

# Access to Justice in Botswana

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## Abstract

This article seeks to find out if Botswana has achieved complete access to justice for all her citizens. It makes a case for a more radical and comprehensive approach that focuses on promoting access to justice and systemic change. Over the years there has been substantial growth both in the economy of the country and the development of institutions which deal with the administration of justice. On a historical note, the High Court was first established in Bechuanaland in January 1939. From the establishment of the High Court in 1939 until 1955, appeals from that Court were taken to the Judicial Committee of the Privy Council in London. The establishment of the Court of Appeal meant that appeals were no longer taken to the Privy Council. The country currently has a total of four High Court divisions; one in Lobatse, Francistown, Gaborone and Maun. In 1966, Botswana had only two Magistrate Courts, one in Lobatse and another in Francistown. Currently, there are many Magistrate Courts in Botswana. In addition to these formal courts, there are Customary Courts which have been estimated to be dealing with about 80% of cases in this country.

## Keywords

Access to Justice, Customary Courts, International Instruments, Barriers to Justice, Role of Chiefs

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## 1. Introduction

The object of this paper is to trace access to justice in institutions in Botswana together with its customary courts. The term access to justice has been defined to mean an individual's ability to seek and obtain an effective resolution of conflict and redress for wrongs (Morhe, 2011). The United Nations has held that these remedies or redress should be claimed through formal or informal institutions of justice, and in conformity with human rights standards (Lasnet, 2015). Access to justice is a fundamental right and every country, either developed or

developing, must ensure that every one has access to justice in Court (Morhe, 2011). In the quest of ensuring accessibility in Botswana, the government and its institutions has come up with solutions to tackle the access to justice challenges. This solution includes the establishment of Legal Aid Botswana. Legal aid is a system that enables those who cannot afford the services of a lawyer to receive financial assistance in order to assert their legal rights and this promotes access to justice for the most vulnerable in society (Quansah, 2007). Some other solutions involve the establishment of Small Claims Court and the continued use of Customary Courts. In addition to this, in 2018 the University of Botswana opened a Legal Disability Clinic and this clinic helps people with disabilities through the University of Botswana students supervised by law lecturers (Dipholo, 2019). Government intends dispersing the Small Claims Courts around the country rather than being available in Francistown and Gaborone only (Kgagamatso, 2019). This will improve access to justice especially among the marginalized groups and those who are far from cities, towns and major villages.

## 2. International Framework

The Constitution of Botswana is silent on the status of international instruments. As such, treaties ratified by Botswana do not automatically create rights and obligations enforceable by the domestic Courts. This article will discuss some of these instruments.

### 1) International Covenant on Civil and Political Rights

Article 9 in its entirety looks at the procedural aspects of justice, focusing on the role of institutions' fair outcomes (UN, 1966). It mandates effective remedies for persons whose rights or freedoms are violated and judicial authorities within the legal system to adjudicate these rights, and provide meaningful remedies (UN, 1966).

Article 26 of the above covenant provides that all persons are equal before the law and entitled to equal protection of the law, without discrimination based on any characteristics laid out therein (UN, 1966). These include race, color, sex, language, religion, political or other option, national or social origin, property, birth or other status (UN, 1966).

### 2) The Convention on the Elimination of All Forms of Discrimination against Women

Article 2 stipulates that state parties must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, including through the establishment of competent national tribunals and other public institutions to ensure protection of women against discrimination (UN, 1979).

Article 15 of the Convention provides that women and men must have equality before the law and benefit from equal protection of the law. The Convention lays out the need for appropriate measures to ensure that women can exercise and enjoy their human rights and fundamental freedoms on a basis of equality with men (UN, 1979).

### 3) The Universal Declaration of Human Rights

Article 7 of the Declaration recognizes that all are equal before the law and are entitled without any discrimination to equal protection of the law and all have rights to an effective remedy by the competent national tribunals for any violation of their rights (UN, 1948).

### 4) The African Charter on Human and People Rights

Article 7 recognizes to right of every individual to have his cause heard and this includes the right to defense, including the right to be defended by counsel of his choice (AU, 1981).

## 3. Barriers to Access to Justice in Botswana

### 1) Psychological barriers

The formal Courts usually require complex procedures, and this complicates matters especially for illiterate people. Those who are illiterate may refrain from seeking justice when there is need. Complicated procedures, detailed forms, intimidating court rooms and over bearing judges and lawyers make the litigant feel lost (Lasnet, 2015). The other issue is lack of awareness i.e. psychological willingness of people to resort to legal procedure (Lasnet, 2015). It has been held that even those who know how to find qualified legal advice may not do so. Lack of knowledge about legally enforceable rights by the underprivileged, and ignorance about available facilities and how to use them is a challenge (Lasnet, 2015).

### 2) Economic barriers

Legal Aid Botswana aims to help litigants especially the vulnerable with legal aid and this is a welcome initiative because litigation is quite costly. Though government has provided the machinery for dispersing justice to the people and pays salaries of judges and other court personnel, provides buildings and other facilities necessary to try the cases, litigants have to bear other costs of settling disputes such as attorney's fee and it is argued that a party with better resources can employ a better lawyer and use better techniques to win the case (Lasnet, 2015).

Generally this affects access to justice as some litigants go to court unrepresented by a lawyer. Legal representation is vital under the adversarial system of justice, in which parties to court proceedings are left on their own to fight it out, the judge rarely intervenes in the combat and when applied to criminal proceedings, the adversarial system may result in prejudice to the accused, where liberty or life and limb are at stake (Mogotsi, 2014). The other issue is the dilatory judicial process which affects the less privileged because the more the case is delayed, the more the cost of litigation. It has been argued that this puts great pressure on the economically weak and gives advantage to the rich. It is contended that the poor end up settling for much less than his or her legitimate claim. It is argued that the wealthy are at an advantage because they are able to withstand litigation delays, which generally compromise access to justice.

### 3) Geographical barriers

Generally, Botswana has High Courts and magistrate courts spread across the country. However, the availability of the courts has not been completely accomplished. Availability of courts is a major concern for access to justice and it may become physically or economically impossible for most of the disputants to use the courts when they are in far off places (Lasnet, 2015). This imports inconvenience to them and it may become impossible for them to use courts for small dispute claims. The establishment of the Small claim courts was a great initiative but the current problem is that they are only available in Gaborone and Francistown.

## 4. The Role of Customary Courts in Ensuring Access to Justice in Botswana

The Customary Courts in Botswana settle an estimated 80% of the total disputes in this country. This might be due to several reasons such as the cost of litigation in formal courts. Customary Courts proceedings are usually conducted in local languages, and the principles involved are often simple, clear and easy for members of the community to understand. Customary Courts are easily accessible in rural areas and they don't have complex and archaic procedures found in formal courts. Litigation in Customary Courts is much faster than in the formal courts. Customary Courts have long been in use before the advent of colonization.

Before the advent of colonial rule, chiefs were the political and judicial heads of the various African communities. The primary role of the Chief was to govern and to ensure social stability and order (Morhe, 2011). Chiefs and elders resolved disputes within their various communities and also had powers to enforce their decisions (Morhe, 2011). Chieftainship was the central feature of Tswana political organization and the Chief presided over disputes (Dingake, 2000). Advocate Duma Boko has argued that part of the reason the British left the Customary Courts system in place in Botswana was the realization that the native court structures were closely similar to their highly sophisticated judicial system (Boko, 2000). The Customary Courts continue to administer justice in Botswana even today but they have received heavy criticism for the following reasons:

1) Some people have expressed concern that the courts apply "customary law" which discriminates against women and children (Morhe, 2011). It is argued that human rights are very crucial for all human beings and any law which violates the rights of people should be condemned. Some people hold the view that some Chiefs lack formal education hence they do not value human rights.

2) The customary courts are criticized because the remedies, even in criminal cases are usually not geared towards punishment of perpetrators but rather towards fixing relationships in society (Boko, 2000). Many people argue that by doing so justice is not accordingly served. The other accusation is that customary courts do not follow the common law principles of judicial precedent and that the cases are uncertain, unpredictable, unreliable and not uniform (Mogotsi,

2014).

3) Others question whether customary courts should have criminal jurisdiction. Concerns are raised because the rights of accused guaranteed under constitutions, like the presumption of innocence and the right to remain silent and to be represented by a lawyer, are absent in the Customary Courts (Morhe, 2011). The Customary Courts Act explicitly prohibits legal representation under any circumstances, and it is submitted that the prohibition of the right to legal representation no matter how justifiable, is ultra vires the constitution (Mogotsi, 2014). It is contended that criminal cases should be abolished from the customary courts because of the issue of lack of legal presentation of the accused (Mogotsi, 2014).

4) Customary Courts have been accused of not being impartial. It is argued that the Chiefs preside even in cases where they are related to the parties in disputes e.g. a relevant example can be drawn from the case of State vs Mogatse, where the Headman who was hearing the case was related to the accused. It is submitted that the law and practice of appointing Chiefs has nothing to do with qualifications in various customary law across Botswana but has everything to do with being a certain family member. Consequently it is submitted that this situation alone is evidence of injustice prevailing in the customary system of courts (Mogotsi, 2014).

5) The other criticism of the Customary Courts in Botswana has been on the appointment of these Chiefs by the Minister. The Minister is a politician, and his decision to appoint someone who presides over cases is questionable.

The Customary Courts have been the backbone to access to justice in rural areas. This article supports and encourages the continued use of customary courts despite the above mentioned criticisms. These courts ensure that all people have access to justice including the less privileged. In order to ensure justice for all, courts must be available, accessible and affordable to the ordinary man (Morhe, 2011). The Chiefs' role as arbiters in criminal matters should not be overlooked and it is convenient to use them because they are already in existence (Morhe, 2011). In addition Customary Courts enjoy support from a larger section of the society mainly because they are seen to be an integral part of the culture of Botswana (Mogotsi, 2014). Future policies directed towards providing access to justice must take account of the Chief's role and their input in the justice system (Morhe, 2011).

## 5. General Recommendations to Improve Access to Justice in Botswana

Legal education should be provided to the less privileged. Empowering low-income client litigants also requires educating them on the court procedures (Macdowell, 2015). This type of education includes teaching client-litigants about the language of Court, including legal terminology and verbal presentation and etiquette (Macdowell, 2015). Legal education can be a key part of the process of

democratization, in which the public gains the knowledge necessary to understand and participate in its form (Macdowell, 2015).

In order to improve access to justice, modern reforms in dispute resolution include encouraging the use of informal courts and making legal aid services accessible (Morhe, 2011). Some people have argued that Legal Aid Botswana was only accessible in cities, towns and major villages only.

There should be human rights training programs for Chiefs (Morhe, 2011). The program should train Chiefs on how to preside on issues relating to gender based violence. Customary Courts need to be modified by law to regulate their activities and to make them conform to human rights standards (Morhe, 2011).

The government should seriously consider granting the University of Botswana Legal Clinic an annual subsidy for administrative running costs as this will enable the University to increase the staff complement of the law department, enabling it to employ a full-time Director and staff who will be attached exclusively to the clinic (Quansah, 2007).

## 6. Conclusion

Access to justice is a fundamental human right and is indivisible from the other genres of human rights. It may in certain instances be a prerequisite for the realization of civil, political, economic and social rights (Lasnet, 2015). The full realization and enjoyment by the marginalized and vulnerable groups may depend on rights based approaches that equip communities to know and assert their rights (Lasnet, 2015). In the light of these statements, Botswana has through the years have been developing and gearing towards ensuring that the country meets the international standard requirement of human rights. The country still lags behind issues such as the establishment of the human rights commission and ratification of conventions. Ensuring access to justice has been a concern to all the countries therefore one can conclude by stating that Botswana is not yet there but the commitment of being there is highly visible.

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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