

EDUCATING LAWYERS FOR TRANSNATIONAL CHALLENGES: PERSPECTIVES OF A DEVELOPING COUNTRY – BOTSWANA

INTRODUCTION

Botswana is a landlocked country in Southern Africa. It is approximately 581,730 square kilometres in size, two-thirds of which is covered by the Kalahari Desert. The population is some 1.8 million people, almost all of them indigenous Africans. Ethnically, the country is more or less homogeneous, the overwhelming majority of the people being Tswana and speaking the Setswana language.

Botswana was declared a British Protectorate in 1891 and attained independence on September 30, 1966. It adopted a British parliamentary system with a written Constitution containing a justiciable Bill of Rights. Unlike most African countries, Botswana has enjoyed continuous and uninterrupted Constitutional rule marked by regular, free and fair elections, political pluralism, an independent judiciary and incremental realisation of economic and social rights.

The general legal system of Botswana is a mixture of Roman-Dutch law¹ and English Common law² with statutory enactments being dominant since independence. The mixture was a result of the Botswana Protectorate General Administration Order 1891, s.19 (later amended) which provided for the application of all the laws in existence on 10th June 1891 in the then Cape of Good Hope in South Africa. These imported laws have since operated in a fast-changing socio-economic environment with sporadic attempts to adapt them to the evolving circumstances.³ There are provisions⁴ for the application of customary law in disputes between “tribesmen”⁵ and

¹ The law originally introduced by Dutch settlers into the then Cape of Good Hope in South Africa in 1652, which was later, received into Botswana as part of its common law. See A Molokomme “Reception and Development of Roman-Dutch Law in Botswana” (1985) 1 *Lesotho Law Journal* 121.

² See EK Quansah *Introduction to the Botswana Legal System* Pula Press, Gaborone, 2000.

³ Significant among such adaptations are the Penal Code 1964, Married Persons Property Act 1970 and Matrimonial Causes Act 1973.

⁴ See the Customary Law Act 1962.

⁵ Section 2 of the Customary Law Act defines a “tribesman” as any member of a tribe or tribal community of Botswana or of any other country in Africa prescribed by the relevant minister by order published in the Government Gazette for the purposes of the Act.

non-tribesmen with a further provision⁶ under which a non-tribesman may be subject to customary law with his/her consent.⁷

There is a “dual” system of courts in which the common law and customary law courts are integrated in a single hierarchy. The common law is primarily applied in the Court of Appeal, the highest court,⁸ the High Court and the Magistrates’ Courts. The customary law is primarily applied in the Customary Courts although there is a general provision enjoining all courts in Botswana to apply customary law in all cases and proceedings in which that law is the proper law.⁹ The Court of Appeal has mainly appellate jurisdiction and as the guardian of the Constitution has the final word as to the constitutionality of legislation enacted by Parliament or any act done by the Executive.¹⁰ The High Court has unlimited original jurisdiction in both civil and criminal matters as well as in the enforcement of the fundamental human rights provisions of the Constitution. It also exercises appellate jurisdiction in cases originating from the magistrates and customary courts. Customary courts, on the other hand, deal with customary law matters but may also exercise criminal jurisdiction in accordance with the limits set in the warrant establishing the particular court.

HISTORY OF LEGAL EDUCATION IN BOTSWANA

Formal legal education in Botswana started with the establishment of the Department of Law in the then University of Botswana, Lesotho and Swaziland (UBLS) at Roma in Lesotho in 1964. The Department was created on the recommendation of a Report by Prof. LCB Gower, an eminent English jurist, and was linked to the Faculty of Law of the University of Edinburgh in Scotland. Amongst the reasons given for the linkage were, the lack of sufficient number of students to justify a fully-fledged local Bachelor of Laws (LLB) programme, the financial advantages of such arrangement

⁶ Section 10 Customary Law Act.

⁷ See also s. 6 Common Law and Customary Law Act 1969.

⁸ Up till 1973, the highest court was the Judicial Committee of the Privy Council. Appeals to that Committee was abolished by the Judicial Committee (Abolition of Appeals) Act 1973.

⁹ See s. 5 Common Law and Customary Law Act.

¹⁰ A landmark decision of the court in *Attorney-General v. Unity Dow* (1992) BLR 119 held, inter alia, that s. 4 of the Citizenship Act 1982 (as amended) infringed the fundamental rights and freedoms of the respondent as guaranteed under s. 3, 14, and 15 of the Constitution. This decision led to the enactment of the Citizenship Act 1998 to take into account the decision of the court.

over other alternatives such as sending students abroad for their legal training or study for the English Bar and the closer affinity of the Scottish legal system to the Roman-Dutch common law system operating within the three countries as compared with the English common law system. The LLB degree was conferred after a successful completion of a five-year course of study. The programme was divided into three parts, namely, part one which consisted of two years study in Roma, part two, which consisted of a further two years of study at Edinburgh and part three, a final year at Roma.

In 1975, the Lesotho Government withdrew from the tripartite arrangement and Botswana and Swaziland established the University of Botswana and Swaziland (UBS) in 1976 with two constituent campuses at Kwaluseni, Swaziland and Gaborone in Botswana. The Kwaluseni campus continued with the LLB programme as developed under the tripartite arrangement. In 1980, Swaziland decided to terminate the Edinburgh linkage and wholly localise legal education. As a result of this decision, students from Botswana were withdrawn from the Kwaluseni campus and a Department of Law was established at the Botswana campus. The new Department of Law at Gaborone continued with the LLB programme as was taught at the Kwaluseni campus and became part of the new University of Botswana in 1982. The first Botswana LLB degrees were conferred in 1985. In that year Botswana also decided to terminate the Edinburgh link and in 1988 the LLB programme was fully localised.

The localisation of the LLB programme necessitated the development of a new LLB degree programme. In recognition that a lawyer's competence demands a wide range of fundamental skills, the developers of the new programme departed from the traditional approach of separating the academic and professional training of lawyers, and adopted a holistic approach with emphasis on clinical legal education. A graduate with this new LLB degree was entitled to be admitted as an attorney/advocate of the High Court of Botswana without any further professional training.¹¹ Thus, a heavy responsibility was thrust on the Department of Law of the University of Botswana as the sole agency for the training of lawyers in Botswana. This situation continued until 1996 when the Legal Practitioners' Act was passed to regulate the profession in

¹¹ See s. 8 (c) and (d) of the Legal Practitioners Act 1967 now repealed and replaced by the Legal Practitioners Act 1996.

Botswana.¹² Under this Act, a Law Society was established with the overall responsibility for promoting legal education and for upholding standards of professional conduct.¹³ The Act also introduced for the first time, pupillage for newly qualified graduates from the University with an LLB degree. They are to serve a 12-month period in the chambers of an experienced “pupil master” of not less than seven years standing as a legal practitioner.¹⁴ The aim of this is to enable the newly qualified lawyer to gain practical experience in the practice of the law before embarking on a practice of his/her own. This provision changes the existing practice whereby graduates from the University go straight into legal practice after being admitted to practice by the High Court. It also means that professional training is now in the domain of the Law Society and this will warrant an appraisal of the current curriculum of the Department of Law. The question, which is currently being debated in the University, is whether the Department should devolve the practical training to the Law Society and concentrate solely on the academic training of lawyers. Discussions with the Law Society are on going in an attempt to streamline legal training as a whole to reflect the new realities of the Botswana market place.

UNDERLYING CONSIDERATIONS IN TRAINING OF LAWYERS

Despite the seemingly transnational foundation of legal education in Botswana, the primary purpose of training lawyers was and still is the provision of manpower to serve Botswana’s needs. However, the training is geared towards providing exposure to as many law courses as possible within the five years taken to acquire the LLB degree, the basic qualification for admission to practice law. Currently, some forty-five law courses are offered to law students at the University of Botswana. The objective is to train students to acquire theoretical and professional legal skills and to prepare them for the practice, application and further study of law. An essential component of the training is the clinical legal education.¹⁵ This involves training students in a clinical setting of a Legal Clinic. This is organised basically like a de

¹² See EK Quansah “The legal Practitioners Act 1996 of Botswana” (1997) 41 *Journal of African Law* 140.

¹³ See s. 55 of the Act.

¹⁴ A proposal is in place to reduce the period of practice required for a legal practitioner to qualify as a pupil master from seven to five years. See Legal Practitioners (Amendment) Bill No. 8 of 2003.

¹⁵ See GM Kakuli “Experimentation in clinical legal education in Botswana” (1989) 5 *Lesotho Law Journal* 433.

facto law firm, in which students are supervised by lecturers in conducting real life cases from indigent clients. A big handicap in this part of the training is the shortage of funds to run the clinic. Funding is derived from the Department of Law's budgetary allocation, which is not adequate to run the clinic along professional lines. Extra funding has been sought from elsewhere but this has not met expectations. The lack of funds has inhibited the capacity of the Department to respond adequately to modern changes in professional practice.

In order for students to take advantage of the increasing use of information technology for processing, storage, transfer, retrieval, analysis, presentation and dissemination of information, it is requirement of the LLB degree that they become computer literate. Every student is expected to take and pass a course in the fundamentals of computer and information skills in the first year of the programme. The course is designed to provide law students with such basic computer skills as will enable them to fully exploit the materials in the University Library, which is increasingly being computerised. Such knowledge not only helps them to source information for their studies but it also enables them to keep abreast with legal developments in other jurisdictions around the world. To underline the need for students to be computer literate, the High Court is in the process of computerisation and very soon legal practitioners will be able to file documents electronically without physically going to the court. Computer literacy will help them in their future professional practice. These developments augur well for the profession in Botswana, which is at the beginning of a transition from print to digital technology.¹⁶

Another dimension to legal training in the Department of Law at the University of Botswana is that the academic staff within the department comes from diverse legal background across the African continent thus bringing their experiences to bear on the training of students. Students regularly take part in international moot competitions, such as the Jessup and the All-African moot competitions. The involvement in these competitions over the years has immensely broadened the outlook of the students.

¹⁶ See M. Fombad *The Adoption and use patterns of information and communication technologies (ICTs) in Law Firms in Gaborone, Botswana*, unpublished dissertation for MILS (2002), University of Botswana Library at p. 144.

There is however, very little transnational cooperation in the training of lawyers within the Southern African region. Although Botswana houses the headquarters of the regional grouping of Southern Africa Development Community (SADC) the opportunity for regional cooperation in legal training has gone amiss. There has been however, some peripheral co-operation with the University of Namibia and the Universities of the North-West and Natal in South Africa, in the area of curriculum development. Staff members do take part in specialised regional groups, such as SADC Social Security Core Group of researchers, academic, policy makers/policy activists which acts as the “think tank” on social security issues in the region and the Trade Law Centre for South Africa (TRALAC) which aims at building Trade Law intellectual capital to facilitate the integration of the Southern African region into the global trade system. The experience gained in participating in the deliberations of such organisations is making an invaluable impact on the teaching of relevant courses in the Department.

FUTURE PROSPECTS

Botswana has committed itself, as part of its “vision 2016”¹⁷, to become an educated and informed nation. In the rapidly changing globalise economic and social conditions of today, this commitment will entail adapting the educational system to the challenges of the “global village”. The product of such an education system should be able to compete favourably on the international market. Legal education should be in the forefront of this commitment, as the building of an open, democratic and accountable nation, which is one of the long-term visions of the country, cannot be achieved with lawyers whose training is suspect. Legal education should be recognised as a special case demanding extra funding from Government in order to enhance the training being given in the University of Botswana. The current law curriculum in the University is comprehensive. It goes beyond the traditional core courses and deals with areas of law that reflects Botswana needs, such as Law and Health Care, Gender and the Law, HIV/AIDS Awareness courses, Law and the Media, International Trade and Investment, Intellectual Property, Human Rights, Environmental law and Social Security Law, to mention a few. These are areas of

¹⁷ See *Long Term Vision For Botswana – Towards Prosperity For All* (1997) at pp. 5-6 and 29-35.

law in which capacity building will stand the country in great stead to compete favourable on the international scene. The recently introduced postgraduate courses in law will further enhance this capacity building.

Furthermore, attempts are being made to forge a closer link between the University of Botswana and the Law Society of Botswana to ensure that what the Department of Law at the University does is in consonance with the demands of the profession. Also the same link should be forged with Law Societies in neighbouring jurisdictions, for example, the Association of Law Societies of South Africa to pave the way for mutual recognition of training in view of the close affinity between the two legal systems.

Finally, it can be said that the basic infrastructure for the training of transnational lawyers is in place in Botswana. What is required is adequate funding to strengthen it in order to enhance and sharpen the lawyering skills of the trainees to enable them to operate effectively in the “global village”, a goal that the country seeks to achieve by 2016.