

Full Length Research Paper

# When customary laws face civil society organisations: Gender issues in Botswana

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**In Botswana, society continues to operate under a dual legal system: an indigenously-based customary legal system, and received law, that is, the Constitution, based on a system inherited from the former colonial state. The fact that the constitution places prominence on custom within a range of contexts is particularly significant for women's rights. How far the Government is able to promote basic women's rights and to what extent customary law takes precedence over constitutional law are two legitimate questions yet to be clearly settled. This paper examines how customary law may be contrary to the basic human rights of women, by means of investigating the role of several civil society organisations that act to promote democracy and defend women's human rights. Moreover, the article assesses Botswana's current level of legislative compliance with international obligations, in seeking to identify priorities for working towards greater future compliance.**

**Key words:** Botswana, gender, conflict, culture, civil society.

## INTRODUCTION

Located to the north of South Africa, Botswana is a landlocked country 582,000 square kilometres in land area (that is, larger than France) yet with an estimated population of 1.8 million (less than the city of Paris). The majority of the Botswana people<sup>1</sup> are indigenous Africans, belonging to the Tswana tribe and speaking *Setswana*. Small minorities of *Kalanga*, *Basarwa*, *Kgalagadi* and other peoples also reside in Botswana, although the name Botswana is still used as an all-embracing term referring to all citizens of the nation. At the time of its independence in 1966, Botswana was one

of the world's poorest countries. After 40 years of tremendous growth (a 9% annual average between 1966 and 1999, that is, the highest rate on the planet), Botswana posted the third highest African GDP per capita in 2007. This same year, the Botswana people had become wealthier than the neighbouring South Africans (World Bank, 2009). Botswana has made history by transitioning from a classification as one of the world's least developed countries to a middle-income developing nation (Muchiru and Ekpo, 2006). Furthermore, compared to the rest of Africa, Botswana is considered a 'shining liberal democracy', with elections held every five years, an independent judiciary, and low levels of corruption (Carbone, 2005).

Nevertheless, such staggering economic success since 1966 has been accompanied by an enormous curse in the country's health field. Since Botswana's first case of HIV/AIDS was reported in December 1985, the epidemic has spread rapidly. Botswana now ranks second in the world for HIV/AIDS prevalence (Muchiru and Ekpo, 2006).

According to the 2004 Botswana MDG Report, the

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<sup>1</sup> While "Botswana" serves as the country name, the term "Botswana" is used for the population as a whole and "Motswana" for a single person. The official languages are "Setswana" and English, yet many others also exist. Some of the Setswana words used in this paper are: *Kgosi* = Chief (pl. *dikgosi*); *Morafe* = Tribe (pl. *Merafe*); *Bogosi* = Chieftainship (the institution); and *Kgotla* = Village Assembly (also means the courthouse).

adult HIV prevalence rate has remained above 30% since 1995. Women are the primary victims of HIV/AIDS: the 2002 HIV Sentinel survey, conducted across all health districts, shows that in 2002, HIV prevalence rates among women aged 15 - 19 was approximately 21% and for women 15 - 49 it rose above 35.4% (UNDP, 2004). Gender issues lie at the heart of this public health catastrophe. Conservative views towards women based on tradition and deep-rooted institutional cultures have helped spread this disease in both urban and rural areas. Moreover and like most African countries, Botswana society continues to operate under a dual legal system, combining elements of an indigenously-based customary legal system with received law, as inherited from the former colonial state.

In Botswana, customary law for the most part constitutes the core of personal law, especially as regards women's rights. Since the majority of the population continue to live a traditional lifestyle, customary law continues to reign supreme in the areas of family and inheritance. More specifically, it establishes the obligations of children, women and men towards one another, in addition to defining property ownership and dictating marriage and divorce proceedings. Lastly, this legal framework organises access to all types of resources; on the whole, it strengthens the traditional social order. Consequently, traditional practices may be lawful under certain circumstances. Equality between women and men is not necessarily guaranteed and only rarely takes precedence over custom.

The Botswana government has ratified many regional and international human rights instruments since 1966, including the obligation therefore to ensure that the basic rights of the Botswana people are being respected by all administrative levels. Determining the extent of government obligation to promoting the basic rights of its citizenry as well as the degree to which customary law takes precedence over constitutional law are two legitimate queries to be addressed herein.

The intention of this investigation is not to reflect negatively on the Botswana government, nor is it our purpose to examine in detail all customary practices that end up in human rights violations. Based primarily on reports issued by both non governmental organisations (NGOs) and the United Nations, this paper will first examine how customary law may be contrary not only to the country's obligations but also to basic human rights. With this objective, we will be raising questions about norms and customs that constitute a threat to the full achievement of women's human rights while customary law is being applied. The next part will focus on the role of a number of Civil Society Organisations (CSOs), which act to promote democracy and defend human rights. The article will also assess Botswana's current level of legislative compliance with international obligations in order to identify priorities for pursuing greater future

compliance.

### **Customary law and gender equality**

Even though the Constitution and ensuing law ratified in 1966 prohibit governmental discrimination on the basis of gender (Section 3, 1966 Constitution), no prohibition is decreed against discrimination by private persons or entities. While rape is outlawed, the concept of spousal rape does not get recognised, nor is domestic violence against women specifically prohibited. Despite being ruled illegal, prostitution was widespread (United Nations, 2003). Sexual harassment in the private sector is not covered by the law, yet sexual harassment committed by a public officer is considered an offence. Since the end of the 1990s however, the Government has increasingly demonstrated its political will to introduce gender mainstreaming (Muchiru and Ekpo, 2006), as evidenced by:

- i. The National Policy on Women and Development was implemented in 1996;
- ii. The Convention on the Elimination of all forms of Discrimination against Women was ratified in 1997;
- iii. The Botswana National Council on Women was established in 1999;
- iv. The Gender Advocacy and Social Mobilisation Strategy was developed in 1999;
- v. A study of the socio-economic impacts of violence against women was conducted and disseminated in 1999;
- vi. Point persons for gender-specific issues were appointed to various ministries in 2000;
- vii. A "Step-by-Step Guide to Gender Mainstreaming" was published in 2002;
- viii. Study tours were conducted throughout the country on the topic;
- ix. Support was provided to commemorate "Sixteen Days of Activism on Violence against Women" and International Women's Day;
- x. A disaggregated gender database for senior management positions in both the public and private sectors was compiled.

Yet all these efforts have not been enough. The Constitution may be strictly enforced in the application of any law, and while the court's independence may be enshrined in the Constitution, nonetheless no explicit provision making the Constitution the supreme law of the land has ever been adopted in Botswana. As Boo (2006) observed, "this is assumed". According to the 2007 Country Reports on Human Rights Practices released by the United States Bureau of Democracy, Human Rights and Labour (US Department of State, 2008), sexual discrimination has persisted even though from a legal

perspective women have the same civil rights as men. Many traditional laws enforced by tribal structures and Customary Courts have clearly restricted women's property rights and economic opportunities. Traditional tribal law also referred to as customary law, still limits gender equality.

When the British Bechuanaland Protectorate was established in 1885, indigenous legal laws had been in effect for a long time. The addition of customs applied in specific tribal areas defines the term "customary laws" now used. These customary laws therefore differ from one tribe to the next, and one tribe might accept what another rejects. All such laws remain unwritten. With the members of a particular community, the *Dikgosi* share knowledge of these laws and apply them. Since lawyers are not allowed to appear in court (Section 32, Customary Law Act, Cap. 16:01), the Customary Courts are free and, consequently, more accessible to citizens than the Received Courts. Customary Courts are empowered both civil and criminal jurisdiction: courts adjudicate minor criminal offences under the Penal Code (Sections 11 - 12, Customary Law Act); moreover, trials are often held in the local language. In Botswana, English is spoken only by a minority while Setswana is spoken by over 70% of the Botswana people. At least 80% of cases are processed in the 500 Customary Courts spread throughout the country, with this proportion estimated to be as high as 90% for civil cases and 85% for criminal cases<sup>1</sup>. Customary courts are administered by individuals without any legal training; hence no codified guide is part of the deliberation. Court sessions are more likely therefore to reflect discriminatory perceptions, such as the second-rate status of women in society.

The definition of customary law is given under Section 2 of the Customary Courts Act of 1969, as well as under Section 4 of the Common Law and Customary Act (Booi, 2006):

'Customary law', in relation to any particular tribe or tribal community, means the law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.<sup>2</sup>

It is very interesting to note that in Botswana, customary law embodies the roots of all legal bases, since common law is defined as "any law (...) other than customary law"<sup>3</sup>. For this reason, the Botswana's 1966 Constitution<sup>4</sup> gave such a legal recognition in Chapter IV (Parliament), Part IV (Powers of Parliament): 88 –

<sup>1</sup> According to the Integrated Regional Information Network (IRIN), Botswana. See also "National Development Plan", Paragraph 20.6. <http://www.ditshwanelo.org/bw/botswana.html>, accessed 3 March 2010.

<sup>2</sup> <http://www.laws.gov.bw/Docs/Principal/Volume2/Chapter16/Chpt16-01%20Customary%20Law.pdf>, accessed 3 March 2010.

<sup>3</sup> <http://www.laws.gov.bw/Docs/Principal/Volume2/Chapter16/Chpt16-01%20Customary%20Law.pdf>, accessed 3 March 2010.

<sup>4</sup> <http://www.botswanaembassy.org/index.php?page=constitution-of-botswana>, accessed 3 March 2010.

## Introduction of Bills

The National Assembly shall not proceed upon any Bill (including any amendment to a Bill) that, in the opinion of the person presiding, would, if enacted, alter any of the provisions of this Constitution or affect:

- (a) The designation, recognition, removal of powers of Chiefs, Sub-Chiefs or Headmen;
- (b) The organisation, powers or administration of customary courts;
- (c) Customary law, or the ascertainment or recording of customary law; or
- (d) Tribal organisation or tribal property, (...)

The indigenous peoples' laws have not yet been incorporated into the general law of the land, though they still constitute some of fundamental bases for the general law.

Customary law should normally be compatible with the Constitution and in no way oppose morality, humanity or natural justice (Section 2, Customary Law Act, Cap. 16:01). Yet, even when customary law passes these standards, the attitudes and methods adopted by the Customary Courts can still sometimes lead to distortion (see Montle David Sekonpelo vs. Sebedi Keetile, 1958, HCTLR 88), which is not uncommon when traditional justice collides with the post-colonial (Roman-Dutch) system of justice.

Customary Law actually continues to affect the personal and property rights of women. Men are still being treated as the head of the family and granted guardianship rights over women and children. The law does not specifically prohibit domestic violence against women, given the widespread abuse of women in Botswana (US Department of State, 2002, 2006). Customary law allows husbands to treat their wives in the same manner as minor children. Husbands may resort to corporal punishment to discipline their wives, and this practice is common in rural areas. Greater public awareness and improved legal protection have resulted in increased reporting of domestic violence and sexual assaults (US Department of State, 2008). Nonetheless, women have remained in abusive marriages for many years, as a result of how they perceive the abuse and the social stigma that prevents them from leaving (Maundeni, 2002). Despite introduction of the Abolition of Marital Power Act (2004), women married under Customary Law are still not covered by the legislation on abolishing marital power. The Government plans on addressing marriages under Customary Law in the future, but the Abolition of Marital Power Act has been met with opposition in the *Ntlo ya Dikgosi* (House of Chiefs), a purely advisory institution with no legislative powers yet which commands significant influence.

A mother holds no maintenance rights under Customary Law when children are born out of wedlock. The father is expected to pay the mother's father certain compensation in reparations for damaging the family reputation, yet

incurs no responsibility to support the child. The child's maternal grandfather has the duty of supporting his unmarried daughter's child: this situation reflects the view that a woman remains her father's "property" until marriage, at which time she becomes her husband's property<sup>1</sup>. Women were constrained in particular by the norm that compensation was only available for the first pregnancy. Even though it is possible to negotiate a reduced compensation for second and subsequent pregnancies, bargaining during these negotiations takes place 'in the shadow' of this norm and places women in a disadvantageous position (Gallanter, 1981). A *nyatsi* (concubine) cannot claim any share of her husband's estate, despite the very high number of extramarital births and female-headed households according to official Botswana statistics (Botswana Central Statistics Office, 2008). In April 2008, a national daily reported the following (Mmegi, 2007a, 2008):

Traditionally, a man is like a bull. He can jump over the fence and mate with cows in the next kraal. *Bonyatsi*, or the keeping of concubines, has been part of the lives of most Batswana from time immemorial; it is one practice that has survived the test of time.

Under Customary Law, if parents are married and separated, the custody of the children is traditionally granted to the father's family, with the mother merely granted visitation rights (Mokomane, 2001). Where there is no written will (which is typically the case), male children's rights to inheritance under Customary Law take precedence over that of female children, with daughters in some cases even being disinherited altogether.

The underlying customary norms promote and maintain male control of the nation's productive resources, primarily the land. Inheritance is organised through the male lineage, thus further excluding women from gaining control of the land (Molokomme, 1994). A wife's ownership rights depend on the legal system under which she was married. A woman married under traditional law or with the stipulation of common property is viewed as a legal minor and requires her husband's consent to buy or sell property and land, apply for a bank loan, and enter into legally-binding contracts. Women married under a community of property contract are allowed to own real property in their own names and moreover the law stipulates that neither spouse can dispose of joint property without mutual consent. Under traditional law, unmarried women fall under the guardianship of their father and, upon his death, under the guardianship of his heir, who is then also granted ownership of any assets. Some traditional systems have relaxed this rule and now grant unmarried women varying degrees of legal control.

Sedentarisation has also undermined the former egalitarian gender relations in other ways. In shifting their

subsistence resources to animal husbandry and crop planting, gender roles have become more rigidly defined and a woman's work is seen as "unworthy" of men.

Botswana law does not recognise rape within the confines of marriage. However, studies in the region reveal a high level of abuse and rape within marriages in rural areas, the majority of which go unreported: Interestingly, after considerable debate, the issue of marital rape was ignored because it was deemed incompatible with the Penal Code (Mmegi, 2007b). Indigenous women experience an increase in domestic violence and sexual abuse. Alcohol contributes to spousal and child abuse, and alcohol-related violence generally constitutes a major cause of social conflict. The female school dropout rates is high, in part due to teen pregnancies and girls' fear about remaining in what they see as exploitative situations<sup>2</sup>.

Girls' enrolment in primary and secondary institutions is comparable with that of boys (UNDP, 2004). Although the education system is based on gender equality, socio-economic influences continue to place more pressure on girls to drop out, for reasons that include looking after sick relatives, pregnancy (a government policy allows girls to return to school after 84 days of leave, but in practice they rarely do, The Education Act, Chapter 58:

1) and marriage arranged under Customary Law. While Common Law does not allow minors under age 18 to marry, Customary Law permits the marriage of children, and this often results in girls being forced to marry against their will. Once married, they are also forced to leave school.

Ultimately, the effect of traditional culture, which emphasises negotiation as a solution to problems over court action, leads to the unfair treatment of women and perpetuates their minority status.

Customary Law is often tribe-specific. When traditional culture does not effectively promote and defend gender equality, human rights cannot therefore be seen as compatible and threatens some aspects of these traditional cultures:

Culturally, women had no say; they were supposed to be seen but not heard. Culture relegated women to a subordinate position where they were expected to respect men at all costs, and to know their boundaries as women. Cultural traditions made women overly humble. Cultural proverbs such as *Mosadi, mosalagae* ('a woman's place is in the home') perpetuated the under-representation of women in leadership and decision-making positions (Peters, 2004).

A research study, conducted in September 2002 and focused on analysing 25,110 news items, found that news in Botswana, through various media channels, was primarily delivered through the voices and perspectives of men. Few women sources are quoted in reports, other

<sup>1</sup> <http://www.ditshwanelo.org/bw/gender.html#gencust>, accessed 3 March 2010. The Botswana Centre for Human rights: "Human rights, not human wrongs".

<sup>2</sup> International Work Group for Indigenous Affairs (IWGIA), [http://www.iwgia.org/sw9942.asp#516\\_10206](http://www.iwgia.org/sw9942.asp#516_10206), accessed 3 March 2010.

than stories related to issues such as gender violence. Female journalists are only allowed to cover a limited number of issues, including for example entertainment and the courts<sup>1</sup>. Such a strong male influence on public views is likely to result in biased reporting and continues to reinforce gender stereotypes in *Tswana* society; it clearly indicates that despite changes in Common Law, gender inequality remains strong in practice, especially in more traditional and rural areas. Women's subordination is deeply ingrained into the consciousness of both men and women, which is why feminist associations faced many difficulties and challenges at the beginning of their existence.

## THE ROLE OF CIVIL SOCIETY ORGANISATIONS

When discussing the concept of civil society, we are referring to the realm of "voluntary self-generating and organised non-state organisations" (Molutsi, 1995). Civil Society Organisations are considered by the United Nations Development Program (UNDP) as partners working to complement the development efforts of governments on behalf of its citizens. They represent the best bodies to understand local problems and needs and, in some cases, are the only legitimate and credible local actor for implementing policies and changing conservative gender practices.

Only two non-governmental organisations existed in 1990 with the ability to analyse official policies and lobby the Government. In 1991, a total of 18 NGOs were engaged in the formal policy-making arena (Osei-Hwedie et al., 2004). A study conducted by Holm, Molutsi and Somolekae in 1993 to 1994 concluded that the Botswana civil society was weak in spite of a multiparty political system and the development of private media (Holm et al., 1996). Civil Society Organisations were in fact primarily concerned by promoting their members' interests and much less by their relationship with the State (Somolekae, 1998). Ten years later, Carbone proposed the same conclusion: "civil society in Botswana was rather weak" (Carbone, 2005), in providing four main reasons. First, authority was rarely questioned due to cultural reasons. The former royal family still controlled power and authority within the leading political party, the BDP (Botswana Democratic Party). The role and dignity of *Kgosi* at both the national and local levels kept repressing movements favouring emancipation. Second, despite being a liberal and democratic State, clientelistic government administrations have nurtured a culture of dependency. From the first Botswana President Seretse Khama, who ruled between 1966 and 1980, to his son

and ruler since 2008 Seretse Ian Khama, the same party and even the same family within this party seem to be leading the nation. Third, the Government has for a long time denied the role of civil society as a legitimate player in the development process. Civil Society Organisations have been tagged as either promoting foreign interests or infiltrated by the opposition (whose influence has always remained weak). The State has thus used the law to frustrate or impede the initiatives and activities of these groups (Somolekae, 1998). The fourth and final reason is that civil society has not been cohesive and has lacked funding. Since the Botswana was the primary source of financing for these organisations for years, it was in a position to define and circumscribe the role and influence of each individual organisation.

Since the late 1990s, it can be readily observed that the availability of donor resources (both inside and outside Botswana<sup>2</sup>) has provided the means for CSOs to mobilise and strengthen their capacity. This increased inflow of funds to NGOs has been facilitated by Botswana's reputation as the model for democracy in Africa. Among such organisations, women's groups had been excluded and isolated by the Government for years.

Traditionally, women's organisations were essentially welfare-oriented, but during the mid-1980s radical women's groups began appearing on the political scene. Furthermore, since 2000, numerous associations have been championing special interests. The growth of civil society in terms of numbers of participants, membership and formal structures has been tremendous (Osei-Hwedie, 2004).

The *Emang Basadi* Women's Association was first formed in 1984 to lobby to overturn laws that were deemed discriminatory against women in Botswana. A few years prior, the 1982 Citizenship Amendment Act had denied women married to non-citizen men the right to transmit citizenship to their offspring. Even though this Association was poorly received at the outset, it began step-by-step to organise and network Botswana society in conjunction with other *Emang Basadi* CSOs. Switching to a more political agenda in the 1990s, the Association launched the Women's Manifesto, promoting the equal political participation and representation in public decision-making for women. This initiative occurred at the same time that political parties were drafting manifestos in preparation for the upcoming elections. Given that women were a natural majority among the electorate and that political parties considered the women's vote as a good opportunity to extend their electoral base, *Emang*

<sup>1</sup> Media Institute of Southern Africa (MISA), "Gender and Media Baseline Study", conducted by MISA and Gender Links: <http://www.misa.org/genderandmedia/accountability.html>, accessed 3 March 2010.

<sup>2</sup> In 2001, the famous rock group UB40 staged a special concert in their hometown of Birmingham to celebrate their 21<sup>st</sup> anniversary. As part of an invitation for UB40 to join the United Nations' ongoing campaign to stop the alarming spread of HIV/AIDS, the group has donated US\$ 75,000 from the proceeds of that concert to UNDP Botswana for disbursement to deserving organisations in the area of HIV/AIDS (source: UNDP in Botswana): [http://www.unbotswana.org/bw/undp/news\\_220604.html](http://www.unbotswana.org/bw/undp/news_220604.html), accessed 3 March 2010.

*Basadi* helped increase women's representation after the historic 1994 elections (from 5 to 11% of the seats in Parliament). Next, it sought to build a longer-term strategy of sustained political mobilisation. In the 1999 party primaries and national elections, more women candidates ran for office than the total number for all previous elections held (Selolwane, 2004). Nevertheless, female mobilisation had obtained only limited results up until then. First, like with most of Africa's political parties, Botswana's women politicians tend to be spouses and associates of male politicians. According to the so-called "First Lady" syndrome, they typically support their partner rather than representing women's interests. Second, the "winner-takes-all" electoral system reduced the possibility for women to win seats in the Botswana Parliament. Even though 45% of the electorate voted for the opposition, only 18% of parliamentary seats were actually won by opposition politicians. Third, opposition parties are splintered into impotent fragments: the main opposition party, the Botswana National Front, underwent a new split in the run-up to the 1999 elections, denying them any representation at all in the composition of Parliament.

Women active in politics from all parties in Botswana founded the Botswana Caucus of Women in Politics (BCWP), a spin-off from *Emang Basadi*. The BCWP is a non-partisan organisation constituted to provide a forum for solidarity and support as well as a united voice on gender issues. The caucus fulfils its missions through training, research, lobbying and networking for politically active women. The BCWP is committed to a society in which women and men have equal opportunities to participate in all spheres of public and private life (Peters, 2004).

The *Metlhaetsile* Women's Information Centre was created in 1991. At first, it was a village-based education and information centre located in Mochudi (40 km from the capital city of Gaborone), operating with a volunteer staff and board. With the approval of the local Chief *Kgosi Linchwe II*, the Centre established a resource, counselling and advisory office and moreover conducted workshops, organised public meetings and published educational materials for the purpose of introducing the notion of gender inequality into the country's public consciousness (Andreopoulos, 1997). In 1998, its founder was appointed to a judgeship. Since then, the Centre has continued to address complex dilemmas facing women and their families in order to reduce the gender inequality gap.

The Botswana Centre for Human Rights, *Ditshwanelo*, is another CSO that has attempted to influence national human rights policy; it was established in 1993 and since that time is still the only Botswana organisation dealing with all aspects of human rights. Most of the information available on gender inequality in Botswana is centralised and disseminated by *Ditshwanelo*. This Centre advocates for changes in laws, policies and practices, while raising

public awareness regarding rights and responsibilities. In 2000, together with women's NGOs, it lobbied for the adoption of a domestic violence bill to protect women and children. Alongside the Women's NGO Coalition, *Ditshwanelo* published the "Know your Law" handbook on inheritance rights, which is particularly relevant for women in Botswana (Ditshwanelo, 2004). The Centre also participates in the University of Botswana Gender Policy and Programme Committee workshop on establishing the Gender Study Centre at the University. Moreover, it has taken part in various projects such as the Women's Shelter project established in 1998. In recognition of the prevalence of domestic violence, this project is aimed at assisting women and their children who survived domestic violence by providing them with 24 h a day temporary shelter, support and rehabilitation (Ditshwanelo, 2004).

All NGOs involved with the empowerment of women in Botswana joined their forces to form the Women's NGO Coalition as an umbrella body, in order to represent their interests in dealings with the Government. The Women's NGO Coalition (WNGOC) is a network of non-governmental organisations and non-profits concerned with women's empowerment, and rural women in particular; it promotes solidarity and facilitates lobbying and advocacy, through collaboration, networking and capacity building. Many of these organisations belong to the WNGOC. In addition to those presented above, the Botswana Federation of Trade Union, the Cooperation for Research, Development and Education (CORDE), the Society of Women against AIDS in Botswana, the Women's Finance House Botswana, Women Against Rape and Women and Law in Southern Africa Research and Educational Trust (WLSA) are all members as well. The Botswana Federation of Trade Union is specifically intended to empower women on issues affecting them both in and outside the workplace, with a focus on educating women about gender issues relevant at home, work and elsewhere. The Women Against Rape (WAR) organisation provides counselling, legal support and moral support to rape victims; it has lobbied for harsher sentences for rapists. As a testimonial to the achievements of these CSOs, tougher laws against rape were voted in 2004, and the 2004 Marital Power Bill abolished the common law rule that had given a husband power over his wife (Transparency International, 2007).

Since the early 1990s, CSOs have changed in a number of ways. Their numbers have grown significantly, with estimates including 150 indigenous NGOs, around 50 Community-Based Organisations, some 23 Trade Unions and a handful of business associations (Transparency International, 2007). At the beginning of the millennium, these entities began receiving funding by international donors and private sources. Their impact on gender equality has been tangible: women now hold a number of key positions and female priests have even

been ordained by the Dutch Reformed Church.

In the Government's 19-member 2005 cabinet for example, five were women. 11 women count among Botswana's 61 elected Members of Parliament. Of the 15 members of the 'Ntlo ya Dikgosi' (House of Chiefs), three are women. Women currently hold a number of other prominent positions, including: Governor of the Central Bank of Botswana (Dr. Linah Mohohlo), the first female Attorney General (Dr. Athaliah Molokomme, appointed in 2005), the Director of Public Prosecution (Ms. Leatile Dambe, appointed in October 2005 following promulgation of the Constitutional Amendment Act creating the post), University of Botswana Deputy Vice Chancellor for Student Affairs (Professor Lydia Nyathi-Ramahobo, also appointed in 2005). Female priests have been ordained in some of the country's major Christian denominations such as the Dutch Reformed Church. The decision to allow female priests within the Dutch Reformed Church was met with some hostility (Ditshwanelo, 2007).

Some noteworthy legal changes have been enacted as well (Ditshwanelo, 2004):

- i. The Citizenship Act was amended to enable Botswana women married to non-citizens to transmit Botswana citizenship to their children (after the landmark 1995 case of *Unity Dow v. Attorney General*).
- ii. In 1998, the Penal Code was amended to include a gender-neutral definition of rape.
- iii. Abolition of the Marital Power Act of 2005 now gives equal power in the family to both partners in a common law marriage. Prior to this legislation, married women were regarded as minors, and policies in effect across government departments and financial institutions demanded that a married woman obtain her husband's consent to carry out any transactions and moreover granted the husband all property rights.
- iv. The Deeds Registry Act has since been amended to enable women to register immovable property under their own names.
- v. The Mines and Quarries Act now allows women to work underground.

Yet as the economy has grown, international funding (both private and corporate) has decreased and the Botswana State has now once again become the primary sponsor of the country's non-political activity, with so much still left to do.

## **BOTSWANA'S LEGISLATIVE COMPLIANCE WITH INTERNATIONAL OBLIGATIONS**

Botswana's Constitution guarantees the equality of all persons irrespective of gender. This equality provision has been reconfirmed by Vision 2016, Botswana's strategic plan to propel socio-economic and political developments

towards building a competitive, successful and prosperous nation. Seven key targets have been defined in order to achieve this objective. The plan also states the aim that by 2016: "No stereotypes will be associated with gender (...). There will be respect of human rights and no abuse of children and women" (Vision 2016, 2003).

Botswana's international commitment to basic human rights has required some adaptation of customary law. For instance, by virtue of Subsections 4(c) and (d) under Section 15 of the Constitution, the prohibition of discrimination on the basis of ethnic origin or tribal affiliation does not apply to matters of personal and customary law, while Subsection 9 authorises the implementation of discriminatory laws currently in effect before entering the jurisdiction of the Constitution<sup>1</sup>. (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision — (...)

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; (...)

These exceptions cannot be justified under the International Convention on the Elimination of All forms of Racial Discrimination (ICERD), ratified in 1974<sup>2</sup>.

On July 17, 1986, Botswana ratified the African Charter on Human and People's Rights (ACHPR), which seeks to eliminate discrimination against women and equality before the law. Ten years later, on August 13, 1996, Botswana signed and ratified the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW), in addition to the Beijing Declaration and Platform of Action adopted at the Fourth World Conference on Women in 1995. CEDAW is the only human rights treaty that affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. This Convention requires countries to take all appropriate measures to modify their constitution and legislation to comply with the articles of CEDAW or abolish existing laws, customs and practices that discriminate against women. The government signed and ratified the Convention in 1996.

The following year, the Southern African Development Community (SADC) Declaration on Gender and Development was signed and ratified by Botswana. This Declaration included a commitment to achieving a proportion of at least 30% women working in political and decision-making structures by the year 2005. Unlike other

<sup>1</sup> 1966 Botswana Constitution: <http://www.botswanaembassy.org/index.php?page=constitution-of-botswana>, accessed 3 March 2010.

<sup>2</sup> The ICERD Treaty: <http://www2.ohchr.org/english/law/cerd.htm>, accessed 3 March 2010.

SADC countries, Botswana has not introduced a gender quota system. According to the United Nations Development Programme's 2005 report, women occupied 11% of Parliamentary seats in Botswana.

While public institutions are bound by these anti-discrimination provisions, no explicit extension has been adopted to protect women from discrimination by any person or organisation under customary law. Article 14 of CEDAW obligates the States' political parties to implement measures that ensure the equality of rural women. Country women in Botswana play a significant role in the economic survival of their families and communities despite being frequently disadvantaged in areas such as land ownership, health, education and housing. Achieving substantive equality for rural women as well as complying with CEDAW requires special measures to be incorporated into both the Constitution and legislation. Botswana, however, has yet to undertake such measures.

Similarly, Article 16 of CEDAW mandates banning discrimination in areas of family and personal law including marriage, separation, divorce, maintenance, child custody, property division, paternity and inheritance<sup>1</sup>. In its General Recommendation 21, the CEDAW Committee states that the right to own, manage, enjoy and dispose of property is central to a woman's right to financial independence<sup>2</sup>. Women in Botswana do not enjoy equality in relation to the ownership, administration, use and control of property since patrilineal inheritance is the favoured legislative status, thus leaving men in charge of land and property. The Article further stipulates that inheritance laws be applied to both genders. Though the country's inheritance laws apply equally to men and women under Common law, the customary rules of inheritance may lawfully and openly contradict formal law. Unfortunately, no national human rights apparatus has been assigned to promote and protect human rights, including women's rights, nor does any funded body monitor the implementation of non-discriminatory laws and policies on behalf of the advancement of women, as required under Article 3.

Botswana is a party to the International Covenant on Civil and Political Rights (ICCPR), following its accession announced on September 8, 2000. Under Article 50 of the ICCPR<sup>3</sup>, the country has agreed to apply the provisions to all sectors without limitation or exception. However Botswana has still not ratified the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, which came into force

<sup>1</sup> See the CEDAW Treaty: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>, accessed 3 March 2010.

<sup>2</sup> See General Recommendation n°21: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>, accessed 3 March 2010.

<sup>3</sup> See the ICCPR Treaty: <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 3 March 2010.

on December 22, 2000. This Protocol provides an international access to justice for women who have been denied access in their native countries via a claims review process overseen by a committee of independent experts.

Regarding the status of children under customary law, the Botswana government has for the first time, through the recently introduced Children's Bill of 2007, called for the increased involvement of parents and children in decision-making. The objective of this Bill is to hold Botswana liable for its obligations relative to the Convention on the Rights of the Child (CRC<sup>4</sup>), ratified in 2003, and the African Charter on Rights and Welfare of the Child (ACRWC<sup>5</sup>). The Bill is currently being debated (Barbara, 2009), amidst continued widespread ignorance of CRC and children's rights in Botswana (Godisang, 2009).

The extent to which customary law must conform to existing international human rights norms raises complex policy issues for the Botswana government. International instruments are not directly applicable in cases of domestic law, and not all rights provided in the Covenants are addressed in the Constitution and national legislation. The courts are required to interpret domestic law in a manner consistent with international treaties; knowledge of the rights contained therein by the legal profession remains limited (see also Attorney General vs. Unity Dow, [1992] 1 BLR 158).

At both the policy and legislative levels, substantial progress has been achieved towards gender equality. The substantive challenge now lies in bridging the gap not only between progressive policy and legislative reforms but also between tradition and deep-rooted institutional cultures that prevent equal citizenship rights for men and women. The key obstacle is therefore transformational (UNDP, 2004) and consists of aligning institutional and personal attitudes with progressive policies and laws. However, before changing social attitudes, concrete things can be done (UN, 2003; UNDP and Government of Botswana, 2004).

The top priority is to eliminate gender-specific constraints on learning. Girls should be relieved of the burden of household responsibilities beyond normal chores essential for healthy development. Moreover, no child should have to sacrifice his/her educational opportunities because of the need to work. Incorporating gender equality into human rights publications, such as teaching materials for schools, as well as creating specific publications for women, such as Ditshwanelo's Guide on Domestic Workers' Rights, represent good ideas along these lines. A greater diversity in women's education and training should be strengthened. Public

<sup>4</sup> See the CRC Treaty: <http://www2.ohchr.org/english/law/crc.htm>, accessed 3 March 2010.

<sup>5</sup> See the ACRWC Treaty: <http://www.africa-union.org/child/home.htm>, accessed 3 March 2010.

education towards transforming practices is an imperative for achieving gender equality.

As entrepreneurship is the key towards social and economic development, developing micro-finance for rural women could help them become more independent and respected. The Government needs to increase women's access to revolving loan schemes, either individuals or a group. Rural women are involved in many income-generating activities (Joshi and Kirjavainen, 2002). They could use modern agricultural technologies for tasks like planting improved seeds along with new machinery (e.g. grinding machines, cassava slicing machines) or trade agricultural products.

Another challenge is to facilitate the entry of women into fields traditionally dominated by the other gender. Many women are already at the head of powerful institutions. The promotion of capable women to leadership positions could speed up social and cultural changes. This trend towards more women in leadership positions should continue. The government should recognise women's roles and rights through affirmative action, by mandating procedures to ensure a minimum quota of female representatives, as it has been done in India in March 9, 2010. Botswana would gain significant momentum towards women's presence among the political, corporate and civic leadership. A connection definitely exists between life outcomes for particular groups of society and their influence on leadership. Women's empowerment necessitates placing women in positions that allow influencing policy.

Effective action to promote gender equality requires assessing the magnitude of the inequality problem by a broader range of stakeholders. To measure progress, an effective system of monitoring gender-related developments is thus essential. A mechanism for monitoring gender inequalities should be set up by the Government under the patronage of NGO or the UN. Unfortunately, critical information for conducting gender-related analysis lies outside the public domain. At present raw gender-related data are generated by different institutions: e.g. police, courts, educational institutions, labour offices, NGOs). Such input should then be pooled in order to build a credible database in support of gender-related policy analysis and advocacy.

Eventually, women often suffer discrimination simply because institutional practices and social attitudes are slow to respond to progressive policy and legislative reforms. Botswana's policies and laws do not discriminate on the basis of gender. Many policies and laws are actively promoting gender equality. To change social and cultural behaviours against women, mobilisation and awareness building campaigns should be launched to encourage women to participate in political, social and economic activities. Tougher measures, albeit with due sensitivity wherever culture and tradition are concerned, should be introduced when institutions engage in

discriminatory practices or retain discriminatory provisions in their official documents (e.g. application forms). Social attitudes on the role and status of women within the community must be changed as the gender-based discrimination constitutes a human rights violation.

## CONCLUSION

Unlike Western democracies, the political process in Botswana does not involve close collaboration or electoral alliances between interest groups and political parties. Virtually no such relationship exists, as a result of the fact that elections and representation are largely determined by "ethnic loyalties" rather than "issues, government performance or even candidates' personality". In other words, since interest groups are issue oriented, like *Emang Basadi* (women's rights), the labour movement (workers' rights) or *Ditshwanelo* (human rights), they exert just little leverage over rural politicians, who make up 80% of Parliament and 90% of the BDP MPs, given that ethnic loyalties are strongest in rural areas.

Party loyalty has in fact thwarted the previous efforts of organisations like *Emang Basadi*. Although such organisations lobby for women and in general for political parties to increase the percentage of women holding political office, it is difficult for women to vote for a candidate from an opposing party simply because she is a woman: party affiliation seems to carry with it a stronger commitment (Osei-Hwedie, 2004).

Like other government institutions, the Customary Courts have been affected by Botswana's rapid transformation since independence. It has now become a contentious matter for the traditional courts to deal with more assertive citizens who will not compromise on their rights. In handling these complex problems, the Government must regularly adjust its strategies as circumstances dictate. The extent to which human rights can be merged into Constitutional legislation under the traditional legal system remains limited. This age-old system continues to undermine the rule of law and with it the dignity of the Botswana people. The time has definitely come for the Customary Courts to employ legally trained personnel and for Botswana to have their constitutional rights observed and respected. But as Morapedi noted (Morapedi, 2002), even if an opposition party were to take political power, abolishing *bogosi* would still seem impossible given that Botswana still cherish the institution, no matter how weak it may be.

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