate time and facilities to prepare for his defence and a fundamental right to defend himself or to be defended, at his own expense, by a legal practitioner of his choice.

On a comparative note, in South Africa, the 1996 constitution entrenches a person's right to be represented in certain circumstances at state's expense. Section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.

Section 28 (1) (h) of the constitution of South Africa provides that every child has the right...to have a legal practitioner assigned to the child by the state, and at states expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.

Section 35 (2) (c) states that: "Everyone who is detained, including every sentenced prisoner has the right...to have a legal practitioner assigned to the detained person by the state, and at states' expense, if substantial injustice would

otherwise result and to be informed of this right promptly.”

Section 35 (3) (g) states: Every accused person has a right to a fair trial which includes the right...to have a legal practitioner assigned to the accused person by the state and at states expense, if substantial injustice would otherwise result and to be informed of this right promptly. The term “substantial injustice” has been interpreted by the South African Legal Aid Board to mean facing a charge in a criminal matter where a prison sentence without the option of a fine could be imposed (Olivier et al., 1999).

The South African constitution places an obligation on the state to ensure the provision of legal assistance to certain categories of persons. Indeed everyone who is detained including every sentenced prisoner and children fall within the category of persons entitled to legal aid in South Africa.

3. Legal Aid Botswana

Legal Aid Botswana provides legal services such as advice, legal representation in the magistrates court, High Court, Industrial Court, Land Tribunal and the Court of Appeal of Botswana. It also conducts public legal education on legal rights and responsibilities (Legal Aid Botswana Act 2015). It offers these services through its salaried legal practitioners employed by Legal Aid board and by private lawyers through the Law Society of Botswana.

Botswana Citizens who cannot afford a lawyer but have a reasonable chance of winning their case are covered. They have however to undergo a means test. Salaries or wages, commissions, bonuses, rentals, investments, allowances, subsidies, maintenance and grants received are considered when one undergoes the means test (Legal Aid Leaflet, 2015). Sometimes one may have to make a contribution in order to be assisted. No contribution is required if one earns less than P2000.

Where Legal Aid Botswana succeeds in helping a client to recover or claim a financial benefit, a small percentage of such a claim is required to be paid to Legal Aid Botswana. No percentage is required on the first P20000. The money would be payable upon actual recovery.

Legal Aid covers matters relating to family law, land, labour law, contract law and the law relating to damages, e.g., car accidents (Legal Aid Leaflet, 2015). This list is not conclusive. Criminal trials are not covered except for persons under the age of 18 years. Customary court and small claims court representation is not allowed. Preliminary Industrial mediation is not covered. Maintenance claims except where the other party is legally represented are not covered.

The vision of Legal Aid Botswana is justice for the poor. Its mission is taking quality legal services to the poor through education, advice and legal representation (Legal Aid Leaflet, 2015).

As indicated above, Legal Aid Botswana does not cover assistance in criminal matters except for persons under the age of 18 years. This is a serious shortcoming in the matters of access to justice. Justice should be accessible to all irrespective of whether the matter is civil or criminal. Legal Aid Botswana would do well

if it covered labour matters from inception to conclusion. There is no reason why pre industrial mediation is not covered if other labour issues are covered. Proposals are at an advanced stage for Legal Aid to cover individuals with criminal matters before the courts. It is not known whether government will accede to that request.

4. The Legal Clinic and Dual Role

As alluded to above, the Law Department of the University of Botswana runs a Legal Clinic. Its main objective is to provide training for law students intending to practice law in Botswana. The Legal Clinic plays a crucial role in the provision of practical skills training. It offers law students an opportunity to acquire and improve upon their skills in real legal problems. Since law students are required as part of their curriculum to work in the Legal Clinic, they acquire skills related to interviewing clients, deciphering and analysing legal problems, researching appropriate legal solutions, and seeking the implementation of those solutions in a legally acceptable manner.

The Legal Clinic has a second, social function. Its services are primarily available to members of the public who can least afford to pay for legal support in the commercial legal market. A means test is administered to determine whether a potential client is sufficiently indigent to be assisted by the Legal Clinic.

The Legal Clinic is thus talked of as one of the few legal aid schemes in the country. This is a social function very much appreciated by its clients and the general public. It is a function that has contributed immeasurably over the years to the positive image of the department of law and of the university. But it is a function which also brings to the fore the issue of costs, and of whether the university should be the institution through which such social services are extended.

The positive public and political image notwithstanding, the role of the Legal Clinic in the provision of legal aid services should not be exaggerated. It was set up primarily as a teaching tool, for the attainment of specific objectives of the law programme. It ministers mainly to indigent persons and social groups, partly so as not to be seen as competing with traditional providers of legal services. The way it is structured within an academic setting, and the support it receives from the university, although extremely valuable, would not justify the Legal Clinic being projected as a true legal aid scheme.

5. State Funded Judicare System

This involves referring successful legal aid applicants to practitioners in private practice (Olivier et al., 1999). Such practitioners provide the necessary legal services to the applicants and are remunerated by the board in terms of a fixed tariff laid down by the board and agreed to by the legal profession (Olivier et al., 1999). These practitioners provide legal services in accordance with the rules and regulations laid down by the Board from time to time (Olivier et al., 1999). Indigent persons are in that way assisted by this form of community service of-

ferred by legal practitioners who make their expertise, time and experience available for the indigent persons' cases (Olivier et al., 1999).

For the first twenty years of its existence, the Legal Aid Board in South Africa provided legal aid by means of *judicare* (Quansah, 2007). The system worked fairly well when there were comparatively few cases; its advantage being to provide clients with access to skilled and experienced private legal practitioners, greater freedom of choice in who they want to represent them, and the involvement of the local bar in providing services to indigent clients (Quansah, 2007). The downside was that it was expensive and difficult to access and ensure quality services from participating practitioners (Quansah, 2007).

5.1. State Funded Public Defender Programmes in South Africa

Public defenders are full-time salaried lawyers employed by the Legal Aid Board and they deal primarily with criminal cases where the accused has a constitutional right to legal representation in trials and appeals (Quansah, 2007). They are legal interns in the district courts and qualified lawyers in the regional and High Courts and are operating at justice centres throughout the country (Quansah, 2007). This model of legal aid delivery is said to be considerably cheaper than the *judicare* model. However, it has been suggested that a fully-fledged system of public defender offices is likely to prove too expensive for small developing countries. In light of the South-African experience, this model may prove too costly for Botswana (Quansah, 2007).

In South Africa this programme was launched as a pilot programme in Johannesburg in 1992 and subsequently converted into a permanent office in 1997 (Olivier et al., 1999). Its aim was to address the problem of legal representation in criminal cases (Olivier et al., 1999). Later on in 1996, a further office was established in Soweto (Olivier et al., 1999).

Qualified, admitted attorneys and advocates, candidate attorneys and administrative personnel are employed at these offices and paid a monthly salary by the legal aid Board with the object of representing indigent accused in criminal cases and until recently in civil matters.

5.2. Legal Aid Board University Law Clinics

These are distinct from Independent University law Clinics (Olivier et al., 1999). In South Africa in 1994, the Legal Aid Board entered into cooperation agreements with about 21 universities (Olivier et al., 1999). In terms of this agreement, the Legal Aid Board undertook to employ attorneys to act as principals for candidate attorneys and also to pay the salaries of the candidate attorneys who would render legal services to indigent persons at such university law clinics (Olivier et al., 1999). The university undertook to make infrastructure and certain other services available. The idea was to render legal services to communities where the demand was great. Legal aid clinics provided legal aid in terms of the rules and regulations set down by the legal aid board and only to indigent persons who satisfied the means test or had a constitutional right to legal aid.

The services rendered are in both civil and criminal matters.

5.3. Independent University Law Clinics

The objective of these clinics is to provide practical legal training for law students as well as to provide free legal services to indigent people (Olivier et al., 1999). These clinics operate with a director as head and candidate attorneys under supervision and a means test that is administered. Independent Law Clinics play a valuable role in providing social as well as legal services to the poorer members of the community. They supplement the work of the Legal Aid Board and Legal Aid Clinics (Olivier et al., 1999).

6. Non-Governmental Organisations and Legal Aid

Apart from the above, there are many NGOs that provide legal services to the poorer members of the community (Olivier et al., 1999). They play an important role in making legal services accessible to people in rural and marginalised areas. They provide grass root access to justice through their network of satellite legal advice centres. They counsel, advice and refer people to the relevant places where they can be assisted. They do casework and research, negotiation, mediation, human rights education and representation of clients amongst other things (Olivier et al., 1999). These non-governmental organisations are funded mainly by the private sector and foreign donors in order to enable them to provide social and legal services. They have established a good record by the assistance that, they have rendered over the years to communities and individuals. They play a very important role in making legal services accessible to people in rural and marginalised areas. They are organisations that provide grassroots access to justice through their network of satellite advice centres (Olivier et al., 1999).

Ditshwanelo—The Botswana Centre for Human Rights

Ditshwanelo is a locally based NGO founded in 1993 and which plays a key role in the protection and promotion of human rights in Botswana society (Quansah, 2007). The organisation seeks to educate, research, counsel and mediate on human rights issues, with particular reference to those who are marginalised and disempowered. One of Ditshwanelo's endeavours, with respect to the promotion of access to affordable legal assistance, has been the establishment of a satellite office in the Gaborone suburb of Old Naledi (Quansah, 2007). This community consist primarily of unschooled low income earners, who are the most in need of accessible legal assistance. Ditshwanelo has, over the years provided legal assistance in some public interest cases (Quansah, 2007).

7. Small Claims Court

The small claims court is also a type of legal assistance made available not only to indigent persons but also to the community at large. This is an excellent forum where people have access to justice.

The small claims operate in the Magistrate courts of Botswana and have limited powers as prescribed by the Act ([Government of Botswana, 2021](#)). The proceedings of the court are open to the public but may be held in private (in camera) for reasons of confidentiality or other special circumstances ([Government of Botswana, 2021](#)).

This court is only open to natural persons (not available to corporations) except as defendants or counter-claimants. The objective of Small Claims Court is to provide simplified procedure and allow access to justice for those without the means to engage lawyers for claims which are within the powers of the court ([Government of Botswana, 2021](#)).

The Small Claims Courts' jurisdiction is limited to a maximum of BWP 10,000.00.

Key characteristics of the small claims court:

- The atmosphere in the court is relaxed and informal.
- The proceedings are conducted in any of the official languages of Botswana.
- Lawyers are not allowed to represent parties in that court.
- The court may allow or call additional witness(es) to give evidence.
- Interpreters are provided for those who do not understand any of the official languages used in court.
- If a plaintiff is unable to prepare their own documents, the clerk of court is available to assist.
- Strict rules of evidence do not apply in the court and cases before the court must be completed in one session.
- The order of the court is final and cannot be appealed against but can be reviewed on the grounds that the court did not have jurisdiction over the matter.

8. Pro Deo or Pro Bono Legal Aid

Private practitioners have a duty to assist clients who have a deserving case and cannot afford to pay for legal fees on a pro deo basis. The agreement between the attorney and the client would be that if the client succeeds, the attorney would be entitled to receive the costs recovered.

Under section 56 of the Legal Practitioners Act 1996, every member of the Law Society is committed to rendering pro deo or pro bono work ([Quansah, 2007](#)). This requires the court to assign practitioners to cases in which a party, usually an accused person, cannot afford the services of a lawyer to handle their case at a nominal fee ([Quansah, 2007](#)). Currently, it is court practice that an accused, usually charged with murder, and who cannot afford legal representation, be assigned a lawyer by the court to help with his/her defence and that, in the interest of justice, the accused has legal aid ([Quansah, 2007](#)). Such aid may be offered after consultation between the presiding judge and the Registrar of High Court ([Quansah, 2007](#)).

Informa Pauperis Proceedings

This system is administered through the offices of the Registrar of the High

Court of Botswana. Successful applicants are referred to practitioners by the Registrar for assistance. Such practitioners have to render their services gratuitously unless the indigent person succeeds and is awarded costs.

9. Conclusion

In Botswana, the major players in the provision of legal aid are the Legal Aid Botswana and the University of Botswana Legal Clinic. Whilst the Legal Aid Botswana provides assistance to poor litigants to a significant extent, it is not enough. It only provides assistance in civil cases and in very limited situations in criminal cases. Legal Aid Botswana is grappling with the issue of how to expand its provision of services to criminal matters and the Government of Botswana is still to accede to that request.

The University of Botswana Legal Clinic on the other hand provides assistance to indigent members of the society but its contribution is only marginal. It has resource constraints and was mainly designed to equip students with lawyering skills.

The pro bono system also does work in Botswana. Its efficacy depends on the willingness of lawyers generally to assist indigent persons in the society.

State funded public defender programmes, Legal Aid Board University Law clinics and Independent University Law clinics are found in South Africa and are mentioned in this discussion for comparative purposes. It is only when Botswana emulates South Africa with regard to the above that we can truly say that there is social assistance and Legal Aid in Botswana.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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