

Botswana

Botswana has a plural legal system composed of both common and customary laws, which co-exist and overlap, and sometimes come into conflict. Customary law is not codified, and its content varies between tribal groups within Botswana (The International Commission of Jurists, 2013).

In 2016 Botswana established the National Gender Commission (NGC), which is made up of 16 commissioners from government, parastatals, the private sector and civil society organisations (Kgosikebatho, 2016). The NGC was established by the Minister of Labour and Home Affairs, and the duties of commissioners including providing policy direction, leadership, and governance; advising government on gender issues (in particular with regards to policy development and service delivery); and liaising with the Gender Affairs Department and other public and private sector stakeholders to develop strategies for advancing gender equality (Ibid).

1. Discrimination in the family

a) Overarching legal framework for marriage

Marriages are governed by the Marriages Act (Chapter 29:03), which stipulates that the minimum legal age for marriage is 18 for both men and women, though anyone under the age of 21 must obtain permission from their parent/guardian, or where this cannot be obtained from an administrative officer in the district in which they reside. Forced marriages can be voided in terms of the Matrimonial Causes Act (Chapter 29:06). According to the Marriages Act, anyone who solemnizes an invalid marriage shall be guilty of an offence and liable to a fine not exceeding BWP 1 000 or to imprisonment for no longer than one year, or both.

Customary, religious and civil marriages can be registered under the Marriages Act, however there is no legal recognition of de facto or informal unions, which are reportedly becoming more common in Botswana (Mokomane, 2013).

b) Child marriage

The legal age of marriage is 18 for both men and women. Forced marriages for children under the age of 18 and child betrothal are prohibited under the Children's Act (Act 8 of 2009). Both the Marriages Act and the Children's Act provide penalties for those who solemnise child marriages, including fines and imprisonment.

Child marriage is reportedly uncommon (US Department of State, 2017; UNICEF, 2016). However, The Botswana Network on Ethics, Law and HIV/AIDS reported that in 2015 at least 3 cases of child marriage took place, and these cases occurred within the Bazeduru tribe (BONELA, 2015). In addition, these marriages are often intergenerational, and result in early pregnancy, school drop-out, and are linked to abuse (Fanian, 2016; CEDAW Committee, 2010).

c) Household responsibilities

The Abolition of Marital Power Act (2004) repealed common law practices of patriarchal marital power, and gave men and women equal rights within marriage and guardianship over their children. It specifies that women are not required to obey their husbands, and enjoy the same rights to be head of the household and make major familial or economic decisions. However, this Act does not apply to customary or religious marriages (Section 3). Women married under customary law are considered legal minors, and require the permission of their spouse for household decisions, and access to finance (US Department of State, 2017).

Labour patterns in Botswana have historically involved significant migration of male labour; hence many women bear full responsibility for household chores, and childcare (Dobson, 2011). In addition, the impact of the HIV/AIDS pandemic has led to a high number of female-headed households, and this has been linked to poverty and vulnerability (UNICEF, 2015; BOCONGO, 2009).

d) Divorce

Men and women have equal rights to initiate divorce and to finalise it in terms of the Matrimonial Causes Act (Chapter 29:06). However, like the Abolition of Marital Power Act, this Act does not apply to customary or religious marriages. This limits the ability of women within these types of marriages to access equality or to initiate divorce.

In addition, no person can initiate divorce if the marriage has lasted less than two years (except in serious circumstances), or when the spouse is not domiciled in Botswana, or has not been a resident of Botswana for a continuous period of three years prior to instituting divorce proceedings (Matrimonial Causes Act, Chapter 29:06, Section 7).

With regards to children, the Matrimonial Causes Act provides for rulings on custody and maintenance. Kumar (2009) reports that many women in Botswana remain economically dependent on men, and so can be discouraged from initiating divorce in order to protect their own or their children's access to resources. In addition, the anti-discrimination clause in the Constitution does not apply in grounds of divorce, which can lead to the unequal distribution of assets in divorce cases (CEDAW Committee, 2010).

e) Inheritance

The default marriage regime is marriage out of community of property. However, prior to marriage registration spouses are able to indicate that they wish to marry in community of property (World Bank, 2016). Protection of property is provided by Section 3(c) of the Constitution, however the Constitutional clause on non-discrimination does not apply to the devolution of property on death, which puts women at a disadvantage upon the death of their spouses. However, the Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act (Chapter 31:03) provides for surviving spouses of those who die wholly or partly intestate to be an intestate heir of the deceased whether the spouses were married in or out of community of property.

The Abolition of Marital Power Act (Chapter 29:07) provides women with the same right as men to administer the joint estate when married in community of property (Section 7). In 2012 the Court of Appeals decided in favour of women's rights to inherit and to remain on the property after the death

of a spouse. The court decision clarified that customary law needs to be brought in line with constitutional principles and the Customary Law Act's standard of compliance with the values of natural justice and morality (International Commission of Jurists, 2016). The Abolition of Marital Power Act currently does not extend to customary and religious marriages, and in customary law daughters are unlikely to inherit property as it is passed on to male heirs (BOCONGO, 2009; Committee on the Elimination of Discrimination Against Women, 2010).

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Ritual 'cleansing' of widows after the death of their husbands has been reported in Botswana. These practices can involve widows having to drink the water used to wash the dead husband's body, or sexual intercourse with a relative (The Loomba Foundation, 2015). In addition, reports of evictions and property theft are common

2. Restricted Physical integrity

a) Violence against women

Botswana has neither signed nor ratified the Maputo Protocol, or the Southern African Development Community (SADC) Protocol on Gender and Development. The Botswana Penal Code and the Domestic Violence Act address the majority of crimes against women. The Government has developed a National Gender Based Violence Strategy 2015 – 2020.

Violence against women (VAW) is common and has been linked to challenges of substance abuse and economic inequality between women and men (Kayawe, 2015), as well as cultural norms that reinforce women's inferior status to men (GenderLinks and the Ministry of Labour and Home Affairs, Women Affairs Division, 2012). VAW is linked to the HIV/AIDS epidemic, by affecting women's ability to demand contraception, and increasing their vulnerability to contracting the virus (UNDP, 2014). Access to justice for gender-based violence cases are low, with only slightly more than one third of cases resulting in a prosecution (Gender Links and the Ministry of Labour and Home Affairs, Women Affairs Department, 2012).

b) Domestic violence

The Domestic Violence Act introduced in 2008 addresses the need for protection for a variety of domestic crimes in both current and former partnerships, as well as a broad definition of domestic violence. It includes any controlling or abusive behaviour that harms the health or safety of the applicant and includes physical abuse or the threat thereof; sexual abuse or the threat thereof; emotional, verbal, or psychological abuse; economic abuse; intimidation; harassment; damage to property; unlawful detainment; stalking; and where the applicant and the respondent do not stay in the same home, entry into the applicants home without his or her consent (Domestic Violence Act, Chapter 28:05).

The Domestic Violence Act provides for the option of several forms of interventions in cases of domestic violence including an interim order, a restraining order, a tenancy order, or an occupancy order (The Domestic Violence Act, 2008, Section 7). An interim order may direct the police or a deputy sheriff to remove the applicant or her/his children from the residence, or to prohibit the respondent

from committing domestic violence, entering the property, or the applicants work place or place of safety or refuge, prohibit communication, and make any other provision necessary including the arrest of the perpetrator (The Domestic Violence Act, 2008, Section 9). Occupation orders grant the applicant or child the exclusive right or non-exclusive right to live in the residency occupied or belonging to the applicant for a specified or indefinite period of time (The Domestic Violence Act, 2008, Section 10). A tenancy order shall grant the applicant or child the exclusive or non-exclusive tenancy of the residence occupied by the applicant, the respondent or by both the applicant and the respondent, with such order as to payment of rental or mortgage as shall be just (The Domestic Violence Act, 2008, Section 11). Where any of these orders are contravened, a person can be considered guilty of an offence and liable to a BWP 5 000 fine, or imprisonment not exceeding two years (The Domestic Violence Act, 2008, Section 19).

The Botswana Council of Non-Governmental Organisations (BOCONGO) reported that the Domestic Violence Act is not well implemented due to a lack of awareness about the provisions of the Act on the part of ordinary people, and due to persistent gender inequality. In addition, they report that law enforcement officers do not take complaints of domestic violence seriously, placing women in danger (BOCONGO, 2009).

In 2014, the government piloted a mobile referral system programme to improve the nature of referrals between various government role players involved in providing support for VAW services, including services for domestic violence survivors (USAID, 2014). This system both improves survivors' knowledge of the services available to them, and collects data on the nature and extent of VAW.

Cultural norms endorse domestic violence, suggesting that it is a mechanism for keeping women 'in check' and that during bride-price payments (*bogadi*) a man buys a wife, and thus she is his property (Dikobe, 2013). Domestic violence has increasingly been linked to femicide, with increasing numbers of 'passion killings' reported annually over the past decade (Van Allen, 2016; and Mooka, 2015). Women's economic dependence on men is linked to low reporting rates (BOCONGO, 2009).

c) Rape

Rape is defined in the Botswana Penal Code (Section 141), and is criminalised; however the Act does not criminalise marital rape. Section 142 of the Botswana Penal Code provides a minimum sentence of ten years and a maximum life sentence for rape, and provides for increased sentencing depending on attendant violence, or infection with HIV. Where rape is attended by violence and causes further injury the minimum sentence is 15 years imprisonment. All people convicted of rape are required to undergo an HIV test, and if found to be HIV positive the minimum sentence is 15 years imprisonment and a maximum sentence of life imprisonment with corporal punishment if the person was unaware of being HIV positive. If however the perpetrator was knowingly HIV positive the minimum sentence is 20 years and the maximum sentence is life imprisonment with corporal punishment. Rape sentences cannot run concurrently with any other criminal sentences, and when someone is accused of rape they are not entitled to be granted bail. There are no reductions in penalties if the perpetrator marries the victim.

Sexual relations with a child younger than 16 is considered defilement in terms of the Penal Code and carries a minimum sentence of ten years imprisonment.

The 2012 VAW Indicators Study revealed that 16% of women reported having experienced an attempted rape, and 11% said they had experienced rape in their lifetime (Gender Links and the Ministry of Labour and Home Affairs, Women Affairs Department, 2012). Of respondents, only one in nine women reported this to the police, and one in seven reported it to a medical professional (Gender Links and the Ministry of Labour and Home Affairs, Women Affairs Department, 2012). Underreporting is common, as is the protection of the perpetrators of violence against women by their families and communities (World Health Organisation, 2014).

Attitudes and norms that promote violence also pose a barrier to preventing rape and other forms of sexual violence. The 2012 VAW Gender Indicators Study revealed that less than half of men, and only slightly more than half of women interviewed believed that rape within marriage was possible (Gender Links and the Ministry of Labour and Home Affairs, Women Affairs Department, 2012). In addition, 20% of women and almost 38% of men believed that if a man has paid *lobola* for his wife she must consent to sexual relations with him (Gender Links and the Ministry of Labour and Home Affairs, Women Affairs Department, 2012).

d) Sexual harassment

There is no specific law on sexual harassment, however the Public Services Act (1998) prohibits sexual harassment by members of the public service both during and outside of work hours. There are no criminal penalties, however it is punishable with termination, forfeiture of retirement benefits, loss of pay and/or benefits, reduction in rank or pay, or a disciplinary reprimand.

This is not extended to the general public however, and many women report being sexually harassed in educational institutions and in their workplace (Gender Links and the Ministry of Labour and Home Affairs, Women Affairs Department, 2012).

e) Female genital mutilation

The Children's Act (2009) Section 62 prohibits female genital mutilation (FGM) and provides for a fine or term of imprisonment (not more than three years) for anyone who coerces, pressures or deludes a child into undergoing FGM. No evidence suggest FGM is practised in Botswana.

f) Abortion

Abortion is illegal in Botswana and is only permitted up to 16 weeks of pregnancy if the pregnancy endangers a woman's life, mental or physical health, or if the child is likely to suffer mental or physical disability. Anyone who seeks an abortion or who administers an abortion illegally can be punished by seven years in prison.

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In 2014 Botswana passed an Anti-Human Trafficking Act. Reports note that most instances of trafficking occur in rural areas, and trafficking is most commonly for forced labour and sexual exploitation (US Department of State, 2017)

Botswana has the third highest HIV infection rate in the world, and women are particularly at risk of contracting the disease due to unequal gender relations, early marriage, early sexual debut and

gender-based violence (AVERT, 2017). The Government of Botswana has identified adult sex workers as a key population in terms of the provision of HIV treatment and services, with an estimated 62% of adult sex workers being HIV positive (AVERT, 2017).

Reports of forced sterilisation and forced abortion by State service providers have been made (Gender Links and the Ministry of Labour and Home Affairs, Women Affairs Department, 2012).

3. Restricted Access to productive and financial resources

a) Secure access to land and assets

There are three types of land tenure in Botswana: tribal land (formerly known as tribal reserves), freehold land, and state land (formerly known as crown land) (Bornegrim and Collin, 2010). State land is allocated by the Department of Lands, in eight urban areas. Applications for this type of land are open to any person above the age of 18 holding a valid *omang* ID card. This land is not free. Tribal land is administered through 12 Main Land Boards as well as 41 subordinate land boards. Applicants must complete a Customary Land Rights form, and submit it to the relevant land board, in response to an invitation to apply from the relevant Land Board or subordinate land board (Ministry of Lands and Housing, 2011). There are thus no legal restrictions in terms of gender in the process of applying for land.

The Deeds Registry Act (Chapter 33:02) Section 18 makes it possible for women to register deeds in their own name, whether married or unmarried. If married, women are required to disclose whether they are married in or out of community of property. The Act explicitly states that women shall not require the assistance of their husband in executing any deed, and that immovable property bequeathed or donated to a woman married in community of property shall not form part of the joint estate if this is specified as a condition of the bequest or donation (The Deeds Registry Act, Chapter 33:02, Section 18).

According to the FAO (2017) most people in Botswana still reside in customary land. Government policies are gender neutral when it relates to land. Land is allocated on a 'first-come, first-served' basis. This has gendered implications, and marginalises women, because of gender norms that make it difficult for women to claim independent land rights (PLAAS, 2010). Married women therefore still face challenges in accessing land without the support of their husbands.

Land boards are not allowed to discriminate on the grounds of gender (PLAAS, 2010). However, spouses may not be allocated two separate residential plots, unless they provide evidence that this is necessary (PLAAS, 2010).

The Abolition of Marital Power Act gives women the same rights as men within marriage to make major decisions with regards to land and property, and to administer the joint estate. In cases of divorce, the Matrimonial Causes Act (Chapter 29:06) provides that a divorce order must determine the relative access to land and other property. However, these acts do not apply to women in customary marriages. The Government of Botswana acknowledged that the National Policy on Housing does not sufficiently address the needs of women, and hence access to prime housing tends to favour men (The Gender Affairs Department, Ministry of Labour and Home Affairs, 2014).

b) Secure access to formal financial resources

Women and men are equally able to open a bank account, and the Abolition of Marital Power Act removes requirements for women to seek permission from their husbands to do so in civil marriages. However in customary marriages women are required to ask their husband's permission to make financial decisions, including applying for credit (US Department of State, 2017).

Botswana was found to have the largest gender gap in the region with regards to financial inclusion and access to credit (FinMark Trust, 2016). However, where non-bank lending was provided, the gap between men and women's access to credit was reduced, and access to informal accounts (i.e. through microfinance institutions) was the same for men and women (FinMark Trust, 2016).

Women are often economically dependent on their partners, and hence struggle to access resources such as land, cattle, or credit from larger financial institutions because of a lack of collateral (BOCONGO, 2009). Although the Abolition of Marital Power Act allows for property to be registered in the wife's name, matrimonial property is usually registered in the name of the husband and thus women require their husband's assistance to access any form of credit (BOCONGO, 2009).

The Government introduced a Women's Grant that aims to support women to start their own income generation projects (Ministry of Labour and Home Affairs, 2011). In addition, the National Development Bank provides loans for various forms of investments, and its criteria are gender-neutral (National Development Bank, 2017). The Women's Finance House was established in 1989, to assist low-income entrepreneurs with training, credit, and savings (FAO, 2017).

The Government notes that investment schemes have positively affected women's ability to own small stock, however men are more likely than women to have ownership over subsistence farming (The Gender Affairs Department, Ministry of Labour and Home Affairs, 2014).

c) Workplace rights

Botswana has ratified ILO conventions 100 (Equal Remuneration) and 111 (Discrimination). The Employment Act (Chapter 47:01) is the primary law governing labour relations in Botswana.

There is no law mandating equal pay for equal work for men and women nor prohibiting gender discrimination in hiring, recruitment, training, or other work assignments. The Employment Act makes provision for maternity leave from a period of six weeks prior to birth, and six weeks thereafter. This is paid at a minimum rate of 25% of a woman's ordinary salary, and is covered fully by the employer. An employer is not legally allowed to terminate employment during a woman's maternity leave. There is no provision for parental or paternity leave.

Women do not have to request permission from their husbands to register a business or choose a profession according to the Abolition of Marital Power Act. However this Act does not apply to women married in customary or religious marriages.

The African Development Bank (AfDB) found that both occupational segregation and gender bias influence women's decision-making with regards to choice of profession (African Development Bank, 2011). In terms of occupational segregation the report notes that women are likely to self-select lower paid, or more marginal careers based on historical patterns of employment. There is also a pattern of

lower investment in women's professional abilities (Ibid). The AfDB further found that women face difficulties in securing stable and profitable employment, and that this presents a challenge for efforts aimed at addressing gender inequality. For example, men are more likely than women to be employed in craft and related occupations, self-employment with and without employees, legislature or managerial occupations, professional occupations agricultural employment; and paid employment. Women are less likely to be employed in positions with managerial responsibilities (Ibid). Modesto (2016) further identifies that a lack of awareness on the part of women regarding their employment rights is a further barrier to women securing better employment.

The FAO notes that women belonging to minority ethnic groups face particular discrimination, particularly the Basarwa who live in remote areas with poor service delivery (FAO, 2017).

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In 2007 the Botswana Defence Force enlisted women for the first time, and as of 2014 there were more than 100 women in these posts (The Gender Affairs Department, Ministry of Labour and Home Affairs, 2014). Women soldiers have noted that accommodation for women is not ideal, and that restrictions on women being pregnant have limited their ability to enter the force (The Gender Affairs Department, Ministry of Labour and Home Affairs, 2014).

Sex work is illegal in Botswana, however BOCONGO (2009) notes that high levels of female unemployment have made it more likely for women to enter sex work.

4. Restricted Civil liberties

a) Citizenship rights

The Botswana Citizenship Act (Act 8 of 1998) provides equal rights to men and women to confer nationality on their spouse or children, and to retain nationality. Dual Citizenship is prevented in Botswana, unless the dual citizenship is required as a result of a person marrying a foreign spouse where registration as a foreign citizen is required in the foreign country. In the cases of children born out of wedlock, the father is not required to put his name on the certificate. In some instances women are still expected to take on the nationality of their spouse as a result of cultural norms (BOCONGO, 2009). Birth registrations are lower in rural areas, and the Ministry of Nationality, Immigration and Gender Affairs launched a Universal Registration Campaign called 'Let Your Child Be Visible' which focuses on increasing registration, and the inclusion of father's names on certificates in order to protect children (Ministry of Nationality, Immigration and Gender Affairs, 2016).

National identity cards and passports are available to all citizens at the age of 16 years old (Immigration and Refugee Board of Canada, 2012). The Constitution grants all citizens freedom of movement within Botswana, however it does not make reference to the right to leave Botswana (The Constitution of Botswana, Section 14). Applications for Identity documents and passports require a valid birth certificate, which may have negative effects on children whose births were not registered within the 60 day time frame, and a marriage certificate for married women (but not men).

b) Voting

Women gained the right to vote in 1965 (The Government of Botswana, 2011), and are given equal right to vote in the Constitution (The Constitution of Botswana, Section 67). In the 2014 elections more females than males registered to vote (Mosikare, 2014).

c) Political voice

Although the Constitution of Botswana uses the masculine pronoun throughout the references to hold or be appointed to political office, there are no legal restrictions on women's right to run for office. However, cultural norms and insufficient financial resources make it difficult for women to run. The Government reports that women may be deterred from running for political office because of the financial resources required to establish a campaign, and the time and energy to run one (The Gender Affairs Department, Ministry of Labour and Home Affairs, 2014). In addition, cultural norms and negative perceptions of women's ability to lead may discourage women from pursuing careers in politics, and from getting support in their communities (BOCONGO, 2009).

d) Access to justice

The Constitution provides all Botswanan people with the equality before the law and provides women and men with the same rights to sue and be sued.

Many of the challenges women face in accessing justice are linked to the dual legal systems of customary and civil law. Both the Customary Law Act and Customary Courts Acts prioritise the application of customary law for most civil cases, and in order to seek justice in ordinary courts women must request a transfer. However, these requests are not always granted (International Commission of Jurists, 2016). In addition, women often lack the information and resources to request this transfer, or pursue matters in civil courts (The Committee on the Elimination of Discrimination Against Women, 2010). In addition, customary law is often applied in a way that discriminates against women and although the Constitution contains a non-discrimination clause, this clause does not apply to "adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law" (The Constitution of Botswana, Section 15 (4)(c)), which prevents the protection of women in these cases. Although customary courts are supported and respected by many citizens of Botswana, they do not afford the same due process as formal courts, and because judges are not trained there is no standardised application of decisions or rulings (US Department of State, 2017).

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