Law and the Sexes: Modernity and the Metarmophosis of the Legal Status of Women in Botswana

Bugalo Maripe*

ABSTRACT

One of the intractable issues that Botswana has had to grapple with since independence is the question of gender equality. The establishment of Parliament set two rule making systems on a collision course; the traditional law making system in which customary law is made on the one hand, and law-making by Parliament on the other. Many of the laws that Botswana received from the Cape of Good Hope did not treat men and women equally. This was exacerbated by the fact that customary law, with its unequal treatment between the sexes, was allowed to continue to exist side by side laws made by Parliament. Today's society is different in many ways. The level of education has risen; participation by women in the economic landscape has increased; there are more independent women who do not look up to any man for survival, women get voted into Parliament and the last census indicates that the population comprises more women than men. All these factors have dictated law reform to reflect the changing societal posture. The legislature has been challenged to re-think the societal norms that position men above women and to engage in process of law reform to ensure gender parity. The judiciary has also been challenged in its interpretative role to embrace modern equality jurisprudence.

This paper traces the reform agenda since independence to determine the extent to which gender equality has been achieved. It will be argued that while the legislature has taken measures in advancing the reform agenda, it has done so in a manner that has created uncertainties in some areas, leaving judicial interpretation, with its own limitations, to remove sex based discrimination prevalent in the past. It is contended that outstanding ambiguities and uncertainties should be addressed through further revision of the law.

* LLB (Botswana), LLM (London), Associate Professor of Law, Department of Law, University of Botswana, Maripeb@mopipi.ub.bw

1. INTRODUCTION

From time immemorial, the position of women under law has been subjugated to that of men. Generally, the law permitted open discrimination against women in the transaction of national affairs, in the family and generally. In many cases this differential treatment was taken as given, without the need for justification, yet in others the explanation given was based on the physical and related differential features of men and women. It was believed that by reason of their inferior physical constitution, women were weak and deserved protection by men in many spheres of life. Conversely, as men were perceived to be stronger, they were deemed to be deserving of an empowering position which enabled them to protect not only themselves, but women, children and the society generally. This paternalistic standpoint permeated many a society, across continents, and even transcended racial and religious frontiers and was uniform across the globe.[1] By reason of the perceptions aforesaid, the law, itself a product of society, for a long time, generally reflected these stereotypes. The law was laden with restraints against any endeavours that women could pursue to better their lives, even in areas which did not require physical strength to prosper. This stereotype is best illustrated by a nineteenth century case from the United States of America, *Bradwell* v *Illinois,* in which a married woman who had passed State bar examinations, was seeking to be allowed to practice law. In rejecting the application, the court pronounced itself as follows:

> "the civil law; as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defendor. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[2]

This resonates closely with the position in Botswana where, under custom,

1 See J.E. Grubbs, *Women and the Law in the Roman Empire*, London and New York , Routledge, (2002); M. Salmon, *Women and the Law of Property in Early America*, Chapel Hill and London, University of North Carolina, (1986); A. Armstrong and W. Ncube (eds), *Women and Law in Southern Africa*, Harare, Zimbabwe , Zimbabwe Publishing House, (1987).

2 83 U.S. 130 (1873). See also A. Molokomme, Marriage: "What every woman wants or a declaration of 'civil death'? Some legal aspects of the status of married women in Botswana," Vol 4, Nos 1-2 (1984) *Pula, Botswana Journal of African Studies*, pp. 70-79.

the position of women was generally inferior to that of men.[3] The inferior status of women was evident in the marriage setup. A married woman usually came under her husband's fold and came to be regarded more as a "child" of the husband, with the result that she lacked capacity to do anything with legal consequences. With time, and with the recognition of the rights of persons generally, societies began to adopt measures aimed at elevating the position of women. International instruments were adopted,[4] and domestic legislation was either enacted or amended to achieve this objective.

Without unduly limiting its remit, the paper traces the development of law in the past 50 years in three main areas: family-related legislation; equal opportunity-related areas like employment; and *locus standi*, to establish the extent to which the position of women has improved in these areas of the law. It will be argued that the position of women changed for the better in the last fifty years, with significant improvements in the law relating to *locus standi*; women's entitlement to receive, deal in and dispose of property; and that the situation of men and women in the workplace has substantially been rendered equal.

2. THE BOTSWANA LEGAL SYSTEM: AN OVERVIEW

The legal system in Botswana is characterized by a variety of laws that apply in a hierarchical fashion. At the apex of the hierarchy sits the Constitution, which is the basic law of the country to which every law owes its validity. Although the Constitution does not carry any provision that declares it the supreme law of the country, this position arises from judicial interpretation[5] and is supported by academic commentary.[6] The Constitution contains a Bill of Rights which not only recognizes the fundamental rights and freedoms of the individual but provides for equal protection of the law and proscribes discrimination in its

3 A. Molokomme, n2.

4 For example, the United Nations Convention on the Political Rights of Women (1952); the United Nations Convention on the Elimination of All forms of Discrimination against Women (1979); the Beijing Declaration and Platform for Action (1995); The African Charter on Human and Peoples Rights (1981) and its 2003 Maputo Protocol on the Rights of Women, the Southern African Development Community (SADC) Declaration on Gender and Development (1997) and its 2008 Protocol, among others.

5 *Petrus and Others* v *The State* [1984] BLR 14; *Attorney General* v *Dow* [1992] BLR 113.

6 B.O.Nwabueze , *Constitutionalism in the Emergent States,* London , C. Hurst & Co, (1973); D.D.N. Nsereko, *Constitutional Law in Botswana*, Gaborone, Pula Press, (2002), p. 36.

several forms.

In addition to the Constitution, Parliament has made laws for the general administration of the affairs of the country. These laws enjoy validity to the extent that they are not inconsistent with the Constitution.[7] Outside legislation, there is the common law that derives from pronouncements of the courts in the exercise of their adjudicatory functions.[8] The common law must be consistent with the provisions of any statute and the Constitution.[9] Lastly there is customary law[10] which too must be consistent with the Constitution. The simultaneous application of modern rules of law embodied in legislation and the common law on the one hand and customary law on the other is known as the "duality" of laws,[11] which is another feature that characterizes the Botswana legal system. In both systems of law the position of women was inferior to that of men.[12]

3. INTERNATIONAL LEGAL INSTRUMENTS

The adoption of legal instruments designed to uplift women must be construed as an acknowledgement by the international community of unequal treatment between the sexes. In adopting the instruments, the international legal order relies on State parties to roll out the benefits and entitlements spelt out thereunder. This is one of the limitations of the international legal order, the absence of an effective implementation machinery. There is also the foundational limitation based on the twin but disparate existence of the theories of monism and dualism which is adequately covered in other literature.[13] Botswana is still characterized by the strict dualist approach. Rules of international law embodied in treaties to which she is a signatory do not automatically become part of the law of Botswana unless they are incorporated into domestic law by legislation.[14]

7 Some of the notable relevant cases include the *Dow* and *Petrus* cases at n5.
8 C. K. Allen, *Law in the Making*, 7th edition, Clarendon Press, Oxford, (1964), pp. 302-311.
9 *Ndlovu* v *Macheme* [2008] 3 BLR 230.
10 Customary Law Act, Cap 16:01, section 2.
11 A.J.G.M. Sanders, "Legal dualism in Lesotho, Botswana and Swaziland: A general survey", 1 (1985) *Lesotho Law Journal*, pp. 47-67.
12 See A. Molokomme, *n*2, and H. R. Hahlo, *The South African Law of Husband and Wife*, 5th edition, Kenwyn, Juta & Co Ltd, (1985).
13 B. Maripe "Giving Effect to International Human Rights Law in the Domestic Context of Botswana: Dissonance and Incongruity in Judicial Interpretation", 14, 2 (2014) *Oxford University Commonwealth Law Journal*, pp. 251-282.
14 *Dow* case n5 ; *Good* v *AG* [2005] 2 BLR 337.

Botswana is party to several instruments specifically targeted at the womenfolk.[15] However, these have not been incorporated into domestic law and therefore suffer challenges of enforcement. It should be observed here that Botswana has literally refused to sign up to the United Nations Covenant on Economic, Social and Cultural Rights and has only recently signed the SADC Protocol on Gender and Development both of which lay down commitments for subscribing states to remove forms of unequal treatment between men and women. The reasons for refusing to sign the ECOSOC have never been made clear but its argument has been presented that the country already provides for the obligations spelt out under the covenant, even to a greater extent than subscribing states! It seems plausible to say that one of the reasons for not committing to the instruments is the apparent conflict between the prevalent customary norms and the commitments established under the instruments. This presents a difficulty for the State authorities. However, the international legal instruments, although not incorporated into domestic law, have influenced some legislative reforms geared towards ameliorating the position of women.

4. THE JUDICIARY AND SEX BASED DISCRIMINATION

The judiciary's role in removing disadvantages against the female folk is recognizable on two intertwined fronts. Firstly, in decisions in which Parliamentary enactments were challenged on the basis that they violated the anti-discriminatory or equality provisions of the Constitution; and, secondly, in decisions in which a rule of customary law was impugned for violating the Constitution.

The Constitution provides for the rights of the individual in the following terms:

> "Whereas 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 the public interest to each and all of the following namely- life, liberty, security of the person and the protection of law… subject to such limitations…designed to ensure that

15 See generally the instruments indicated in n4.

the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."[16]

The inclusion of the word "sex" in this provision means that the rights are granted to both males and females. The phrase "protection of the law" has been interpreted to mean equal protection of the law.[17] However, section 3 is a general provision and the various concerns that it covers are treated more specifically under various other parts of the Constitution. In the case of protection from discrimination, section 15 provides in part:

"(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.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision-

(a) ...

(b) ...

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."

These provisions have been interpreted in the case of *AG* v *Dow,* discussed below, which is considered the leading judicial authority on several constitutional issues and in particular issues round sex based discrimination.

4.1 *Attorney General* v *Dow.*[18]

The matter concerned citizenship of two children born to the marriage of the respondent, a female citizen of Botswana, and a male citizen of the United States

16 Section 3.
17 *Dow* n5; *Muzila* v *AG* [2003] 1 BLR 471.
18 [1992] BLR 113.

of America. The relevant sections of the Citizenship Act of 1984 provided as follows:

"4 (1) A person born in Botswana shall be a citizen of Botswana by birth and decent if, at the time of his birth

(a) His father was a citizen of Botswana; or

(b) In the case of a person born out of wedlock, his mother was a citizen of Botswana.

5 (1) A person born outside Botswana shall be a citizen of Botswana by decent if, at the time of his birth-

(a) His father was a citizen of Botswana;

(b) In the case of a person born out of wedlock, his mother was a citizen of Botswana."

The respondent claimed that sections 4 and 5 of the Citizenship Act offended against section 3 of the Constitution in that they discriminated between Botswana women married to alien men on the one hand, and Botswana men married to alien women, on the other. It was argued for the State that the omission of the word "sex" from section 15, which describes "discriminatory treatment", means that discriminatory legislation against women was permitted in Botswana.[19] This was so, as the submission proceeded, because Botswana was a patrilineal and male-oriented society. The court held that section 15 was merely a list of instances of discrimination and could not override section 3, which was the dominant provision and in which equal protection for all was guaranteed. Sex was therefore one of the forms of discrimination envisaged under section 15 notwithstanding that it was not specifically included in that section. Thus the court literally 'read' the word 'sex' into section 15 in its approach to constitutional interpretation which it said should be 'broad and purposive'.[20] The court found that sections 4 and 5 of the Citizenship Act violated the Constitution and set them aside. In outlawing sex based discrimination, the court outdid a rule of customary law, which found expression in legislation, the effect of which was to position men above the women. The case is cited and followed in other jurisdictions as an indication of the impact it has had in the

19 At the time the word "sex" did not appear at section 15(3). It was only included through the Constitution (Amendment) Act No.9 of 2005.

20 Pp.164-170.

prevention of sex based discrimination outside Botswana.[21]

4.2 *Student Representative Council of Molepolole College of Education* v *The Attorney General.*[22]

Students at Molepolole College of Education, sought, among others, an order to the effect that Regulation 6 of the college's regulations was null and void by reason that it was (a) unfair and unreasonable and (b) *ultra vires* section 3 of the Constitution of Botswana by reason of its discriminatory effect. It was alleged that Regulation 6 unjustifiably discriminated on the basis of sex. The relevant portion of the regulations provided in part as follows:

"6. Absence through pregnancy

6.2 Any student whose conception date is confirmed to have occurred between December and April will leave college immediately and will rejoin the college in the next academic year.

6.3 Any student whose conception date is confirmed to have occurred between May and November will continue her course for the rest of the year but will miss the next academic year.

6.5 A student who becomes pregnant for the second time whilst at college and is likely to break the continuity of her studies for the second time will be required to withdraw permanently."

It was argued for the government that the "regulations were formulated positively by the college with the intention of providing a student with a well-planned maternity leave. They were meant to protect the nursing mother and baby"[23] and were intended for the benefit of pregnant students. This was rejected by the Court on the basis that the effect of the regulations was that a student who fell pregnant must necessarily suffer an enforced withdrawal from college for at least a year, which period could be longer depending on the point in time when the pregnancy occurred. The Court took the view that the real purpose of the regulations was purely punitive. This was reinforced by the terms of sub-regulation 6.5 which required permanent withdrawal from the college in the

21 See the South African case of *Nyamakazi* v *President of Bophuthatswana* 1992 (4) SA 540; the Zimbabwean case of *In Re Wood and Hansard* 1995 (2) SA 191 (ZS). See also World Women's Report 2011.

22 [1995] BLR 178.

23 Paragraph 18 of the Answering affidavit.

event of a second pregnancy.

There was no provision in the Education Act,[24] in terms of which the regulations were promulgated, that authorized, either expressly or by necessary implication, the abridgement of rights of students on account of their gender. In our law, a regulation cannot impose more onerous responsibilities on those to whom it is directed than those provided for in the enabling Act.[25] Thus, on this account the regulations would not enjoy validity under the Education Act. The following remark by Lord Russel CJ in *Kruse* v *Johnson* could also apply to the regulations:

> "If for instance [byelaws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as to find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires."* [26]

The regulations were partial and unequal in their operation as between different classes in two respects. Firstly, they were meant to, and did, penalize only female students and not their male counterparts who, in some instances, would have been responsible for the pregnancy. Secondly, they targeted the biological status of particular female students, i.e. those who fell pregnant as against those who did not. This could not find justification in the minds of 'reasonable men'. They also penalized students for getting pregnant without regard to their marital status. They failed to take into account a relevant consideration and were unreasonable.[27] It is apparent that the court was inspired by the reasoning in *Mfolo and Others* v *Minister of Education, Bophuthatswana and Another,*[28] a South African case to which the court was referred, in which the court found no justification for the differential treatment to which female students were subjected.

If the regulations were targeted at preventing pregnancy and penalizing

24 Cap. 58:01, Laws of Botswana.

25 *Botswana Motor Vehicle Insurance Fund* v *Marobela* [1999] 1 BLR 21.

26 [1898] 2 QB 91, at 99-100.

27 A decision is unreasonable and liable to be set aside if it fails to take into account a relevant consideration; *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.

28 1992(3) SA 181.

those involved in its making, equality of treatment would demand that both parties to the pregnancy be subjected to the same penalty, especially if the male is also a student. This was the essence of the reasoning of the Court when it observed thus:

> "We have here a regulation made ostensibly for the benefit of women, which, if that claim is correct, would fall into the class of 'treatment of different sexes based on biological differences' and would therefore be taken as not amounting to discrimination on the ground of sex as stated in the case of *Attorney-General* v *Dow.* Were the regulation not made for the benefit of the female students of the college, I would have said without hesitation *prima facie* the regulation was discriminatory….the reason given by the college administration for the regulation is incorrect and unacceptable. The regulation is held *in terrorem* over the head of the female student. Her male counterpart can be responsible for any number of pregnancies in the college during his course and suffer no such liability or punishment."[29]

In the event, it is submitted that the Court correctly found that the regulation was illegal and contrary to sections 3 and 15 of the Constitution and was therefore null and void.

4.3 Ramantele v Mmusi and Others[30]

Silabo Ramantele and his wife Thwesane lived in their yard (the Homestead) in Kanye. He died in 1952. Thwesane remained in the yard. The yard was subsequently redeveloped by his four daughters (the Respondents) using their own resources. His two sons, Basele and Banki, did not assist in making improvements to the dwelling house. Critically, his other son, Segomotso, who was not Thwesane's biological son, did not help in the improvements. Thwesane, Basele, Banki and Segomotso died in 1988, 1990s, 1995 and 2006 respectively. In 1991, Edith (the First Respondent), who had built the biggest house on the homestead, and who had left the homestead following her marriage, returned to the homestead after her husband's death. She occupied the house she built. Molefi, Segomotso's surviving son, the Appellant, then claimed the homestead

29 Pp. 196-197.
30 CACGB-104-12(yet unreported).

for himself. His claim was that the homestead had been inherited by Banki, who had then exchanged it for Segomotso's plot elsewhere many years previously. In this he relied on the male ultimogeniture rule in asserting Banki's claim to the yard and by extension his. The Court held that the male ultimogeniture rule had not been shown to exist and declared that the Ngwaketse customary law rule of inheritance does not prohibit female or elder children from inheriting as intestate heirs to their deceased parents' family homestead. In coming to this conclusion the Court took the position that any such rule, if it existed, had not been shown not to prejudice the rights of others, nor was it in the public interest as required by Section 3 of the Constitution. This conclusion protected not only the rights of female siblings but other male ones as well if they were not the last born son. Thus the judiciary eliminated a relic of the old traditional order that tended to operate in favour of males against their female siblings.[31]

The *Dow* and *Ramantele* cases are separated only by reason that whereas the former was concerned with a statutory provision, the latter was concerned with a rule of customary law. They converge by reason that in either case the operation of the rule separated the sexes in terms of rights and entitlements. In both cases the judiciary found against the rule on equal protection considerations of the Constitution. By interpretation the judiciary outlawed sex based discrimination.

5. LEGISLATIVE ACTIVITY

Section 15 of the Constitution permits the legislature to make laws with discriminatory effect and in particular, with respect to *marriage* and *other matters of personal law,*[32] as long as it satisfies the conditions set out thereunder. This is a recognition of the disparate treatment between the sexes in marriage and other matters of personal law. On the authority of this provision, Parliament has enacted several laws covering this sphere of life.[33] The laws passed more

31 See G.R. Lekgowe, "*Mmusi & Ors* v *Ramantele & Another*: An opportunity missed to begin the burial of Attorney General v Unity Dow?" 15 *UBLJ* (2012) pp. 81-90; O. Jonas, "Gender equality in Botswana: The Case of *Mmusi and Others* v *Ramantele and Others*" 13 *AHRLJ* (2013) 229-244 on the High Court judgment; C.M.Fombad, "Gender equality in African customary law: has the male ultimogeniture rule any future in Botswana?" 52 (2014) *Journal of Modern African* Studies, pp. 475-494 on both judgments.

32 Section 15 (4) (c).

33 Some are discussed in this article.

recently were meant to reverse some of the negative consequences for women that arose from the earlier pieces of legislation. This is evident in employment and family related legislation.

5.1 Employment – related Legislation

Traditionally, sex based discrimination in the work place was not an issue in Botswana in the way it was in other parts of the world. This was because men and women played different roles in the family setup and in societal ordering as a whole. In the social order of things, formal work was reserved for men, while women were assigned the role of organizing the family and doing all the home chores. The roles were separated. Issues of discrimination in the workplace never arose perhaps until the 19th century when the colonial era introduced permanent fixed kinds of employment as a means of livelihood. It was during this period that women began to do work traditionally reserved for men, and with time there were calls for equal treatment not only in the workplace but in all spheres of life.

The promulgation of the Employment Act was never really to address the gender imbalances in the work place. Rather, it was to address inequities that existed between the employer and the employee especially under the common law. However, the International Labour Organization Conventions have had a significant influence on the domestic laws of countries who are parties to those conventions. Botswana is no exception in this regard. There are several employment related pieces of legislation, some of which are of general application while others are industry specific.

5.1.1 The Employment Act

This was enacted against the backdrop of imbalances in the workplace between the bargaining positions of the employer and the employee in an employment contract. The rights and obligations of the parties were hitherto governed by the common law, which conferred more rights on the employer than on the employee. The contract was traditionally a master-servant relationship in which the employee was a servant and the employer the master. At common law an

employee was at the mercy of the employer and the latter could terminate the contract at will and for any reason.[34] Far from addressing gender balances, the Act was meant to set minimum terms and conditions of employment in view of the imbalances identified.

Until recently, with the consolidation of conditions of work in the general public service under the Public Service Act,[35] the Employment Act was the over-arching piece of employment legislation with general provisions spelling out conditions of service and the rights and obligations of the parties to the employment contract. One notable provision in the Act prohibited the termination of a contract of employment on the ground of the employee's race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour, or creed. "[36]

The proscription of discrimination is with respect to termination of the contract. It does not extend to the creation of the contract itself. Thus from a strict constructionist perspective, section 23 does not prohibit a prospective employer from declining an application for employment by a woman on the basis only that she is a woman. Only when the woman is employed does she enjoy some limited protection against termination of the contract on the grounds specified. The question would then be why the legislature made provision for non-discrimination in the case of termination of a contract and not at the very important stage of creation of the contract. This comes across as a deficiency. It is submitted that it would have made better sense to make specific rules outlawing discrimination at the hiring stage as well, as prevention is better than cure! It remains now to sketch out instances in which such protection under section 23 has been enjoyed.

In *Moatswi and Another* v *Fencing Centre (Pty) Ltd*,[37] unfair dismissal of two women was alleged. The reasons for termination of employment were contained in a letter which in part read:

> "… We have realized that all our work in each department is very heavy and is not recommended for women. They cannot load or work late night shift. So we have no alternative but to terminate your service."

34 *Moatswi and Another* v *Fencing Centre (Pty) Ltd* [2002] 1 BLR 262.
35 No.30 of 2008.
36 Section 23 (d).
37 n34.

The Industrial Court found that in the circumstances the employer had not placed any evidence before the court to show that there were constraints on women performing the functions at the required hour and that the applicants had not been consulted on any inherent difficulties that may have existed in relation to their performance of the stated functions. The Court concluded that the termination was discriminatory on the grounds of sex and was thus unlawful. The Court followed its own reasoning in a similar matter, *Tsumake and Others* v *Fencing Centre (Pty) Ltd*[38] concerning the same employer who had dismissed two other women for exactly the same reasons. The justification presented by the employer is captured in the statement of defence filed, which read:

> "We have always employed a small number of ladies at our business and we have made a trial to increase the number of female employees. This we did in good faith and they worked for us for some length of time.
>
> Unfortunately we discovered that the situation was not suitable for the ladies, neither for ourselves
>
> On many occasions we needed extra hands to load trucks and we could not use ladies to do this. Other times we had to work late into the evening to finish a particular order, and we could not allow ladies to work late being wives and mothers."[39]

The court pronounced itself as follows on the reasons for the termination of employment:

> "The Respondent may well have had the best of intentions. But in law those intentions leading to the employer's unilateral decision on what is good for women count as patronage, if not male chauvinism. Employees, irrespective of sex, have to be consulted on what is or is not good for them on matters of gainful employment. To deprive any employee of a source of livelihood on the ground that one is being helpful to the employee can hardly be a welcome gesture."[40]

Again the court found the termination unlawful and awarded maximum permissible damages to the dismissed employees.

While the legislature may be applauded for proscribing sex based

38 Case No; IC 8/2001(unreported).
39 P. 2.
40 P. 3

discrimination in the work place, it is recommended that the absence of a provision outlawing discrimination during the contractual phase, be addressed by enacting such a provision.

5.1.2 The Public Service Act.[41]

Prior to 2008, there were no uniform rules governing employment in the public service. There was a separate legal machinery governing the teaching profession, local government and the more general public service. With the exception of the Police Service, the Botswana Defence Force and the Prisons Service, the Public Service Act has now consolidated the civil service and brought it under one system of administration and applying the same legal rules. In all matters relating to appointment, the Act provides that no appointing authority or supervising officer shall discriminate against any employee "on the basis of sex, race, tribe, place of origin, national extraction, social origin, colour, creed, political opinion, marital status, health status, disability, pregnancy or any other ground, nor discriminate against any person seeking employment on any such ground."[42] (emphasis added).

It is not limited to termination as is the case with the Employment Act. It also applies to the pre-contractual stage. It is broader in its scope and takes a holistic approach to issues of discrimination at the workplace. For that reason it is far better than the Employment Act.

Although the various pieces of legislation that govern the disciplined forces do not carry elaborate provisions proscribing discrimination in matters of employment, it is submitted that the situation would fall to be governed by sections 3 and 15 of the Constitution to the extent that they outlaw unequal protection of the law. The Constitutional provisions should be seen as the residual protection afforded to employees in the event of absence of specific provisions relevant to a specified industry.

41 n35.
42 Section 7.

5.2 Family – related Legislation

This section deals with legislative developments related to the family setup. One of the incidences of the patriarchal nature of our society is the conferment and denial of rights upon the different sexes in the family set up as demonstrated by the *Dow* and *Ramantele* cases. Apart from marriages solemnized under customary law, the power relations of the parties under different statutory frameworks depended on whether or not the marital power was reserved in favour of one of the spouses, usually the husband. Because of its centrality in defining the rights and entitlements of the spouses, the parameters of the concept of the marital power need delineation.

5.2.1 The Concept of Marital Power

This concept has a long and old ancestry. It has its origins in custom, religion and the common law. As it somewhat defines itself, it was a power in matrimony that was held by one party, always the husband. It conferred upon him rights and imposed certain obligations. Its justifications are varied.[43] It was the traditional belief that because of their bodily constitution and role, women needed men to protect them.[44] Commentators almost converge on the role served by the concept. Hahlo takes the view that in its widest sense the phrase 'marital power' consists of three elements, namely: (a) the husband's power as the head of the family by virtue of which he has the decisive say in all matters concerning the common life of the spouses, and determines *inter alia*, where and in what style they are to live; (b) the husband's power over the person of his wife by virtue of which he represents her in legal proceedings of a civil nature; and (c) the husband's power over his wife's property which enables him, in his absolute discretion, to administer the joint estate, and without his wife's knowledge or consent, to enter into contracts which bind the joint estate not only during the subsistence of the marriage but also after its dissolution.[45] Others take the view

43 E.K. Quansah, "Abolition of marital power in Botswana: A new dimension in marital relationship?" 1 *UBLJ* (2005) pp. 5-27.

44 *Bradwell* v *Illinois, Moatswi* and *Tsumake* cases.

45 H.R. Hahlo, *The South African Law of Husband and Wife*, Juta, Cape Town (1985) at p. 185; Lesbury Van Zyl, "Section 13 of the Matrimonial Property Act – an historical relic", *CILSA,* 23, 2 (1990), pp. 228-233.

that in its widest sense the phrase 'marital power' comprises the husband's capacity to administer the property which jointly belongs to him and his wife and that this also embraces the legal acknowledgement that the husband is the head of the family, guardian of the children and that he has authority to decide on the family's *domicilium*.[46] The judicial exposition of this position in Botswana may be seen in the case of *Modise* v *Modise*.[47] The parties, who were married in community of property, were not living together. The Respondent (wife) was at the time of the proceedings living in the parties' matrimonial home together with the children of the marriage. The Applicant (husband) applied to court for an order permitting him to sell the immovable property of the parties, being the matrimonial home in which the wife and the children were then living. The entitlement of the husband to alienate property of the joint estate was not disputed, and in fact was specifically recognized by the court as follows:

> "I think that there is abundant authority for the proposition that at common law a husband married in community of property is the administrator of the joint estate, and as such he is free to alienate any such assets under his power or control as he pleases and in his total discretion; and it is only when his motivation in partying with property in the joint estate is redolent with fraud, *viz*, where his purpose or intention in disposing of such assets is to deprive his wife of her share or interest therein that he can legally be called to account."[48]

Kgari v *Kgari*,[49] also involved parties married in community of property, where, by arrangement, the wife ran family businesses while the husband was on a civil service assignment and living away from the matrimonial home. Certain misunderstandings began which practically developed into bad blood between the parties. The wife then sought an order *inter alia* "ordering the respondent not to interfere in any manner or form with the running of the family businesses…" The court held that by reason of the marital power in favour of the husband, the order sought was incompetent. It could only be possible if it was simultaneously sought with an application for judicial separation or an order to declare the

46 A.H., Barnard, D.S.P Cronje and P.J.J Olivier, *The South African Law of Persons and Family Law*, Butterworths, (1986), pp. 190-191.
47 [1991] BLR 333.
48 P. 334.
49 [1996] BLR 489.

husband a prodigal, or appointment of a *curator bonis* to divide the joint estate. Since she had not done any of these, the order sought was refused.

For a long time various legislative schemes were structured around this paradigm.

5.2.2 The Administration of Estates Act

This Act provides for the administration and distribution of estates of deceased persons, minors, persons under curatorship, absent persons and all property given in trust by deceased persons and incidental matters by way of letters of administration granted by the Master of the High Court.[50] It provides:

> *"*Letters of administration may be issued to a woman, but shall not, without the consent in writing of her husband, be granted to a woman married in community of property, or to a woman married out of community of property when the marital power of the husband has not been excluded*."*[51]

The limitation against women is clear. The executor is the only person who can validly take control of and deal with the estate in terms of letters of administration issued by the Master of the High Court.[52] Women are disqualified on the basis of their marital status whereas their male counterparts are not. This law fails the *Dow* test.

5.2.3 The Married Persons Property Act.[53]

This was enacted against the background of the then prevailing common law in terms of which the marital power applied. Prior to the Act, every marriage was presumed to be in community of property, as well as profit and loss, unless the contrary was proved.[54] The Act reversed that presumption. The property regime of Africans was to continue to be governed by rules of customary law unless the parties brought themselves within the ambit of the Act by making the express choice or in any dispute where it appeared that it would be unjust to apply the

50 Section 27.
51 Section 28.
52 *Samsam* v *Sakarea* [2004] 1 BLR 378.
53 Cap. 29:03, Laws of Botswana.
54 *Joina and Associates* v *Modikwa* [1999] 1 BLR 475.

rules of customary law, which decision would usually be determined by the mode of life of the parties and other factors.[55]

However, this Act is considered to have been unsuccessful in the realization of its objectives. There are several reasons for this state of affairs. The main reason is that at the time of its enactment, the country had been independent for slightly over three years. The level of sophistication among the citizen-folk was very low owing to illiteracy, low economic status and generally a very rural and traditional background. The notion of marriage out of community of property was then a foreign concept which could not be adapted to with ease.[56] One commentator says marriage in community of property was and still is seen as the "appropriate medium within which to demonstrate the couple's commitment to each other."[57] Other reasons are that the law did not tamper with the internal operation of the rules of the common law especially the concept of the marital power and this made the law a non-starter.[58]

One serious consequence of a choice of the marriage regime was the irrevocability of that choice. This arose from judicial application of the immutability doctrine which dictated that once a regime was chosen, the choice could not be changed.[59]

In 2014 Parliament repealed the Married Persons Property Act, and enacted a new one.[60] The principal object of the Act was to allow spouses to change the property regime they opted for at the solemnisation of their marriage subject to certain safeguards spelt out in the Act, whose purpose is to protect the interests of third parties. It effectively outlaws the immutability rule. It does not exclude the choice of a property regime and leaves the application of customary law to marriages solemnised under that law. In addition, it allows spouses married under customary law to opt out of that system and choose a

55 *Molomo* v *Molomo* [1979-80] BLR 250.

56 See G.O.Radijeng, *Customary Law and Gender Equality: The Legal Status of Women in Botswana* (Unpublished D.Phil Thesis, University of Oxford (2004).

57 Quansah, n43.

58 A. Molokomme, "Overview of family law in Botswana" in A. Bainham (ed) *The international survey of family law* (2000), p. 43 who argues that the 1996 Deeds Registry Amendment Act, by leaving the husband's marital power intact, treated only the symptoms rather than the root cause of the disease.

59 See T. Jobeta and O. Jonas, "The abolition of the doctrine of immutability in the matrimonial property regime of Botswana" 17 *UBLJ* (2013), pp. 65-71and the cases discussed therein.

60 Act No. 12 of 2014.

regime under the Marriage Act,[61] with the possibility of further changing it from in or out of community of property as the case may be. The "benefits" it sought to introduce are potentially enjoyable by a great number of married persons.

5.2.4 Deeds Registry Act.[62]

This law provides for registration of deeds and transfers of title over land. Prior to 1996, the husband, as the administrator of the joint estate, could transact in respect of the joint estate to the exclusion of his wife, who in turn required the assistance of her husband if she were to do so. The relevant provision, section 18, in part read:

"(3) A woman married out of community of property shall be assisted by her husband in executing any deed or other document required or permitted to be registered in the Deeds registry….unless the marital power has been excluded or unless the assistance of the husband is on other grounds deemed by the Registrar to be unnecessary

(4) Immovable property shall not be transferred or ceded to a woman married in Community of property except where such property is by law or by a condition of a bequest or donation thereof excluded from the community and the marital power

Provided that, in the case of a married woman who is a citizen of Botswana whose husband is a non-citizen of Botswana, immovable property may be transferred or ceded to such woman as if she were married out of community of property and the marital power did not apply."

(5) If immovable property not excluded from the community has, at the commencement of this Act, been registered in the name of a woman married in community of property which still subsists, her husband to whom she is so married may, unless

61 Section 5. This was section 7 of the repealed Act.
62 Cap 33:02.

she is authorized by a court order to deal therewith, alone deal with such property."

Here again, unless the marital power was excluded, the husband was almost a sole owner of the property. He could alone deal with the property to the exclusion of the wife. The proviso to section 18(4) clearly discriminated against citizen women married to citizen men when compared to citizen women married to non-citizens. This would have failed the *Dow* test. It is clear that there was discrimination on two fronts which had to be removed. This came about in 1996, when section 18 was amended to remove the offending implications. The principal object of the bill was:

"to enable women, whether married in or out of community, and whether or not the marital power has been excluded, to execute deeds and other documents required or permitted to be registered in the deeds registry without their husband's assistance." [63]

The relevant amended provisions of the Act now read:

"18 (3) A woman, whether married in community of property or not shall not require the assistance of her husband in executing any deed or document required or permitted to be produced in connection with any such deed or document, and immovable property may be transferred or ceded to her as if she were married out of community of property and the marital power did not apply.

18 (5) If immovable property not excluded from the community is registered in the name of a spouse married in community of property, neither spouse may, irrespective of when that property was so registered, alone deal with such property unless he has the consent, in writing, of the other spouse, or has been authorised by an order of court to deal therewith."

This has brought in some gender parity in that the wife is given the same powers that the husband has, and most importantly, it has outlawed the power of one spouse to deal in the property of joint estate unilaterally.

63 Deeds Registry Amendment Bill No. 17 of 1996.

5.2.5 The Abolition of Marital Power Act[64]

The discussion above has shown how the problems arising from the marital power pervaded many legislative schemes. This was the mischief that was sought to be removed by this Act, which provides:

"4 (1) Subject to the provisions of this Act-

(a) the common law rule in terms of which a husband acquires the marital power over the person and property of his wife is hereby abolished; and

(b) the marital power which a husband had over the person and property of his wife immediately before the commencement of the Act is hereby abolished.

5 The effect of the abolition of marital power is to remove the restrictions which the marital power places on the legal capacity of a wife and abolishes the common law position of the husband as head of the family." (Emphasis added).

The clear intention of the legislature is to abolish and render inoperable the concept of marital power. In this way, gender balance is maintained as no spouse has better rights than the other in the transaction of their family affairs. It applies retrospectively.[65] One of the requirements for the rule of law is that legislation must be prospective in that it regulates future relationships unless it confers rights. [66] In the circumstances it certainly takes away privileges that men married in community of property had prior to the enactment of the Act. This has however not been challenged in the courts. The Act nevertheless preserves the validity of acts done before the abolition of the marital power.[67] It is an Act of general application and removes the power in any legislative scheme that provides for its application. This includes the Administration of Estates Act. The restriction of the appointment of a woman married in community of property as an executor has thereby been removed. Although the restrictions under the Deeds Registry Act were removed by the amendment to that Act, this is cemented by the Abolition of Marital Power Act to the extent that it requires

64 No. 34 of 2004.
65 Sections 4 (1) (b) and 6(a).
66 J. Raz, "The rule of law and its virtue", 93 (1977) *LQR* p. 195.
67 Section 4(2).

the consent of the other spouse in dealing with the joint estate.[68]

This also affects the question of standing, which was also a restriction upon a woman to transact legal affairs. However, such restriction amounted in certain cases to an advantage in favour of women.

6. *Locus Standi in Judicio*

Literally translated this means place of standing in court. It basically refers to the legal competence of a person to appear in court or forum as a party to legal proceedings.[69] Because of the concept of marital power, a woman married in community of property with marital power in favour of the husband had no *locus standi in judicio* and could not conclude valid legal acts or transactions without the assistance of her husband.[70] It was held in *Joina and Associates* v *Modikwa* that:

> "Under the common law therefore…a married woman except for two or three cases, has no *legitima persona standi in judicio*: she is a minor under the marital power of her husband and cannot either sue or be sued…The rule requiring it to be stated in the writ of summons, if the plaintiff and/or the defendant is a female, what her marital status is, was in my view, introduced in order to ensure that the plaintiff and or the defendant had the necessary *locus standi* to sue or to be sued as the case may be."[71]

Prior to 2005, the Rules of Court [72] which regulate the conduct of civil litigation in the High Court provided that every writ of summons should contain particulars about the parties' marital status if she were a female litigant, and if married, her marriage regime.[73] These requirements were in line with the need to establish the capacity of a married woman. The requirement was couched in peremptory terms indicating that any failure to comply therewith would render the summons defective. This did not apply to male litigants. The application of these rules is demonstrated in three cases decided by the High Court.

68 Section 9.

69 See B. Maripe, "*Locus standi* and access to judicial review: Statutory interpretation and judicial practice in Botswana," 1999 *THRHR* pp. 390-426.

70 H.R. Hahlo, *The South African Law of Husband and Wife*, Juta, Cape Town (1985) at p. 185. .

71 [1999]1 BLR 475, 481.

72 Cap. 04: 02, Laws of Botswana.

73 Order 6 Rule 4 then.

6.1 *National Development Bank* v *Mogatwane*[74]

The bank lent monies to a woman who was married in community of property who had been on separation from her husband since 1989. She was not assisted by her husband. Following several breaches of the loan conditions, the bank sued for recovery of monies owed. The summons cited her as only a defendant, without more. Having failed to enter appearance to defend, the bank obtained default judgment. A writ of execution was then issued, in terms of which certain property on which stood a house occupied by the husband, was attached. That was the first time he learnt of the matter. The husband then launched an application in which he sought an order rescinding the judgment obtained against the wife by the bank. The Court of Appeal held that the failure to aver in the summons that the borrower was married in community of property was fatal to the proceedings launched by the bank and rescinded and set aside the judgement and the writ of execution.

6.2 *Joina and Associates* v *Modikwa*[75]

The appellant, a firm of lawyers, issued summons against the respondent, a woman who had formerly been employed by the firm as an Accounts Clerk, claiming monies allegedly misappropriated by her from the appellant's trust account.

In the pleadings, the respondent was described as "an adult female whose further and better particulars are to the Plaintiff unknown." As there was no appearance to defend, the appellant obtained default judgment, subsequent to and in terms of which a writ of execution was issued. The respondent then brought an application in which she sought an order rescinding and setting aside both the default judgment and writ of execution on the grounds that the judgment had been erroneously sought and granted as "she was married in community of property and subject to her husband's marital power." The answering affidavit opposing the rescission application averred that the respondent had, without the assistance of her husband, entered into a contract with Wesbank for the purchase

74 [1996] BLR 755.
75 [1999] 1 BLR 475.

of the vehicle which had been attached in execution of the default judgment. It was also averred that she had entered into a contract of employment with the appellant without disclosing that she was married. Both the High Court and Court of Appeal held that the non-disclosure in the pleadings that the parties were married in community of property made them defective and vitiated the proceedings. The court rescinded and set aside both the default judgement and the writ of execution.

6.3 *Attorney General* v *Keatswitswe*[76]

The respondent was a civil servant who had been allocated a house for residence by the Government. The government then applied to court to evict her from the house because she was not using the house. This was breach of the lease. The respondent raised a *point in limine*, that as a woman married in community of property, Government was not entitled to institute proceedings against her without citing her husband, and, therefore, she lacked the necessary *locus standi.* The court held that the applicant's papers were defective to the extent that they did not disclose the marital status of the respondent. The application was accordingly dismissed.

In all these cases, the absence of *locus standi* was successfully raised by women defendants to defeat proceedings instituted against them. It was therefore a factor in their favour and they benefitted from it. Could it then be said that it was against their interests? In the narrow confines of the cases it does not seem so.

With the amendment to the laws it would be interesting to establish whether the removal of this shield in litigation would be a welcome development. At a policy level, however, removal of previous imbalances between the sexes must be more important.

After some discernible equivocation, the rules now provide that the particulars of all individual litigants, in the form of gender, marital status, and marriage regime be stated.[77] This has equalized matters.

76 [2006] 2 BLR 222.
77 From 12 January 2011.

7. HARMONISING THE LAWS

We have seen some of the legislative and the judicial gestures to improve the situation of women. Legislative activity has resulted in proliferation of laws that are not necessarily in harmony with each other. This causes confusion. Despite laudable gestures, some discriminatory provisions still remain in some statutes, for example, section 28 of the Administration of Estates Act. This is not desirable. This is caused in large measure by a fragmented reform programme that sometimes produces conflicting legislation. A holistic approach would ensure uniformity in the laws in general. It is urged that certainty in the laws may be achieved by implementing the Revision of the Laws Act[78] which allows for a 'clean up' and 'alignment' of all the laws enacted by Parliament.

7.1 The Revision of the Laws Act

This Act sets up a Law Revision Commissioner and empowers him with wide ranging powers to do a number of things with respect to law. The Law Revision Commissioner is the Attorney-General.[79] The primary duty of the Commissioner is to prepare and publish all the laws at any given point in time.[80] In the preparation of pages to be included in the Laws of Botswana, the Commissioner has power to, *inter alia*: (a) omit or remove from the Laws of Botswana all written laws or parts of written laws which have been repealed expressly or specifically or by necessary implication, or which have expired;[81] (b) consolidate into one written law any two or more written laws relating to similar matters;[82] and (c) transfer any provision contained in any written law from that law to any other written law to which he considers that it more properly belongs.[83]

There are many provisions found in different pieces of legislation that cover the same subject, albeit with different implications and without reference to each other. For example ante-nuptial contracts could adequately be

78 Cap 01: 03, Laws of Botswana.
79 Section 3.
80 Section 4.
81 Section 9 (a) (i).
82 Section 9 (b).
83 Section 9 (f).

addressed under the Deeds Registry Act and the Married Persons Property Act, yet the Ante-nuptial Contracts Act is still extant, and the other two Acts make no reference to it. Others, like the Marriage Act, Ante-Nuptial Contracts Act, Abolition of Marital Power Act, and the Married Persons Property Act all cover issues of marriage but the provisions thereof are not necessarily consistent. They can be consolidated into one or fewer pieces of legislation. There is no principled justification for their separation. Parliament has to intervene here and clean up matters.

What brings out a few questions is the power of the Commissioner to omit or remove those laws which have been repealed by *necessary implication.* This must of necessity import a value judgment on the part of the Commissioner. He is not checked in the decisions he makes in this regard. This is quite a wide power which can be abused and may overstep into Parliamentary responsibilities. The exercise of powers (b) and (c) above would permit a consolidation of many of the laws that touch on the same subject. This would make the law less cumbersome, uniform, easier to ascertain and remove contradictions. An example here is the Abolition of Marital Power Act and the Adoption of Children Act.[84] The former provides that "The consent of both parents shall be required in respect of- the adoption of a minor child."[85] The latter provides that "a court to which an application for an adoption order is made may grant the order if in the case of an illegitimate child the consent to adoption is given by the mother…"[86] The consent of the father is not required. There was a conflict between the two enactments until Section 4 (2) (d) (i) was rendered unconstitutional in *Khwarae* v *Keaikitse and Others*,[87] where the High Court found that the provision was offensive on equal protection considerations and set it aside.

Surely Parliament should not depend on the judiciary to correct what is in its exclusive domain to do. Parliament should do its work.

84 Cap. 28: 01, Laws of Botswana.
85 Section 18 (2) (b).
86 Section 4 (2) (d) (i).
87 MAHGB-000291-14 (as yet unreported).

8. CONCLUSION

Has the situation of women improved to date? The answer depends on the prism through which one views the situation or the value system to which one subscribes. The amendments to the Deeds Registry Act and the Married Persons Property Act and the promulgation of the Abolition of Marital Power Act have certainly removed the restrictions placed in the way of married women to conclude valid legal transactions. Any restrictions upon the unilateral dealing with property of the joint estate applies to both spouses equally and not only upon the wife as before. No spouse has an advantage. The judiciary has struck down legislation that discriminated against women in the cases discussed. From this perspective, the question has to be answered in the affirmative. However, on the flip side of this debate, one could make the argument that the Abolition of Marital Power Act has removed a shield behind which women could take refuge and escape responsibility for their acts on *locus standi* considerations. The absence of *locus standi* in the *Mogatwane* case shielded the woman from liability for repayment of monies to the bank. In the *Modikwa* case, she was shielded from potential liability for monies allegedly misappropriated *animo furandi* from her employer, and in the *Keatswitswe* case, she was shielded from eviction from a house. The net effect of the decisions here was to confer a benefit that was otherwise not available. It is a case where they were profiteering from their own wrong. This "benefit" would no longer be available, and it follows from that premise, one would answer the question in the negative. It is submitted that on principles of equality and non- discrimination the position of women has improved. What remains is Parliamentary activity in aligning the laws. This cannot be left to the judiciary.