

A question of culture

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CHAPTER 1

Constitutional and legal rights

Articles 4-11



Athalia Molokomme, attorney general of Botswana.

Photo: Courtesy of Botswana Gazette

KEY POINTS

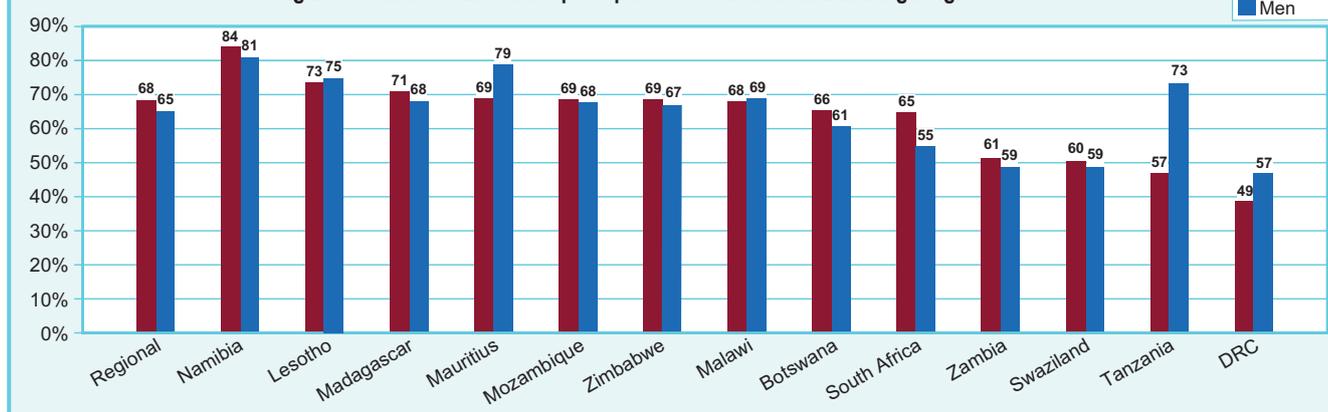
- The Constitution guarantees equality before the law and prohibits discrimination based on sex or gender.
- Using the Citizen Score Card (CSC) to gauge perceptions of constitutional progress, women and men gave the government an average score of 70%. Their score could suggest that respondents seem aware that Botswana has made notable progress, but that obstacles still remain, particularly women's relatively poor access to justice.
- Contradictions between formal and customary laws still exist. Botswana has a long way to go to ensure that customary law is subject to prohibitions against gender discrimination.
- However, in some aspects, Botswana has displayed commitment toward reducing gender inequalities and improving the status of women through the enactment of laws.
- Women continue to be victims of harmful traditional practices that maintain their lesser status. The enactment of laws is the first step, which legislators need to strengthen with programmes informing persons of their rights.
- Claw back clauses exist linked to personal law that could be detrimental to women.
- There is no legal provision for affirmative action to accelerate the achievement of gender parity in decision-making positions.
- Currently, Botswana has no plans for a constitutional review.

Table 1.1: SGDI and CSC scores for constitutional and legal rights

	SGDI	CSC
Scores	N/A	70%
Ranks	N/A	5

Table 1.1 shows that citizens scored government 64%, a six percentage point drop from the 2013 score of 70%. Women scored 66% while men scored 61%.

Figure 1.1: Women and men's perceptions of constitutional and legal rights



Source: Gender Links 2014 with data derived from citizens' score cards administered in the respective countries.

Figure 1.1 shows that Botswana women scored two percentage points above the regional average, while men, at 61%, scored the government at less than the

regional average. This puts the ranking of the country at number eight in the region according to this indicator.

Constitutional and affirmative action provisions



The Protocol provides that, by 2015, all countries shall endeavour to enshrine gender equality and equity in their constitutions and ensure that these are not compromised by any provisions, laws or practices. State parties are to implement legislative and other measures that eliminate all practices that negatively affect the fundamental rights of women and men. They are also to introduce affirmative action measures.

Gender activists, experts and citizens who took part in this research noted that several good laws exist in the country, but implementation, as well as ensuring adequate human and financial resources, have been the main challenges. For example, the country passed the Domestic Violence Act in 2008, but people still lack adequate resources to implement it. Survivors still do not have access to timely interventions.

Section 3 of the Botswana Constitution guarantees equality before the law. It states that "Every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say the right whatever his race, place of origin, political opinions, colour, creed or sex but subject to respect for the rights and freedoms of others and for public interest (Botswana

Government CEDAW Report 2010)." Section 15 prohibits discrimination and subsection 3 specifically outlaws discrimination based on sex or gender. Parliament amended Section 15 of the Constitution in 2005, adding the term "sex" to the list of categories included under the expression "discriminatory."

The Constitution only provides for equality between men and women, but it does not provide for the Bill of Rights. Citizens cannot take the government to court to claim individual rights. Botswana also has gender-sensitive legislation that deals with personal law. For example, in the Adoption of Children's Act (Cap. 28:01) either sex is eligible to adopt children. The Matrimonial Causes Act (Cap. 29:06) provides that any of the parties to the marriage may bring an action of divorce against

the other. The 1998 amendments of the Penal Code brought in a clause that makes rape gender-neutral, thus recognising that men and boys can also be raped.

A primary challenge is that Botswana is a dual legal system that recognises the modern and customary legal system. The BOCONGO 2010 CEDAW Shadow Report indicates that “customary laws remain a significant obstacle for women to attain and enjoy equal rights as the different ethnic groups still have laws, values and practices that treat women as subordinate and promote discrimination against women and girls.”

Customary laws remain common, and they also remain mostly unwritten, varying depending on the ethnic group. They tend to tolerate unequal power and gender relations (BOCONGO, 2010). Legal practitioners, however, contend that although customs will be respected as far as possible, they should not contradict the law. For example, Judge President Aguda outlined in the government’s 2010 CEDAW Report, “Custom must yield to the pre-eminence of the Constitution, stating that the constitutional guarantee cannot be by custom. Of

course the custom will as far as possible be read so as to conform to the Constitution. But where this is impossible, it is the custom not the Constitution that must go (Botswana Government CEDAW Report, 2010).”

In 2012, in a case of *Mmusi and Others v Ramantele and Others*, the Botswana High Court Judge Key Dingake made a landmark ruling by striking down a discriminatory customary law that only allowed men to inherit the family home. The High Court ruled that the customary inheritance law unconstitutional, noting that it discriminated against women. “It seems to me that the time has now arisen for the justices of this court to assume the role of the judicial midwife and assist in the birth of a new world struggling to be born,” said Dingake, urging the government to take all discriminatory laws off the statute books. “Discrimination based on gender has no place in our modern day society.” The case challenged a Ngwaketse customary law that grants the youngest born son the right to inherit the family home, which clearly violates the right to equality enshrined in Section 3 of the Botswana Constitution (OSISA 2012).



State parties are to implement legislative and other measures that eliminate all practices, which negatively affect the fundamental rights of women and men. They are also to introduce affirmative action measures.

No gender-based affirmative action exists in Botswana. The Revised Area Development Programme of 2009 provides broad strategies aimed at uplifting members of remote area settlements. This practice came about as a result of an acknowledgement that people in remote areas have experienced particular and intractable disadvantage because of long-standing historical prejudice and subjugation by the dominant group. Thus, remote area communities continue to be most affected by poverty and dependent on welfare support from the state, despite interventions and initiatives devised to complement the objectives of the Remote Area Development Programme and other existing national economic empowerment programmes. The major challenges confronting these populations include denied access to land, water rights, education, and health.

Government, through cabinet, has directed that a Comprehensive Plan of Affirmative Action be developed specifically for the remote area communities. This will promote equal opportunities and ensure that national programmes include these communities. The programme identified imbalances and improving the livelihoods of rural dwellers. The Ministry of Local Government (MLG) is conducting affirmative action programmes to promote poverty eradication for remote area dwellers (RADs) in seven districts and 67 settlements from 2012 to 2022.

Major components include agriculture, education, culture, health, transport, communication and technology, water, social and economic empowerment.

In the political sphere, opposition parties have promoted affirmative action. The Botswana Congress Party (BCP) has stated that as part of its mandate it will give preference to youth and women. The ruling Botswana Democratic Party (BDP) has always resisted quotas.



Oratile Moapare is crowned Ms Remote Area Dwellers Programme-Kgalagadi. The pageant aims to encourage inclusiveness and promote involvement of young women from rural areas in preserving their culture and building their self-esteem. Photo: Courtesy Daily News

Table 1.2: Analysis of gender equality clauses in the Constitution

Provides for non-discrimination generally	Provides for non-discrimination based on sex specifically	Provides for non-discrimination on the basis of sex and others e.g. marital status, pregnancy	Provides for the promotion of gender equality	Has other provisions that relate to gender	Has claw back clause	Addresses the issue of contradictions between the Constitution, provisions, laws and practices	Provides for affirmative action
Yes	Yes	Yes	No	No	Yes	No	No
Section 15 (1) and (2) 15. Protection from discrimination on the grounds of race, etc. (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.	Section 3 3. Fundamental rights and freedoms of the individual. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely- (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and assembly and association; and (c) protection for the privacy of his or her home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.	Section 15 (3) 15. Protection from discrimination on the grounds of race and sex (3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.	n/a	n/a	Section 15 (4), (5), (6), (7), (8) and (9). (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision- (a) for the appropriation of public revenues or other public funds; (b) with respect to persons who are not citizens of Botswana; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; Copyright Government of Botswana (d) for the application in the case of members of a particular race, community or tribe of customary laws with respect to any matter whether to the exclusion of any law in respect to that matter that is applicable in the case of other persons or not; or (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society. (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law. (6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5) of this section. (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorised by section 9(2), 11(5), 12(2) 13(2), or 14(3), as the case may be. (8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law. (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section- (a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or (b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.	n/a	n/a

Source: Constitution of Botswana, 2009 and 2011.

Discriminatory legislation



The SADC Protocol provides that, by 2015, SADC countries shall have reviewed, amended or repealed all discriminatory laws and specifically abolish the minority status of women.

The Gender Affairs Department (GeAD) in the Ministry of Labour and Home Affairs conducted the last comprehensive review of discriminatory laws in Botswana in 1998. It reviewed all statutes, subsidiary legislation, all relevant United Nations (UN) conventions, and other documents concerning women. This included the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which Botswana committed to in 1996. The review assessed whether Botswana's laws complied with the CEDAW clauses, which provide the legal framework for eliminating discrimination and promoting equality based on gender. For example, Article 1 of CEDAW defines "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." The Article defines "discriminatory" along the same lines, with the definition under section 15(3) of the Constitution (AG's Chambers, 2009).

As noted in the BOCONGO Shadow Report on CEDAW, though women and girls continue to face discrimination, legislators have not domesticated most articles in the convention, especially in relation to customary law. The

Botswana government report on CEDAW 2010 agrees that, "There is a need to fully domesticate the Convention in order to strengthen the legal framework for the promotion of women's rights."

Legislators have amended the following discriminatory laws or enacted new laws to ensure consistency with the provisions of CEDAW:

- The 2003 amendment of the Citizenship Act allows women married to foreign spouses to pass citizenship on to their children. The case of *Unity Dow v Attorney General* resulted in this amendment.
- The 1996 Mines and Quarries Act removes restrictions placed on women working underground in the mines.
- The 1996 Deeds Registry Act allows women, whether married in community of property or not, to execute deeds and other documents required or permitted for registration in the deeds registry without their husband's consent (GeAD 2009).
- The 2004 Abolition of Marital Power Act and the 2008 Domestic Violence Act remain critical for gender equality.
- The 1997 amendment of the Criminal Procedure and Evidence Act provides for the mandatory hearing of sexual offences in camera.
- The 2004 amendment to the Penal Code made rape gender-neutral and introduced a minimum sentence of 10 years. If violence accompanies the rape resulting in injury to the victim, the minimum sentence increases to 15 years. It also introduced mandatory HIV testing for a person convicted of rape - and if he or she knew of his or her HIV status at the time of the offense, the minimum sentence increases to 20 years imprisonment with corporal punishment.
- The 2000 amendment to the Public Service Act recognises sexual harassment as a misconduct, which could result in penalties.
- The 2001 amendment to the Marriage Act states that no person less than the age of 18 years may marry and that no minor less than the age of 21 years may marry without consent of his or her parents or guardian. It also provided for the registration of Customary, Muslim, Hindu and other religious marriages (GeAD 2009).
- The 2004 Abolition of Marital Power Act abolishes the common law principle of marital power being only with the man, replacing it with equal powers for spouses married in community of property. Either spouse can dispose of the assets of their joint estate.



Members of the Moshupa sub district council Gender Focal Team accept an award at the Botswana Gender Protocol@Work National. Photo: Gender Links

It also makes provision for joint acquisition of property by spouses married out of community of property and abolished the common law principle of unity of matrimonial domicile and allows married women to acquire domicile of choice. The law abolishes the common law position of the husband as the sole guardian of minor children and allows for joint guardianship by both parents.

- The Affiliations Procedures Act 1999 makes it simpler for an unmarried woman to obtain support from the father of her child.

The amendments comprise a notable achievement but they have also been criticised. The Penal Code regarding rape is particularly controversial. Gender activists are disappointed that the law excluded marital rape. The High Court argues that denial of bail to a person accused of rape is unconstitutional. Some say the stiffer sentencing for a convicted rapist who knows that he or she is HIV positive is a violation of the person's human rights (WAD, 2009).

Meanwhile, the Abolition of Marital Power Act is not applicable to customary and religious marriages. Removing the husband as the head of the family has been unpopular. Implementation is difficult given the entrenched customary laws and practices in most regions

of the country. Some people argue that it goes against society's traditional and Christian values (GeAD 2009).

Although the University of Botswana, Bank of Botswana and the Botswana Defence Force have implemented sexual harassment policies, citizens report few sexual harassment cases. The amendment leaves out the private sector where many believe sexual harassment is common.

The 1996 Employment Act is silent on issues of sexual harassment. Some gender activists argue that the implementation of the amendments has been piecemeal instead of addressing the legal system holistically and amending all laws that discriminate against women and girls (BOCONGO 2010). Moreover, the majority of women and men remain unaware of laws and their amendments. GeAD and civil society organisations need to educate the public with the aim of improving the reporting of cases and increasing access to justice.

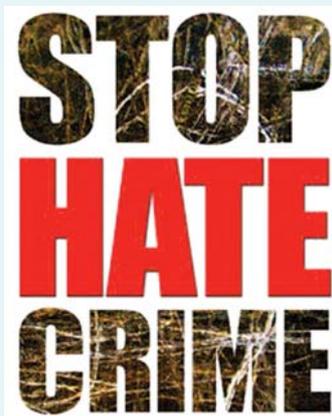
In 2010, a court case ruled that marital rape violates the rights of women. A married woman won the case against her HIV-positive husband who had forced her to have sexual relations. It was a milestone ruling for women's rights, challenging patriarchal values that treat women as minors and make women vulnerable to HIV infection.

Male rape and rape of LGBTI persons is also on the rise as demonstrated by the case that follows.

Rise in gay rape cases worries police: Mmegi Online

Molepolole Police Station Commander Superintendent Andrew Bosilong says he is worried about the rise in the number of cases of males raping other males in the village. Responding to enquiries about a case in which a 40-year-old man of Molepolole allegedly raped a 12-year-old boy, Bosilong said it was worrying that this year alone, they have recorded five cases of "gay rape."

It is reported that on Thursday afternoon last week, the 40-year-old suspect left a drinking hole, telling his friends that he was going to *buy some cigarettes* at a nearby tuck-shop. The man allegedly saw the victim behind a house in the nearby yard. He then called the boy before covering his mouth with his hands while forcing himself on top of him. After the incident, the suspect threatened the victim that he would beat him up if he told anyone about the incident. However, the boy went ahead and



told his mother about the assault. The mother then reported the matter to the police, who searched for the suspect and arrested him on Friday morning after he had fled following the alleged rape. The man is still in police custody.

The victim was hospitalised at Princess Marina Hospital on the same night of the crime and was only released yesterday morning. A family member told Mmegi yesterday that they were not happy with the way the police have handled the case because officers came very late on the night of the incident. Furthermore, the investigating officers did not make a follow-up to find out how the victim was performing in hospital. Bosilong confirmed that they had indeed arrested a 40-year-old Motswana man in connection with the alleged rape. He said the man will not be charged until police investigations are over.

(Accessed in Mmegi Newspaper, 10 September 2013.)

Cohabitation

Both common and customary laws do not allow for cohabitation of women and men (SARDC, 2005). This

is a major gap for lawmakers to address, particularly because the 2001 census shows that more couples cohabite than are married in Botswana.

Access to justice



The Protocol provides for:

- Equality in the treatment of women in judicial and quasi-judicial proceedings, or similar proceedings, including customary and traditional courts and national reconciliation processes;
- Equal legal status and capacity in civil and customary law;
- The encouragement of all public and private institutions to enable women to exercise their legal capacity;
- Positive and practical measures to ensure equality for women in complainants in the criminal justice system;
- The provision of educational programmes to address gender bias and stereotypes and promote equality for women in the legal systems; and
- Equal representation by women on and in the courts, including traditional courts, alternative dispute resolution mechanisms and local community courts.

Table 1.3: Access to justice

Access to justice provision	On a scale of 1-10 (1 very low and 10 very high) 7/10	Explanation
Equality of treatment of women in judicial and quasi-judicial proceedings	5	Formally, there is no different treatment, but in practice, this is not guaranteed. Poor women remain marginalised; they have access to limited services, including information and lack access to legal representation.
Equal contractual rights	5	In practice, customary laws may limit this.
The right to acquire and hold rights to property	5	Women have the right to property, but in practice, it is a challenge because of customary laws, traditions and economic barriers.
Encouraging women to exercise their legal capacity	5	Although women are encouraged to access the law, they have limited access to information and services.
Ensuring equality of women complainants in the criminal justice system	5	Formally, there is no difference, but in practice, the police and judiciary offices may inhibit women's access to justice.
Equal representation in the courts, including traditional courts	4	Few women work in the formal and traditional court systems.
Accessible and affordable legal services for women	4	There is no government legal aid available, only limited NGO and University of Botswana (UB) legal clinic services in urban areas. The government is piloting a national legal aid system.

Source: Source: Gender Links 2012.

Table 1.3 shows that citizens do not perceive that they have easy access to law. In reality, access to the justice system for women and girls remains a challenge due to limited financial resources, poor legal education, lack of a national legal aid service and poor knowledge about their rights. However, the government is making

efforts to address the problems. For example, in 2011 to 2013 it piloted the legal aid service, at the Attorney General's Chambers in Gaborone and Francistown. This initiative will go a long way to assist poor and low-income women and men who do not have resources for legal litigation.

Marriage and family laws; widows and widowers; the girl and boy child



The Protocol makes reference to the following specific legislative provisions: marriage and family rights and the rights of widows; elderly women; the girl child; women with disabilities.

Judges stand up for minority rights



Justice Key Dingake.

Photo: Courtesy Sunday Standard

The Southern African Litigation Centre and National Association of Women Judges hosted a Judicial Colloquium on the rights of vulnerable groups in Botswana from 28-29 March 2014. The event included two sessions, including a Human Rights Defenders Strategy session. Acting Chief Justice Walia noted that human rights apply to all and sometimes collectives need more attention to ensure their human rights.

Citing a recent case, Walia said, "The court must breathe life into the Constitution," noting that the right to equality is interrelated with those of dignity and freedom of expression.

Justice Dingake gave a keynote address on the role of the judiciary in protecting the rights of vulnerable groups, stating that the law has no finer hour than when it cuts through prejudice, disregards conservative case law to protect rights. Dingake also noted that vulnerable groups include women, children, persons with disabilities, sexual minorities and the judiciary cannot protect rights without informed legal profession and it must live by the values stated in the Universal Declaration on Human Rights, which also recognises sexual minorities. "Sexual minorities must be brought into human rights discourse because harm imposed by criminal law risks persons arrested simply for different sexual preference," he said.

Dingake called Botswana's decision to uphold the sodomy law retrogressive, as majority preferences can be harsh and oppressive to minorities. "Equality does not mean uniformity, it recognises divergence even if uncomfortable. Lawyers have a sacred duty to defend unpopular groups and they must remain fearless, smart in crusades in defence of human rights."

Marriage and family laws

The key marriage and family laws in Botswana are:

- The Marriage Act
- The Married Persons Property Act
- The Matrimonial Causes Act
- The Abolition of Marital Power Act

The Abolition of Marital Power Act (Cap.29:07) has improved equality in marriage. Laws, such as the Deeds Registry Act and Married Persons Property Act, protect property rights of both men and women in marriage. Yet for many - as the BOCONGO CEDAW Shadow report points out - "discrimination and inequality continue to prevail in marriage as patriarchal norms and values that are practiced in many communities promote gender

inequality, especially, in marriage, where women are subordinate to men."

In addition, the continued practice of payment of bride price (Bogadi) by the majority ethnic groups results in making men feel entitled to make all the major decisions, such as buying and selling property, family size, and the use of condoms. Customary laws and practices marginalise women and girls despite the changes in women's social and economic status and amendments to discriminatory statutes under the common law (BOCONGO, 2010). The Botswana Government CEDAW report further notes that under customary laws, women remain subjected to male

guardianship and men control family assets and guardianship of dependent children (Botswana Government 2010).

The newly enacted 2009 Children's Act prohibits marriage of children less than 18 years, but customary laws in a few ethnic groups allow children to marry. For example, in the Ngamiland region, men can force girls younger than 18 years, sometimes even as young as 14 years, into marriage, infringing their rights, including their right to education (BOCONGO 2010).

Family Law cases remain the bulk of cases that the legal aid services project have handled so far, which stand at 47.5%, followed by issues of land disputes (especially against land boards) at 7.7%.

Widow and widower rights

Botswana's common law and statutory law says that either spouse can inherit from the other if a will is in place. However, the Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act (Cap. 31:03) has amended the law of intestate (dying without a will). It declares that the surviving spouse of a person who died intestate can guide inheritance. This Act does not apply to the estate of any person who dies intestate and where the rights of succession can be determinable in accordance with customary laws. Where a spouse dies without a will and does not fall within the confines of the Succession Act, customary law rules apply.

The girl and boy child

Botswana has invested in an integrated approach to children's health, education, welfare and survival,

resulting in remarkable achievements. Most notably, more than 90% of children access primary and junior secondary education, and more than 90% of children have been vaccinated against the main infant and childhood diseases (NDP 10, MDG's Report 2010).

In 2009, Parliament approved the amended Children's Act, a milestone achievement because it takes into account the principles of the Convention on the Rights of the Child (CRC) and facilitates the domestication of the instrument. The Act provides for the promotion and protection of the rights of the child, the promotion of the social development, care, support and rehabilitation of children through the development of support and care structures.

The Act is progressive and gender-sensitive, recognising the rights of girls, boys, mothers and fathers. It has domesticated the CRC, which is consistent with the SADC Gender Protocol and also the African Charter on the rights and welfare of the child. It has also reiterated the principle that the best interest of the child must be paramount. It prohibits a range of child abuses such as abduction, sexual abuse, exploitation, and trafficking. A Children's Court will enforce the law and mete out appropriate punishments for these crimes.

The challenge is to educate parents, relatives and other carers on the legal requirements and procedures of the Children's Act. There is also more need for support for abused children. At present, civic organisations and local authorities provide support to abused children but they need government support to ensure sustainability of programming.

Table 1.4: Marriage and family laws; the boy and girl child

Provision	Yes/No	Explanation
Marriage		
No person under the age of 18 shall marry.	Yes	Except under customary marriages
Every marriage takes place with the full consent of both parties.	Yes	Except under customary laws
Every marriage including civil, religious, traditional or customary is registered.	Yes	Customary marriages must now be registered
Parties have reciprocal rights and duties towards their children including when spouses separate, divorce or have marriages annulled.	Yes	Except for customary marriages
Maintenance orders are enforced.	Yes	Enforcement is weak
Married women and men have the right to decide whether to retain their nationality or acquire spouse's nationality.	Yes	Except under customary laws
Widows and widowers		
Widows are not subjected to inhuman, humiliating or degrading treatment.	No	
A widow automatically becomes guardian or custodian of her children, unless otherwise determined by a court of law.	Yes	

Provision	Yes/No	Explanation
A widow shall have the right to live in the matrimonial house after her husband's death.	Yes	Unless married community of property
A widow shall have access to employment and other opportunities.	No	There is no right to employment for anyone in Botswana, but no discrimination
Widows shall have the right to an equitable share in the inheritance of her husband's property.	Yes	Except under some customary laws
Widows shall have the right to remarry any person of their choice.	Yes	Except under some customary laws
Widows shall be protected from all forms of violence and discrimination.	Yes	Except under some customary laws
Girl and boy child		
Eliminating all forms of discrimination against the girl child.	Yes	Except under some customary laws
Girls have the same rights as boys and are protected from harmful cultural attitudes.	Yes	Except under some customary laws
Girls are protected from all forms of economic exploitation, trafficking, violence and sexual abuse.	Yes	Girls have protection under the Children's and Domestic Violence acts
Girls have access to information, education, services and facilities on sexual and reproductive health and rights.	Yes	Access to services remain limited and cultural values prevail that limit girl children access

Source: Gender Links 2014.

Table 1.4 gives a summary of key legislative provisions on marriage and family laws, including for children. As the comments indicate, the primary challenges remain

law enforcement and customary laws not necessarily allowing for the provisions; widows and children remain particularly vulnerable.



Botswana courts grant gay group right to register officially.

Photo: Caine Youngman/LEGABIBO



Post-2015 in constitutional and legal rights

Table 1.5: Proposed revised targets and indicators for constitutional and legal rights

Area	Proposed post-2015 targets	Proposed post-2015 indicators	Priority indicators
Promotion of gender equality in constitutional provisions and ensuring these are not undermined in any way.	1. State parties shall include specific clauses to promote gender equality and equity in their constitutions, and ensure that these are not contradicted in any way by customary, traditional and or religious practices.	1. The extent and scope of specific clauses to promote gender equality and equity in the constitution ¹	1. Number of successful test cases challenging unconstitutional gender justice practices
		2. Number of successful test cases challenging unconstitutional gender justice practices	2. Number of cases of trafficking involving girls and extent to which justice is served
	2. State parties shall ensure that Constitutions prohibit harmful traditional practices	3. Laws are in place prohibiting harmful traditional practices ²	3. Gender awareness of judgments in family law cases
	3. States parties shall ensure that Constitutions give married women and men the right to choose whether to retain their nationality or acquire their spouse's nationality	4. Number of discriminatory laws repealed or amended ³	4. Percentage women accessing free legal aid
	4. States parties shall by 2030 ensure the equal rights and protection of widows and widowers	5. Reduction in the number of cases of widow and widower disinheritance	5. Proportion of justice functionaries who have undergone gender training
	5. Citizen score on government performance on gender, constitutional and legal matters rises progressively to 90% by 2030	6. Percentage increase in the citizen scores on Constitution and legal matters for the region and in each country ⁴	
Abolishing of discriminatory laws and promoting women's rights	6. State parties shall review, amend and or repeal all laws that discriminate on the ground of sex or gender in accordance with Constitutional provisions by 2030	7. Proportion of discriminatory laws repealed or amended ⁵	
	7. State parties abolish the minority status of women by 2030 to ensure equal legal status and capacity in civil and customary law, including, amongst other things, full contractual rights, the right to acquire and hold rights in property, the right to equal inheritance and the right to secure credit	8. Number of countries that abolish the minority status of women	
	8. State parties shall decriminalise sex work by 2030	9. Extent to which sex work is decriminalised in all SADC countries ⁶	

¹ Develop a model constitution that includes gender specific clauses and where gender is mainstreamed in the constitution overall. Compare country constitutions to the model constitution.

² Audit of legislation on harmful traditional practices in all SADC countries.

³ Baseline study to establish all the laws that need to be repealed and amended.

⁴ Gender Links online Citizen Scorecard is administered to at least 5000 people per country annually by SADC Gender Protocol Alliance partners.

⁵ Baseline study to establish all the laws that need to be repealed and amended.

⁶ Audit of legislation in all SADC countries.

Area	Proposed post-2015 targets	Proposed post-2015 indicators	Priority indicators
	9. Repeal laws criminalising diverse gender identities by 2030	10. Number of countries that repeal laws discriminating against persons of diverse gender identities ⁷	
	10. State parties shall recognise marital rape by 2030	11. Number of countries that recognise marital rape ⁸	
	11. State parties shall legalise choice of termination of pregnancy by 2030	12. Number of countries that legalise choice of termination of pregnancy ⁹	
Family law	12. States parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage	13. Gender responsiveness of family law provisions	
	13. States parties shall enact and adopt appropriate legislative and other measures to ensure equal rights and access to property acquired during their relationship	14. Gender awareness of judgements in family law cases	
	14. States parties shall put in place legislative and other measures to ensure that parents honour their duty of care towards their children, and maintenance orders are enforced	15. Number of maintenance cases in courts, and analysis of underlying issues ¹⁰	
The girl child	15. States parties shall, by 2030 adopt laws, policies and programmes to ensure the development and protection of the girl child in accordance with the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child; and	16. Responsiveness of all gender laws and policies to the needs of the girl child	
	16. Protect girls from economic exploitation, trafficking and all forms of violence including sexual abuse	17. Number of cases of trafficking involving girls and extent to which justice is served	
Access to justice	17. State parties shall enact and enforce legislative and other measures to ensure equal access to justice and protection before the law by 2030	18. Number of countries that provide legal assistance	
	18. State parties shall ensure that by 2030 all women have access to accessible and affordable legal services, including free legal aid when required	19. Percentage women accessing free legal aid	
Gender responsive legal system	19. By 2030 the provision of educational programmes to address gender bias and stereotypes and promote equality for women in the legal system	20. Proportion of justice functionaries who have undergone gender training	
	20. Women have equitable representation on, and participation in, all courts including traditional courts, alternative dispute resolution mechanisms and local community courts	21. Proportion of women in the judiciary and traditional legal systems including alter-native dispute resolution mechanisms ¹¹	

Source: 2014 Alliance meetings.

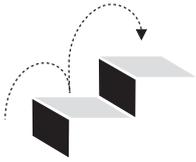
⁷ Establish which countries have discriminatory legislation on sexual minorities and gender identities and track progress on repealing such laws in all SADC countries.

⁸ Audit of legislation in all SADC countries.

⁹ IBID

¹⁰ Gather data from Departments Social Development and Justice.

¹¹ Baseline audit of women in legal structures and annual follow up.



Next steps

Although Botswana's legal system offers considerable protection to women and girls, legislators have not actually implemented many laws, and there is limited awareness of them. Furthermore, the dual legal system means that when abuses occur under customary laws, there is little or no opportunity for redress.

- The law needs to recognise cohabitation since most couples are not married in Botswana.
 - Criminalise marital rape.
 - Review legalising abortion as a choice.
 - Educate the society on the effects of gender-based violence as a preventative strategy.
 - Raise awareness amongst people about laws on gender-based violence.
- Workplaces need to address sexual harassment (The Public Service Act does provide for that but in the parastatal it is an option).
 - Civil society and government need to create awareness about new laws, the amendments and legal procedures.
 - Review alignment of the cultural and common laws.
 - Increase education and creation of innovative means of addressing harmful cultural and traditional practices.
 - Implementation and education remains a challenge; there must be a costing and budgeting to implement gender-related laws and policies.
 - Finalise GeAD's National Gender Analysis and Mainstreaming Training curriculum.