

Original Paper

Towards Adoption of a Human Rights Based Framework for Social Protection in Botswana

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Abstract

A clear gap in the debate on social protection in Botswana has been the lack of a thorough analysis on the human rights based framework. The aim of this paper is to provide an overview of the position of the government of Botswana regarding a right- based approach to social protection. The primary objective is to assess whether social protection regime in Botswana is backed by a legal framework. The paper starts by examining conceptual issues. Here we discuss the concept of social security and social protection. The next section examines international and regional instruments that have been formulated to protect the right to access social protection. Through this analysis, it will be clearly shown that although Botswana is officially committed to providing social safety nets to the poor and vulnerably, social protection is not yet entrenched in the legal framework. To arrive at this conclusion, a thorough analysis is made using the Human Rights-Based approach for social protection developed by the United Nations General Assembly and the Human Rights Council. In conclusion the paper provides recommendations on how Botswana can develop a sustainable human rights- based social protection framework.

Keywords

Social protection, legal framework, human rights, vulnerable groups, United Nations

1. Conceptual Issues

1.1 Definitions of Social Security and Social Protection

The World Bank defines social protection as “public interventions oriented to human capital to: (i) help individuals, households and communities better manage risks; and (ii) provide support to the incapacitated poor” (World Bank, 1999 p. 3). The goal of social protection is to protect individuals

against life-cycle crisis that curtail their capacity to meet their basic needs and to enhance human welfare (ILO, 1952). Conceptually, social protection encompasses social security as well as developmental welfare.

Through its various conventions and international agreements, the International Labour Organization (ILO) defines social security as: “as the protection which society provides for its members through the series of public measures:

- To offset the absence or substantial reduction of income from work resulting from various contingencies (notably sickness, maternity, employment injury, unemployment, invalidity, old age and death of a breadwinner).
- To provide people with health care; and
- To provide benefits for families with children (ILO, 1952).

Social security could also be defined as an umbrella concept which includes social allowances, social assistance and social insurance. It encompasses both private and public measures (or mixed public-private measures) which are aimed at providing income security to individuals and families who fall victim to particular contingencies, such as unemployment, old age, sickness and death (SADC, 2007).

1.2 Social Allowance

These are universal payments made to persons in designated categories who are in exceptional need (such as children, older persons, persons with disabilities) designed to assist them in the realization of their full potential. The main objective of social allowance is social compensation. Social Allowance schemes are financed from government revenue and are not means-tested. They are paid to all persons falling within the designated categories, regardless of their socio-economic position (SADC, 2007).

Examples of social allowance schemes in Botswana include:

- Orphan care program
- Vulnerable groups
- School feeding program
- Old age pension
- World War II veterans
- Community Home Based Care Program

1.2.1 Social Assistance

This is a form of social security which provides assistance in cash or kind to persons who lack the means to support themselves and their dependants. Social assistance is means tested and is funded from government revenues. The main objective of social assistance is to alleviate poverty through amongst other things, the provision of minimum income support. Examples of social assistance programs in Botswana are:

- Destitute program
- Needy Students

- Labour Based Drought Relief program
- Remote Area Development Program

1.3 Social Insurance

This is a form of social security designed to protect income earners and their families against reduction or loss of income as a result of exposure to risk. These risks impair one's capacity to earn income. Social insurance is contributory being paid by employers, employees, self-employed persons or other contributors, depending on the nature of the specific schemes. Examples of social insurance schemes in Botswana are:

- Government Pension Scheme
- Public and Private Health Insurance Schemes
- Workman's Compensation

1.4 Social Protection

According to the SADC CODE, social protection encompasses social security and social services as well as developmental social welfare. It is therefore broader in scope than social security. The term is generally used to refer to public and private or to mixed public and private measures designed to protect individuals against life-cycle crises that curtail their capacity to meet their need. The objective of social protection is to enhance human welfare and functioning (SADC, 2007).

2. International and Regional Instruments

Several international legal instruments have been formulated to protect human rights. These include the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural rights (ICESCR). Together with the International Covenant on Civil and Political Rights (ICCPR), these instruments constitute the International Bill of Rights. With regard to social security, the Universal Declaration of Human Rights provides (United Nations, 1948).

“Everyone, as a member of Society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.

Article 25 of the same instrument proceeds to say:

1. “Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”.

2.1 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR has provisions relating to work in just and favorable conditions, to social protection, to an

adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress.

While the Universal Declaration of Human rights (UDHR) sets the stage for the expression of rights in modern international instruments, the International Covenant on economic, social and Cultural Rights (ICESCR) is the most extensive manifestation of this commitment in the realm of economic, social and cultural rights". Article 9 of the ICESCR provides (United Nations, 1966):

"The States parties to the present covenant recognize the right of everyone to social security including social assistance".

In the performance of its functions the Committee on Economic, Social and Cultural Rights specifically asks State Parties whether they maintain social security schemes in the following areas: Medical care, cash sickness benefits, survivors' benefits, employment injury benefits and family benefits.

2.2 International Labour Organisation (ILO)

The ILO was created in 1919 for the purposes of adoption of international standards to cope with the problems of labour conditions involving "injustice, hardship and deprivation". The Social Security (Minimum Standards) Convention 102 of 1952 provides for minimum standards in nine distinct branches of social security. These branches are: medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors benefits (ILO, 1952). A state must accept three of these branches in order to ratify the convention. The Convention introduces the idea of a general level of Social Security that should be progressively attained everywhere. This system can be adapted to the economic and social conditions prevailing in each country whatever the degree of its development. Some of these branches have had new instruments established by the ILO to supplement convention 102 of 1952. These include; The Employment Injury Convention 121 of 1964. The Invalidity, Old Age and Survivors Benefits Convention 128 of 1967; the Medical Care and Sickness Convention 130 of 1969; and the Maternity Protection Convention 103 of 1962.

2.3 The African Charter

The African Union, formerly the Organisation of African Unity is the principal mouthpiece of the African continent. It was founded in 1963 in accordance with the Organisation of African Unity (OAU) Charter. The African Charter affirms its commitment to the Universal Declaration of Human Rights (UDHR) which has provisions on social security and socio-economic rights. Article 15 enshrines the right of every individual to work under equitable and satisfactory conditions and for every worker to receive equal pay for equal work (SADC, 2003). The Charter further assures the best attainable state of mental health and physical health, and the obligation to take the necessary measures to protect the health of the people and to give medical attention to the sick (Ntseane & Solo, 2007).

2.4 Charter of Fundamental Social Rights in the Southern African Development Community (SADC)

In August 2003, SADC countries adopted the Charter of Fundamental Social Rights or the Social Charter. The Charter has provisions relating to protection of children and young people, elderly persons and persons with disabilities. More importantly, the charter has provisions on social protection. It

provides (SADC, 2003):

1. “Member states shall create an enabling environment so that every worker in the Region shall have a right to adequate protection and shall regardless of status and the type of employment, enjoy adequate social security benefits.
2. Persons who have been unable to either enter or re-enter the labour market shall be entitled to receive sufficient resources and social assistance.

2.5 SADC Code on Social Security

The SADC Code provides in article 3: (SADC, 2007).

- a. Everyone in SADC has the right to social security.
- b. Every member state should establish and maintain a system of social security in accordance with the provisions of this code and Article 10 of the Charter of Fundamental Social Rights in the SADC.
- c. Every Member State should maintain its social security system at a satisfactory level at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security No. 102 of 1952.
- d. Every Member State should progressively raise its system of social security to a higher level, which should include achieving the meaningful coverage of everyone under the system, bearing in mind the realities of development in the particular member state”.

The foregoing discussion demonstrates that social protection is recognized in a plethora of International, Regional and sub-regional instruments as a human right. ILO Convention 102 of 1952 further underscores its importance. This is also further elaborated by the Charter of Fundamental Social Rights as well as the SADC CODE on Social Security adopted by SADC member States. The purpose of this paper is to discuss the extent to which Botswana government has embraced social protection as a human right since attaining independence in 1966. In the section that follows, the Human Rights Based Framework is used to evaluate Botswana’s position.

3. The Human Rights Based Framework for Social Protection

The Human Rights Based Framework (HRBF) for social protection was developed in 2012 by Ms Sepulveda, a Special Rapporteur for the United Nations General Assembly and the Human Rights Council. The HRBF is a direct response to ensure that states abide by the international obligations of social protection. Further it is envisaged that by adopting this framework, the poor and vulnerable populations will be reached in the most effective and holistic manner (Sepulveda & Nyst, 2012). The framework draws its roots from the international and regional instruments discussed earlier in the chapter and from other tools developed by the UN community. The core principles of this framework are presented below:

- ✚ Ensuring an adequate legal and institutional framework and adopting long term- strategies
- ✚ Adopting comprehensive, coherent and coordinated policies
- ✚ Respecting the principle of equality and non-discrimination
- ✚ Ensuring that the implementation of conditionalities (co-responsibility) does not undermine the human rights of beneficiaries
- ✚ Ensuring transparency and access to information
- ✚ Ensuring meaningful and effective participation
- ✚ Ensuring access to accountability mechanism and effective remedies

The section that follows provides a brief overview of the extent to which the Human Rights Based Framework has been implemented in Botswana in the past 50 years. Data for this analysis has been obtained from available government reports and policy documents, empirical studies, international reviews and other relevant sources.

3.1 Ensuring an Adequate Legal and Institutional Framework and Adopting Long-term Strategies

A critical aspect of the human rights approach is that social protection schemes must be enshrined and defined in national legal framework as well as being supported by a national strategy and a plan of action (Sepulveda & Nyst, 2012). In Botswana, numerous social protection schemes have been developed as outlined earlier in the chapter. However, these provisions are only implemented through policy guidelines rather than being embedded in a proper rights-based approach (Ntseane & Solo, 2007). In fact, the Botswana Constitution does not have any provision dealing with social protection rights. Consequently, there are no adjudication structures to ensure that the rights of beneficiaries are protected. In the absence of a comprehensive legal framework and structure, beneficiaries of the current social security provisions may encounter difficulties in enforcing their entitlements (Ntseane & Solo, 2007). Fombard (2011, p. 35) contends that “a solid constitutional framework that provides a right to social security is more effective than an approach that allows the State to act on the basis of compassion and humanitarianism” (Fombard, 2011, p. 35).

Despite the absence of constitutional coverage, it should be noted that a few social insurance programs are protected by the law. Regrettably, these provisions only cover beneficiaries who are formally employed. For example; employment injuries and occupational diseases are compensated through the Workmen’s Compensation Act scheme (Government of Botswana, 1984). Here, the employer has a common law duty to assess the work place in order to provide a safe working environment for his employees. Where an employee is injured at work and institutes a delictual claim against the employer, the employee will succeed if he or she can prove intent or negligence on the part of the employer or of a co-employee if the employer was to be found vicariously liable. Similarly, if an employee contracts a disease and it can be proved that the disease arose out of or in the course of his employment due to the nature of the work, he is engaged upon, the employer has a common law duty to compensate the employee for damages suffered in consequence of the disease. These actions were available at common law but now the state has intervened and passed legislation to enable persons who suffer from

employment injuries and occupational diseases to be compensated by the employer.

Further, Motor Vehicle accidents, occupational diseases and employment injuries are areas of the law where state intervention in the form of social labor legislation is very important. Generally, the state seeks to fill the void in the common law where victims would be left without any compensation if a private individual is not able to provide the necessary compensation. In order to address the situation, the state usually establishes a fund in relation to motor vehicle accidents where the main objective is the payment of compensation for loss or damage caused by the wrongful driving of a motor vehicle. The Motor Vehicle Accident Fund (MVA) in Botswana becomes a substitute for the common law wrongdoer and is obliged to compensate any person (third party) for any loss or damage which the third party has suffered as a result of any bodily injury or death to any other person. The Fund is intended to provide for compensation for certain loss or damage caused in motor vehicle accidents (Government of Botswana, 1998). The compensation paid to a victim of a road traffic accident is meant to put him as far as monetarily possible in the position he was in before the accident and also meant to assuage his injured feelings (pain, suffering, loss of amenities). Since the Fund is meant to be part of the Botswana's social safety net, compensation of a victim of a road traffic accident is meant to enhance his post-accident quality of life to put him as near as possible to the position he was in before the accident and also assuage his injured feelings (pain, suffering, loss of advantage and loss of amenities). The claimant is required to prove his injuries and his loss to assist the Fund to make him an equitable offer.

Finally, through amended Employment Act, female officers who are in full employment are entitled to Maternity leave in line with the ILO Conventions. The following key provisions apply to protect women and the new born (Government of Botswana, 2010):

- ✓ Female employees are entitled to a total 12 weeks paid maternity leave made up of 6 weeks before and 6 weeks after confinement.
- ✓ An additional 2 weeks maternity leave must be given to an employee where she furnishes a medical certificate signed by medical officer or registered nurse and midwife that she is suffering from an illness arising from her confinement and is unfit to return to work.
- ✓ For a period of 6 months upon return to work an employee is entitled to two paid 30 minutes breaks per day for purposes of nursing a child. The employee may request to aggregate the 30 minutes and take one hour once a day.
- ✓ Maternity allowance must be paid at a rate not less than 50% of basic pay and other benefits an employee would otherwise have been entitled to receive.
- ✓ Government, local authorities, parastatals and some private sector companies now pay full salary maternity allowance for the first three children.
- ✓ Absence from work on account of being on maternity leave does not constitute an interruption of employment.
- ✓ An employer who without just cause terminates the employment of a pregnant woman within 3

months of her expected confinement is required to pay her 12 weeks maternity allowance.

✓ Employers are prohibited from terminating the contract of employment during the employee.

The foregoing discussion demonstrates that the legal framework is available only for social insurance programmes; however, social allowance and social assistance schemes are protected through policy provisions. The next section examines the nature of these policy instruments and examines the extent to which they comply with the Human Rights Based Framework.

3.2 Adopting Comprehensive, Coherent and Coordinated Policies

A Human Rights Based approach calls upon States to design an integrated and coordinated social protection strategy that reduces fragmentation and ensures capacity building of all stakeholders implementing social protection programs (Sepulveda & Nyst, 2012). Botswana government must be applauded for the establishment of social protection policy instruments that guide implementation of various social safety nets. From time to time, these instruments are evaluated to make them relevant to the needs of beneficiaries. However, Botswana falls short of the HRBF standard as social protection policies schemes are fragmented and scattered throughout various government departments and ministries. Currently the following Ministries implement social protection schemes; Office of the President, Ministry of Labor and Social Security, Ministry of Youth, Sport and Culture, Ministry of Agriculture and Ministry of Local Government. Non State Actors such as non-governmental organizations and churches also play a critical role in militating against poverty and other social ills. At the local level, local authorities play a key role in the implementation process (Ellis et al., 2007). There is no coordination mechanism in place to ensure that all these players work as a team. Hence, the non-existence of consolidated social policy or a long-term coordinated strategy on social development. A note to be celebrated is the creation of the Department of Social Protection in the Ministry of Local Government. However the coordination function of this department is very limited as its Director does not even have supervisory power over implementers in the local authorities. What is needed to facilitate comprehensive, coherent and coordinated policy environment is the creation of the Ministry of Social Development which will bring together all relevant stakeholders under one roof.

3.3 Respecting the Principle of Equality and Non-discrimination

Adoption of HRBF requires the States to eliminate discrimination in laws, policies and practices and to take special measures to protect the most vulnerable segment of the society (Sepulveda & Nyst, 2012). Available data shows that since independence in 1966, Botswana government has made an attempt to address issues of non-discrimination and equality in the provision of social protection. In the 1970s, the government articulated for the first time, the need to promote social protection through the principle of social justice and equality of opportunity for all (Republic of Botswana, 1970). This commitment was again strongly reinforced in the subsequent National Development Plans (Republic of Botswana, 1991-1997; 1997-2003 and 2003-2008). Further, the Long Term Vision for Botswana (Vision 2016) makes reference to the principle of social inclusion and equality as being central to ending poverty and fostering shared prosperity as well as empowering the poor (Government of Botswana, 1997, p. 9).

“All people will have access to productive resources regardless of ethnic origin, gender, disability, or misfortune. Botswana will have succeeded in helping people to escape from the poverty trap.... There will be a social safety net for those who find themselves in poverty for any reason. This will go hand in hand with the provision of good quality social security, in partnership with the private sector and NGO’s, aimed at vulnerable groups such as the elderly, disabled, orphans and terminally ill”.

The strong articulation of social protection as one of the pillars of Vision 2016 has marked a major shift in social policy reforms. Further, the Long Term Vision of Botswana (Vision 2036) also makes a similar strong articulation towards being moral, tolerant and inclusive society. Under the Human and Social Development, the Vision states that by 2036, “Botswana will be morally upright and tolerant of one another, irrespective of gender, age, location, religion or creed, ethnic origin sex, disability, language or political opinion” (Government of Botswana, 2016, p. 18). This statement is further reinforced by Botswana Sustainable Development Goals.

3.4 Ensuring that the Implementation of Conditionalities (co-responsibility) does not Undermine the Human Rights of Beneficiaries

From the perspective of HRBF, States are to provide social protection without imposing conditions for receipt of these services. Conditional Cash Transfers (CCTs) are often implemented to reduce poverty by encouraging parents to invest in health and education of their children. The largest programs CCTs are found in Brazil, Mexico, Chile, Turkey, Burkina Faso, Bangladesh and Cambodia. Some pilot programs are also being implemented in sub Saharan Africa (Fiszbein & Schady, 2009). Botswana is fortunate in that no conditions are tied for beneficiaries to receive their cash transfers and other benefits. Hence, the social protection regime addresses various forms of risks and vulnerability across life cycle and beneficiaries and their caregivers are expected to conform to policy guidelines and standards (Seleka et al., 2007).

3.5 Ensuring Transparency and Access of Information

Yet another key aspect of the HRBF calls for transparency and access to information to safe guard against corruption and wastage. In addition, beneficiaries are to be empowered to have the right to seek and receive information without fear or intimidation. To this end, social protection schemes are to have built in mechanisms for the disclosure of information about every step in the implementation process (Sepulveda & Nyst, 2012).

The most recent comprehensive evaluation of social protection programs revealed that majority of beneficiaries in Botswana are aware of various social protection schemes (Ellis et al., 2010). As a matter of fact, before a scheme is implemented, communities are informed through their area Councilors, Members of Parliament, Village/Ward Development Committees and as well as through the radio, TV and print media. As reflected earlier in the chapter, the government has formulated policy and guidelines for each social safety net. These documents articulate how the schemes are administered, who is targeted, coverage issues as well as the nature of the assistance. Social workers are charged with

the responsibility to inform beneficiaries about these issues and to encourage them to be registered if they qualify so that their standard of living may be uplifted. Despite these measures, people residing in remote areas are often not reached due to availability of transport and shortage of staff. The creation of poverty maps could assist in ensuring that all the poor and vulnerable groups are properly reached and targeted. The map can either be based on unmet basic needs or household income/consumption measures within village wards or urban neighborhoods (Van Domelan, 2007).

3.6 Ensuring Meaningful and Effective Participation

Apart from access to information, participation is a fundamental element of human rights framework. Conversely, States are encouraged to put in place adequate mechanisms for beneficiaries to participate in the design, implementation, monitoring and evaluation of social protection schemes (Sepulveda & Nyst, 2012). In Botswana, there is a lot of evidence from past evaluation reports that beneficiaries are fully involved as research respondents during evaluation of social protection schemes (Mupedziswa & Ntseane, 2012). This is indeed a step in the right direction as their voice is taken into consideration during data collection process. However, during the design, implementation and monitoring stage, their input is not utilized. A participatory framework ensures that there is constant flow of information on whether programmes meet the real needs and whether eligible beneficiaries are reached and targeted. As a way forward, beneficiaries could be co-opted into existing structures such as the Council Social Welfare Committee or they could have a separate advisory committee which advises Local Authorities, Ministry of Local Government and other structures. They should also be actively involved during the monitoring and implementation stages of these services to provide feedback on bottlenecks and best practices.

3.7 Ensuring access to Accountability Mechanism and Effective Remedies

Finally, social protection that embraces HRBF incorporates a complaints mechanism which guarantees anonymity and allows an appeal process that is independent, accessible, simple, fair and effective (Sepulveda & Nyst, 2012). A review of literature shows that a mechanism for appeal has been put in place for social protection recipients through policy procedures and guidelines (Ministry of Local Government, 2002). The first line of appeal is through the social worker in an agency where the beneficiary is receiving assistance. If the beneficiary is not assisted satisfactorily, he/she then can refer the case to the immediate supervisor. If a resolution is not reached, the Head of the Department is then called in to mediate; then the Assistant Council Secretary and finally the Permanent Secretary in the Ministry of Local Government. In rare occasions, beneficiaries appeal to His Excellency the President. This has happened particularly during kgotla meetings. In general, although beneficiaries may have unresolved complaints, they rarely move beyond the interventions of a social worker. In the absence of a legal framework, where independent courts can intervene, beneficiaries remain unprotected.

4. Conclusion

This paper has examined the extent to which social protection in Botswana adheres to the Human Rights Based Framework. It is evident from this analysis that social protection programs are not protected by a legislative or constitutional provision in accordance with this framework. A constitutionally entrenched right approach is needed to ensure sustainability of these schemes and to protect beneficiaries against corruption and abuse of power. Further, the issue of fragmentation of policies and services has been highlighted as an issue of concern that leads to duplication of services and ineffective utilization of resources. Therefore, a holistic framework that is preventative, inclusive and integrated would be required. This can only happen through the creation of the Ministry of Social Development where all key stakeholders will operate under one mandate guided by a social policy framework. Finally, more efforts must be invested in ensuring meaningful and effective participation of beneficiaries in the design, implementation, monitoring and evaluation of social protection schemes. This process will facilitate that interventions target the real needs of the poor and vulnerable people in line with the Long Term Vision 2036 and Botswana Sustainable Development Goals.

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