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Customary Law and Human Rights in Botswana

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Customary Law and Human Rights in Botswana

Dr. Rekha A. Kumar

Introduction

The right of indigenous people to have customary law accommodated within the communities they live is an integral part of Botswana legal system. How far traditional cultures protect the well-being of their people would illuminate the foundation of human dignity on which human rights protection stands in a country.¹ The revelations may not be affirmative always, however. In Botswana the Constitution places a prominent status on custom in a range of contexts. The core of personal law is very much the domain of customary law. It is of particular significance for women's rights. In its application it reinforces the social order by determining the obligations of men, women and children, their entitlement to resources, property ownership, marriage and divorce. It formulates such matters as the status of widows, child custody and inheritance. In the absence of a guarantee that equality between men and women takes precedence over custom, traditional practices that discriminate against women may be lawful in some circumstances. There are a number of regional and international human rights instruments ratified by Botswana.² The Government has assumed an obligation to ensure that at all its levels of administration basic rights of the people will be respected and protected. How far these legally bind Botswana in its domestic application of customary law is a legitimate question not clearly settled so far.

¹ Diana A. S., United Nations Background Note, The Challenge of Human Rights and Cultural Diversity, *United Nations Department of Public Information DPI/1627/HR*--March 1995 Accessed at <http://www.un.org/rights/dpi1627e.htm>

² The International Covenant on Civil and Political Rights (ICCPR) ratified in 2000. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Accession in 1996), International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Accession in 1974); African Charter on Human and People's Rights (ACHPR) (ratification in 1986); This is the only human rights treaty that affirms the reproductive rights of women and targets culture and tradition as influential forces that shape gender roles and family relations. The following year, 1997, the Southern African Development Community (SADC) Declaration on Gender and Development was signed and ratified by Botswana. This Declaration included a commitment to having achieved at least 30% women in political and decision-making structures by the year 2005. Unlike some of the other SADC countries, Botswana has not introduced a quota system. CRC-Convention on the Rights of the Child (CRC in 1995), - (Ratification in 2003); African Charter on Rights and Welfare of Child (ACRWC) _Paragraph(s) 6 CRC/C/15/ADD.242 (2004)

The paper neither intends to give a detailed picture of all customary practices ending up in human rights violations, nor to reflect negatively on the government of Botswana. Nevertheless, it is aimed at assessing its level of current legislative compliance with international obligations, with a view to identifying priorities for working towards greater compliance in the future. Optimistically, it is anticipated as a resource and an instrument for the government and for non-government organizations to achieve full participation by minimizing the adverse impacts on women and children in all aspects of their lives, including the right to legal representation. However, it may end up raising questions about some norms that pose a threat towards the full achievement of human rights of the most vulnerable group, while customary law is applied.

Customary law in contemporary legal system: through a historical kaleidoscope

The population of Botswana is mainly indigenous Africans, the majority being Tswana, speaking *Setswana*. There are also small minorities of *Kalanga*, *Basarwa*, *Kgalagadi*, and other peoples. The society, like most other African countries, continues to operate under a dual legal system, indigenously based customary legal system and the received law, based on that of the former colonial state. The origins of the customary law in Botswana can be traced back to the founding of Bechuanaland Protectorate (BP), declared in March 1885. Prior to BP there existed a variety of tribal legal systems now collectively called customary law. The law was unwritten. Every adult was socialized into the accepted rules of behavior, and sanctions were applied to their non-observance. The enforcement of the law was left to the male elders at various levels of authority: family, ward, and section heads, all of whom were eventually responsible to the chief. Courts existed at all these levels, and the head of each unit was charged with the responsibility of maintaining law and order in his unit. The chiefs exercised full executive, legislative and judicial powers through a system of delegated authority to the heads.³

The society and the legal system came under external pressure (European traders, missionaries, hunters and colonialists) from 1800s onwards. With their policy of indirect rule, the

³ Athalia M, *Customary Law in Botswana: Past, Present and Future* (1994) (Unpublished)

British interfered very little in the traditional laws and institutions. It was not until 1891 when a formal administration was established and the power to administer justice was given to the High Commissioner in the Protectorate, with due respect to native law and customs, administered in the usual way by the chiefs in their traditional courts. The common law (the Roman-Dutch law) of the Cape Colony was introduced the same year in BP, applied to European/British subjects only.⁴

In contemporary era

Customary law continued to reign supreme in the areas of family and inheritance, since the majority continued to live a traditional manner of life, and urbanization was not so rapid. The imported common law, gradually took over important areas of public law such as the constitutional and criminal wings. Indigenous peoples' laws continued to receive due recognition, even after independence in 1966 but did not get to be incorporated into the general law of the country. The system still prevails with no major policy changes towards customary law.

The definition of 'customary law' as given under Customary Courts Act 1969 (CCAct),⁵ basically is a creation of the post colonial state, but essentially remained the same as the colonial one. Logically, customary law differs from tribe to tribe and is restrictive in its definition, acceptance and practice by each tribe. It should, however, be compatible with the written law and should not be contrary to morality, humanity or natural justice.⁶ Yet, even where customary law passed these standards, the attitudes and methods adopted by the customary courts in the ascertainment of which sometimes led to distortions.⁷ Though these groups shared similar rules in many cases, there were also important differences. The danger, according to Athaliah Molokhomme, the current Attorney General (2009), is that such generalizations may unnecessarily smooth over important differences in the laws of different ethnic groups.⁸ This is however, not uncommon where traditional justice meets with the post-colonial system of justice.

4. *Ibid.*

5 Section 2, Customary Law Act, Cap 16: 01

6. *Ibid.* Sec.2"customary law" means, in relation to any particular tribe or tribal community, the customary 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

7 *Supra* n. 3, See also Montle David Sekonpelo v. Sebedi Keetile 1958 HCTLR 88

8 *Ibid.*

An overview of Customary Law: un-codified although widespread in application

Customary Law has never been documented and it is not generally applicable. Knowledge of the law and its application is passed from *Kgosi* to *Kgosi* and to members of a particular community. The contemporary customary courts are the successors of an elaborate system which existed prior to the colonial period, and which survived in a different form.⁹ However, these courts fall under the Local Government unlike the common law courts which come under the Administration of Justice. The Courts are more accessible to citizens than the Received Courts because they are free since lawyers are not allowed to appear in court;¹⁰ trials are often conducted in the local tongue. Courts generally reflect the traditions and attitudes of the local community; and they often throw out quicker judgments because the cases are heard by the local chief or the presiding officer. They have both civil and criminal competence.¹¹ Consequently, at least 80% of cases are handled in customary courts with the proportion estimated to be as high as 90% of civil and 85% of criminal cases.¹²

There are over 500 customary courts spread across the country, governed by the CC Act.¹³ The Act whittled down the judicial powers of the chief. These limits were first introduced in the colonial period and have been widened by the independent government.¹⁴ Though

9 Roberts S.(1972) The Survival of the Traditional Tswana Courts in the National Legal System of Botswana, *Journal of African Law*, 16:2, p. 103)These courts have different structures. In rural areas, they have three sub-divisions. The lowest division is called the Customary Court. An appeal from here goes to the Customary Court of Appeal, above which in the hierarchy is the Customary Court of the Commissioner. Appeals from this point go to the High Court and the Court of Appeal of Botswana. The urban structure has the Urban Customary Court as the court of first instance.

10 Section 32, *Supra* n. 5

11 *Ibid.* Sections 11-12, *Courts* adjudicate minor criminal offences under the Penal Code.

12 According to IRIN, BOTSWANA. See also "*National Development Plan*", Para. 20.6, Accessed at <http://www.ditshwanelo.org.bw/botswana.html>

13 *Ibid.*

14 *Supra* n. 9

chieftainship (*bogosi*) has lost much of its power, prestige and relevance in Botswana, it asserts that the institution is being run flawlessly.¹⁵

Customary Law and International Obligations: Reconciliation how far

Under Article 50 of the ICCPR, the Country has agreed to apply the provisions of the Covenant to all sectors without limitation or exception. In addition to the Beijing Declaration, the Platform for Action and CEDAW require countries to take all appropriate measures to modify their constitution and legislation to accord with the articles of CEDAW or abolish existing laws, customs and practices that discriminate against women. It calls for the adjustment of the social and cultural patterns of the conduct of men and women with a view to achieving the elimination of prejudice, and practices based on a notion of the inferiority or superiority of men or women. Botswana's international commitment to basic human rights, thus, requires some recognition of customary law. For instance, by virtue of its subsections 4 (c) and (d) under section 15 of the Constitution, prohibition of discrimination on basis of ethnic origin or tribe does not apply in matters of personal and customary law, and subsection 9 authorizes implementation of discriminatory laws in force before entering the main spring of the Constitution.¹⁶ These exceptions cannot be justified under ICERD. Whilst public institutions are bound by the anti-discrimination provisions, there is no explicit extension to protect women from discrimination by any person, or organization under customary law. Article 14 of CEDAW obligates States Parties to put in place measures to ensure the equality of rural women. Country folk (women), in Botswana play a significant role in the economic survival of their families and communities although they are frequently disadvantaged in areas such as land ownership, health, education and housing to name a few. The achievement of substantive equality for rural women and compliance with CEDAW requires special measures to be incorporated into both the Constitution and legislation. Botswana, however, has not done so as yet.

Similarly, Article 16 obligates to remove discrimination in family and personal laws including marriage, separation, divorce, maintenance, child custody, property division, paternity and

¹⁵ Bogosi inspires confidence in foreign lands, *Mmegi*, 17th August 2006.

¹⁶ Paragraph(s) 8 CERD/C/BWA/CO/16 (CERD, 2006)

inheritance.¹⁷ In 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 enjoy financial independence. Women in Botswana do not enjoy equality in relation to the ownership, administration, enjoyment and disposition of property since patrilineal inheritance is given legislative status leaving men in control of land and property. The Article further requires that inheritance laws should apply both sexes. Inheritance laws apply equally to males and females in Country under the Common law, although customary rules of inheritance may lawfully operate in conflict with the formal law. There is no national human rights machinery charged with promoting and protecting human rights including women's rights or funded body to monitor the implementation of non-discriminatory law and policy for the advancement of women as required under Article 3.

On a parallel note about the status of children under customary law, recently introduced, Children Bill 2007(The Bill), the government of Botswana has called, for the first time, increased involvement of parents and children in decision-making. The object of the Bill is to give effect to Botswana's obligations in terms of the CRC, and ACRWC. The Bill is currently under debate.¹⁸ There is still widespread ignorance about CRC and child rights in Botswana.¹⁹

The extent to which customary law must conform to existing international human rights norms raises complex policy issues for the government. The international instruments are not directly applicable in domestic law, and not all rights provided for in the Covenants are addressed in the Constitution and legislation. The courts are required to interpret domestic law in a manner consonant with international treaties; the knowledge of the rights contained therein by

17 CEDAW

18 Barbara R., UNICEF Representative, Botswana *Children's Rights vs. Human Rights: Is There A Difference?*, ORD SEMINAR, University of Botswana, Gaborone 28th January 2009

19 Godisang M., To know and have access to both biological parents: gender, policy and family in contemporary Botswana, ORD SEMINAR, University of Botswana, Gaborone, 4th February 2009

the legal profession is limited.²⁰ Accordingly, any application to recognize customary law in a manner inconsistent with human rights standards would place Botswana in breach of its obligations under international law.

Botswana Customary Law: Some Specific Issues

Gender issues

Inequality of rights endured by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.²¹ The possibility of conflict between customary practices and human rights of women has been well acknowledged at the international level:

Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation (FGM); forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preferences and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.²²

20 CCPR/C/BWA/CO/1 <http://www.universalhumanrightsindex.org/hrsearch/viewAnnotation> ; See also *Attorney General v Unity Dow*, [1992] 1 BLR 158

21 United National Development Fund for Women (UNIFEM) "Women, Culture and Traditional Practices" CEDAW Advocacy Kit Accessed at [gopher://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp](http://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp). The Human Rights Committee has also noted that "... none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant." Human Rights Committee General Comment 23. Para 8 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev5 2001*.

22 Office of the High Commissioner for Human Rights, "Harmful traditional practices affecting the health of women and children" Fact Sheet No.23 <http://www.unhcr.ch/html/menu6/2/fs23.hrm>. Similarly, the Beijing Platform for Action (BPA) defines violence against women to include traditional practices that are harmful to women. BPA adopted by the Fourth World Conference on Women 15 September 1995 para 113(a).

Whilst much of the discourse, in Botswana around the successes and failures of development has focused on economic welfare, little attention has been devoted to the interface between the status of women, and customary law. Despite Constitutional provisions and other law reforms, Customary Law continues to affect the personal and property rights of women. Men continue to be treated as the head of the family with guardianship rights over women and children. Even if much of the impetus for legal reform has come from feminist civil society organizations, it generally falls outside the rubric of development discourse.²³

A following brief sketch of such norms, practices may reflect the picture clearer:

Under marriage

- Abuse of women in Botswana is widespread, but has received little attention. Women stayed in abusive marriages for many years, because of their perception of the abuse, and the social factors that constrained them from leaving.²⁴
- In spite of the introduction of the Abolition of Marital Power Act (2004), women married under Customary Law are not covered by the legislation on abolition of marital power. The Government does plan to address marriages under Customary Law in the future, in spite of opposition to the Act within the *Ntlo ya Dikgosi*.²⁵
- *The State of World Population 2007 report* states gender-based violence as a major public health concern and a serious violation of basic human rights.²⁶ The law does not specifically prohibit domestic violence against women, and it remains a serious problem in Botswana. Customary law allows husbands to treat their wives in the same

23. Godisang B., Situating The Legal Status of Women in Development Processes: The Case of Botswana, *11th CODESRIA General Assembly: Rethinking African Development: Beyond Impasse*, Towards Alternatives Maputo, Mozambique, 6-10 December, 2005

24 Maundeni T, Wife Abuse Among a Sample of Divorced Women in Botswana: A Research Note, *Sage Journals Online Violence Against Women*, Vol. 8, No. 2, pp 257-274, 2002

25 *Ibid*

26 Accessed at http://www.afrol.com/Categories/Women/wom007_violence_unfpa.htm

manner as minor children. Husbands may use corporal punishment to discipline their wives, which is common in rural areas. Greater public awareness and improved legal protection has resulted in increased reporting of domestic violence and sexual assault.

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Maintenance

- A mother has no maintenance rights under Customary Law when children are born out of wedlock. The father should pay the mother's father compensation for damaging the family reputation, but has no duty to support the child. The child's maternal grandfather has the duty of supporting the child of his unmarried daughter. This situation reflects the view that a woman remains her father's 'property' until marriage, when she becomes her husband's property.²⁸
- Women in particular were constrained by the norm that compensation is available for first pregnancy only. Although it is possible to negotiate reduced compensation for second and subsequent pregnancies, bargaining during negotiations takes place 'in the shadow' of this norm, and places women in a position of disadvantage.²⁹
- A *nyatsi* (concubine) cannot claim any share from her boyfriend's estate. Schapera, in his book, *A Handbook of Tswana Law and Customs*, corresponds with the scenario," So long as they (the man and his *nyatsi*) are not formally betrothed and especially as long as *bogadi* has not been paid, neither party is under any legally enforceable obligation towards the other."³⁰

A mirror image of the system in a national daily newspaper reported recently (2008):

27 Botswana Country Reports on Human Rights Practices - 2007 Released by the Bureau of Democracy, Human Rights, and Labor, 11th March, 2008

28 Accessed at <http://www.ditshwanelo.org/bw/gender.html#gencust>

29 Gallanter, M., 1981. Justice in Many Rooms: Courts, Private Ordering and Indigenous Law. *Journal of Legal Pluralism*, 19, pp 1-47. referred from Athalia M., *Supra* n. 3 p.146

30 *Ibid*

"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."³¹

An addendum

Official statistics in Botswana suggest very high numbers of extramarital births and female-headed households.³² One element of family policy in Botswana is a statute allowing women to claim maintenance payments from the biological fathers of their extramarital children. The procedure for claiming maintenance at magistrate's courts around the country is generally governed by the magistrate's court rules, the Roman-Dutch law and more specifically the Affiliation Proceedings Act. Researches indicate that women do not make use of the maintenance law for a variety of reasons. It is feared that a continuing tie to the biological father of the child would interfere with the traditional mechanisms; that child is supported and socially positioned under the system; and with the woman's own prospects for courtship and eventual marriage to the biological father or another man. Thus, even family policies are not fitting within; rather these are imposed upon, the cultural framework of they are trying to help.³³

Ownership rights

The underlying customary norms promote and maintain men's control of productive resources, primarily land. Inheritance is through the male line, thus further excluding women from gaining control of land.³⁴

31 Is bonyatsi relevant in contemporary society?, *Mmegi* 20th April 2007; Concubines, adultery through the eyes of the Kgotla, *Mmegi*, 25th April 2008.

32 Botswana Central Statics Office, 2008, *Census 2001 Report*, Table 14 total no. 136,698 (Country-wise).

33 Anita I. G., Kinship, Courtship, and Child Maintenance Law in Botswana, *Journal of Family and Economic Issues*, Vol. 17(2), Summer 1996
_9 1996 *Human Sciences Press, Inc.* 189 Accessed at <http://www.springerlink.com/content/f308t5r58qk18n32/fulltext.pdf?page=1>;

34 Athalia M., *Supra* n. 3

- The ownership rights of a wife depend on the system under which she was married. A woman married under traditional law or in 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 community of property are permitted to own immovable property in their own names and the law stipulates that neither spouse can dispose of joint property without the consent of the other.³⁵
- 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 legal capacity to varying degrees.³⁶
- Sedentarization has also undermined the former egalitarian gender relations in other ways. Shifting their subsistence resources to animal husbandry and crop planting, sex roles become more rigidly defined and women's work is seen as "unworthy" of men. Women and girls appear to inhabit more restricted spaces although housing is more substantial in settled communities than in the bush.³⁷

Access to resources

- The inner workings of a household usually reflect societal processes. As access to resources usually depends on a women's relationship to a man, married women are often forced to remain in problematic or even violent relationships in order to secure the income and other resources vital to their own and their children's survival.³⁸ There is also substantial evidence that for the vast majority of women, their independent household status through death, divorce or abandonment results in the erosion of any rights they do hold, especially with regard to land rights.³⁹ In the

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ Accessed at <http://www.iwgia.org/sw9942.asp>

³⁸ The economic role of women in development: revisiting the legal environment, Women's access to legal and judicial services, Paper presented at the seminar on 'Strengthening the Economic Condition and Role of Women in Agricultural and Rural Development by Revisiting the Legal Environment'. Kampala, Uganda, 19–23 February 2001.

³⁹ *Ibid*

past unmarried women were required to be assisted by male relatives in their applications for land, but this has changed and they may now have independent and direct access to land. Married women often control the day-to-day activities in the fields as well as the yield and related income, but usually only during the first few years of marriage. Thereafter, the man and his relatives frequently assert control over everything.⁴⁰

In pre-independent Botswana, the status of San women, in the traditional context was characterized by a high degree of autonomy and equal gender relations. They were, at least theoretically, equal to men, took part in public discussions, controlled the land and other resources and had rights over the goods that they produced. Moving to the settlements has, in many cases, entailed a serious deterioration in women's economic status, as they no longer have access to their previous subsistence and income resources. It is also due to the gender discrimination they experience from the authorities. The women from the Central Kalahari Game Reserve (CKGR), for instance, were by-passed when the Botswana government gave compensation in the form of livestock to male household heads only; they have also experienced impediments in getting certificates for residential and arable plots. In both cases, government officials judged that it was the males who were supposed to be the household heads that owned and controlled livestock.⁴¹

Custody of the children

- 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 only having the right to visit.⁴²

Sexual abuse

- Customary law also has the effect of limiting the resources available to women to protect themselves against sexual assault as male power is embedded in and operates within the rules and practices of social and legal institutions.

40 Mokomane, Z., Laws affecting Unmarried and Married Women in Botswana : A Theoretical Review, Communication at the International Colloquium Gender, Population and Development in Africa, 2001 UEPA/UAPS/INED/ENSEA/IFORD, Abidjan. Accessed at http://www.wikigender.org/wiki/index.php?title=Gender_Equality_in_Botswana

41 Govt's handling of the CKGR issue not sincere" Sunday *Standard*, 6April 2008. Accessed at http://www.iwgia.org/sw9942.asp#516_10206;
See Also *Supra* n. 32. The total no. of women -headed household no. is 4,024.

42 *Supra* n. 40

- Botswana law does not recognize rape within marriage. However, studies in the area reveal the high level of abuse and rape within marriage in rural areas, most of which go unreported.⁴³
- Indigenous women experience an increase in domestic violence and sexual abuse. Alcohol contributes to spousal and child abuse, and alcohol-related violence, in general, a major cause of social conflict.⁴⁴
- San women in the settlements are also often the victims of sexual abuse committed by visiting non-San, and there are also cases of young San females in hostels at remote area schools being raped, abused and harassed, sometimes even by teachers and school administrators.
- The drop-out rates of young girls from schools is high, in part because of teen pregnancy and fear on the part of girls about remaining in what they see as exploitative situations.⁴⁵

Education

- The enrolment of girls in primary and secondary institutions is on par with that of boys. Although the education system is based on gender equality, there continues to be socio-economic influences for girls being more likely to drop out, including looking after sick relatives, pregnancy (government policy allows girls to return to school after 84 days of leave, but in practice they rarely do)⁴⁶ and forced into marriages under Customary Law.

While the Constitution of Botswana forbids discrimination on the grounds of “race, place of origin, political opinions, colour, creed or sex,”⁴⁷ the effect of traditional culture which prefers negotiation as a solution to problems as opposed to court action, can lead to unfair

43 Interestingly, the Domestic Violence Act, after much debate the issue of marital rape was left out because it was not compatible with the Penal Code. Domestic Violence Bill In The Offing, *Mmegi*, 23rd April 2007

44 *Ibid.*

45 Accessed at http://www.iwgia.org/sw9942.asp#516_10206

46 The Education Act , Chapter 58:01

47 Section 3.

treatment of women perpetuating their minority status.⁴⁸ A research study, which analyzed 25,110 news items produced during September 2002, found that news in Botswana, in various media channels was rendered primarily through the voices and perspectives of men. There are few women sources quoted in reports, other than stories relating to issues such as gender violence. The issues which female journalists allowed to cover were also limited, for example entertainment and the courts.⁴⁹ Such a strong influence of men on public views is likely to result in biased reporting and continue to reinforce the gender stereotypes in Tswana society. It clearly indicates that despite changes in Common Law, gender inequality continues to be strong in practice, especially in more traditional and rural areas. Women's subordination is deeply ingrained in the consciousness of both men and women.

Status of Children under Customary Law

The status of children in a society is shaped by notions and presumptions about particular attributes of childhood that set children apart from adults.⁵⁰ Children are in a relatively powerless position because of their dependency on adults or caregivers in the traditional society of Botswana.⁵¹ This is based on the fact that in some cultures children are treated as the property or possession of parents rather than holders of specific rights.⁵² Botswana ratified CRC in 2003. The Convention emphasizes respect for the dignity of children and

48 "Traditionally, a man is like a bull. He can jump over the fence and mate with cows in the next kraal," says well-known local artist and former South African migrant worker Rantefe Mothebe. 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. The big question is: What is bonyatsi and is it still relevant in contemporary Botswana society? bonyatsi is when 'a man who is already married takes a concubine (nyatsi) see *Supra* n.31

49 The "Gender and Media Baseline Study", conducted by MISA and Gender Links. Accessed at <http://www.misa.org/genderandmedia/accountability.html>

50 Samuel M.D, Elizabeth S. S, Walter W & Charles H.W., *Children in the Legal System*, 3rd Edition, Foundation Press, US, 1997, Chapter 1, p 1

51 Almon S & FazlurM., A note on the laws against child abuse in Botswana, *Pula. Journal of African Studies*, vol1.14, no.2, 2000

52 Detrick, S., D., & Cantwell, N. *The United Nations Convention on the Rights of the Child*, London, Martinus Nijhoff Publishers.1991; Dow, U.& Mogwe A., The Convention on the Rights of the Child and the Legal Status of Children in Botswana., *A Consultancy Report for UNICEF Botswana*. Women and Law in Southern Africa Research Project (WLSA) Botswana, 2001

recognizes the child as a person and not as property.⁵³ According to Kibria,⁵⁴ a vast majority of the Botswana population is not aware of the rights of children and the legislation pertaining to these rights. Children are expected to adhere to the cultural beliefs and norms of the society within the African culture.⁵⁵ Although the new Children's Bill, 2007 (The Bill) expands on existing human rights norms, it is viewed by some as a radical notion that violates the African culture and tradition.⁵⁶ The Bill has not yet seen the light of the day, the reason, being not fully understood and internalized by all concerned, said the Minister.⁵⁷

The fact remains, though, that customary laws and traditions do not fully reflect the principles and provisions of the CRC.⁵⁸ The bill also shows the gap between international obligations and national action and between laws and practice remains wide. There are many different reasons but one explanation could be the complexities and challenges posed by the plurality of customary practices. The following brief description of such practices under customary law reflects and defines attitudes toward the status of children and entitlements in Botswana:

Physical abuse

According to Bueren, what is and is not child abuse varies from culture to culture. Bestowing rights on children would cause conflicts in some families because of the different cultural practices.⁵⁹ The Customary Law Act allows for the infliction of corporal

53 Cohen, C.P. & Naimark H., 'United Nations Convention on the Rights of the Child: individual rights concepts and their significance for social scientist', *American Psychologist*, 46, pp 60-65, 1991.

54 Kibria, G.K.F.M. (Ed.) , *Rights of Children in a Changing Society: The Case of Botswana* UNICEF, Gaborone. 1987 referred from Almon ., & Fazlur M., *Supra* n. 51

55 *Ibid*

56 Botswana: Nasha Explains Children Bill, *Mmegi*, 21st October 2008. Minister of Local Government Margaret Nasha while addressing a sed a kgotla meeting in Selebi-Phikwe , explained the draft children's bill which she said has been met with mixed reactions because people do not understand what it seeks to address. She expressed that agreements were signed because it was realised that there are serious problems concerning children that need to be addressed.

57 *Ibid*

58 Paragraph(s) 6 CRC/C/15/ADD.242 (CRC, 2004) Accessed at <http://www.universalhumanrightsindex.org/hrsearch/viewAnnotation>

59 Van B., 1995 referred from Almon ., & Fazlur M., *Supra* n. 51

punishment of not more than four strokes to be carried out on child offenders.⁶⁰ It is clear from the Act that corporal punishment by adults is legal.⁶¹

- Similarly, Sebonego (1994) in a study of child abuse and neglect in Botswana found that corporal punishment is very commonly employed by parents and is deep-rooted in the Tswana customs and tradition.⁶²

Orphans under Customary Law: Inheritance rights

Botswana holds two records at present: the strongest economic growth in Africa and the world's highest prevalence of the HIV/AIDS infection. Death related to this scourge cuts across the population and AIDS has become an equal opportunity killer. In the midst of this lies the fate of a growing number of orphaned children without adequate means of support. Some parents left property intended for their care and upbringing but surviving relatives, entrusted with the execution of the duty usurped these for their own personal gain.⁶³ There are many tribes in Botswana each claiming some unique form of customary law. Chiefs have tended to interpret these laws as if they are universally applicable to any given situation. That is a fallacy. For this reason, customary law has caused unwarranted agony around the country because some believe that uncles and aunts have the legitimate right to look after children of deceased persons.⁶⁴

60 Sections 7 and 21(2)

61 However, such practices will not condone the beating up of a child to the extent of being paralyzed, for example. In Botswana, both the Penal Code, 1964 (Section 26) and the Customary Law Act, 1969 (Section 21(2)) allow for the infliction of corporal punishment on child offenders. The Penal Code (Section 26) allows for the infliction of corporal punishment on child offenders less than 18 years of age as long as the punishment does not exceed six strokes. See also Schapera (1938) in his study of child abuse in Botswana found that children are slapped with bare hands or lightly beaten, mainly on the buttocks, with a small wooden switch or broom. Bigger girls are generally beaten with switches on the body or shoulders. Bigger boys are made to lay face downward at full length, and are whipped on the bare body with a cane. p. 118

62 *Ibid*

63 Customary law doesn't serve orphans, *Sunday Standard* 14 January 2004

64 *Ibid*

- Customary law does not have laid down rules governing the management of estates of the deceased. Relatives take advantage of this loophole and cash in, denying children their rightful inheritance, detrimentally affecting the development of surviving children.
- The only statute, which deals with estates, the Administration of Estates Act,⁶⁵ pertains to the estates of deceased tribesmen, who died with a will. Therefore, in the case of a tribesman who died intestate his property must be dealt with according to customary law. While customary law dithers, the Act protects the property of children whose parents died leaving a will or whose parents are not tribesmen. Both are treated differently in the matter of protection. Notably, making a will is an exception rather than a general practice.
- Where there is no written will more often than not, the male children's rights to inheritance under Customary Law take precedence over the female's rights, the latter sometimes being disinherited.
- Children born out of wedlock can only inherit from their mother and generally are not entitled to succeed their father, either.

Maintenance for Children

- Children born out of *bonyatsi* are never formally recognized and do not have a share in the heritage of their father.⁶⁶ The child is considered to belong to the mother's family. This situation discriminates against both the mother and the father, and removes the child's right to maintenance and to a relationship with his/her biological father.

Child Marriage

- Although Common Law does not allow persons below the age of 18 to marry, under Customary Law a child can be married, which often results in girls being forced into

65 CHAPTER 31:01 Section 3 Limits of application of Act. This Act shall not apply-(a)to the estates of deceased tribesmen died intestate, which as heretofore, shall be administered according to the customary law.

66 Is bonyatsi relevant in contemporary society? *Supra* n. 31

marrying someone against their will. When married, they are also forced to leave school.

- Child marriage occurred infrequently and was largely limited to certain ethnic groups.⁶⁷ Parental authority within marriages generally rests with the father of the child. For example, the consent of the father of a marital child alone is sufficient to validate the marriage of that child. Some traditional systems, however, base parental authority on whether or not the father has given his wife the *bogadi* title. This title has the effect of transferring women's reproductive role from their lineage to that of their husbands. Hence, in the absence of *bogadi*, the child is affiliated with its mother's lineage.⁶⁸

Child Sexual abuse

In some tribes, cultural practices have left their youth disadvantaged and not assisted to grow and cope with external pressures. They lack information on sexuality, gender relations etc. Cultural practices have also inadvertently led to silence among youth, children, and parents, on issues pertaining to domestic violence, sexual abuse and rape.⁶⁹

Right to Legal Representation: Inherent Limitations

Section 10(2) of the Constitution of Botswana provides constitutional right to legal representation in criminal matters.⁷⁰ The provision reads as follows:

- (2) Every person who is charged with a criminal offence
 - (d) “shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal representative of his or her own choice.”

⁶⁷ 2008 Report, *Supra* n. 27

⁶⁸ *Supra* n.31

⁶⁹ National Policy On Culture, Republic of Botswana, Ministry of Labor And Home Affairs, Department of Culture And Youth, October 2001, Approved by Cabinet on 4th April 2002 – Directive No. CAB 17/2001.

⁷⁰ Chapter 2, Constitution of Botswana, Cap. 1.

The right to legal representation is qualified by section 10(12) (b) of the constitution, which excludes legal representation in customary courts. In a supportive collaboration Section 32(a) of the CC Act provides:

Right of audience-Notwithstanding anything contained in any other law, no advocate or attorney shall have a right of audience

- (a) in any customary court; or
- (b) in any magistrate's court in any criminal proceedings or in any civil proceedings which fall to be determined by customary law, taken under the provisions of sections 37, 39 and 42 except with the special permission of such court.

The arrangement is defended with arguments like: matters adjudicated in these courts are purely customary issues and minor offences, no legal representation is allowed. Yet as has been referred to at least 90% of civil cases and 85% of criminal matters are heard or tried by customary courts and some have the power to impose sentences of up to five years imprisonment.⁷¹ Serious concerns about the system, such as its tendency to perpetuate discriminatory attitudes are (e.g. the low status of women and children), shared by different groups of society time and again.⁷² The onus remains on the accused person to represent him or her in the court. According to Prof. Fombad, because these courts are staffed by persons who have little legal training, there has been concern about the quality of justice that they provide and the possible effect they have on the rights of those who appear before them, as guaranteed under Section 10 of the Constitution. The authors of the *Botswana Legal System* conclude as follows:

Perhaps one of the most important functions that legal practitioners working through the Law Society have often played in most societies, perhaps less so in

71 Accessed at <http://www.ditshwanelo.org/bw/botswana.html#acc>; see also Fombad CM., (ed), *Essays on the Laws of Botswana*, ch.1, p. 22, Juta Publications, 2007.

72 Accessed at <http://www.ditshwanelo.org/bw/botswana.html#acc>; Customary Court produce complex decisions, *Mmegi*, 8th April, 2008; See also Country Reports 2007, Supra n. 27; Customary courts system: A diabolical nuisance, *Sunday Standard*, 25th July 2008.

Botswana, is as a pressure group that advocates for law reforms and as a watchdog for the respect for the rule of law and respect for human rights.⁷³

In *S v Ntwayame* (2008)⁷⁴ constitutionality of Section 32(a) of the CCAct was challenged by the Appellant who was charged in the Molepolole Customary Court with stock theft.⁷⁵ The appellant and his co-accused, however, wished to be represented by a legal delegate of their own choice and therefore, demanded at the outset before the customary court that their case be transferred to the Magistrate's Court where they may have legal representation. The proceedings were then suspended and the presiding officer reported the matter to the Customary Court of Appeal in terms of Section 37(1) of the Act for further directions. The Section makes specific provision for a case before a customary court if any party thereto demands that the proceedings of which may be transferred to some other court. The Court, nonetheless, directed that the trial should proceed before the Customary Court; thereby denying the appellant and his co-accused their constitutional right to legal representation.

Notably, the appellant was not charged with criminal proceedings which fell to be determined by customary law (in terms of Section 32(b) of the Act), but with the statutory offence of stock theft.

The urgency and necessity of legal aid services to indigents, has been well acknowledged principally by the Law Reform Committee of Parliament.⁷⁶ Lately, concern had been expressed in the Parliament by the then(2008) Minister of Justice, Defense and Security, Mr. Phandu Skelemani,⁷⁷ who said he was aware that many Batswana, especially stock owners want stock theft cases tried only at the customary courts where the accused cannot have legal representation. The minister said the right to legal representation is internationally recognized and Botswana

⁷³ *Supra* n. 71 p.180.

⁷⁴ CLCLB-066-07 (2008) BWCA37, 1st January 2008.

⁷⁵ Section 3(1) of the Stock Theft Act Cap 09:01

⁷⁶ The death penalty in Botswana Hasty and secretive hangings, International Fact-finding Mission, n° 473/2, DITSHWANELO - The Botswana Centre for Human Rights p.16. June 2007

⁷⁷ Right to legal representation under customary law of Botswana , BAPA, 17th March 2008

being a member of the International community and a signatory to the Covenant on Civil and Political Rights of the community of nations cannot be seen to be flouting the covenant protecting human rights.⁷⁸

Deprivation of right to legal representation places women at more disadvantageous state under customary law

The ability of women in sub-Saharan Africa to claim or defend their rights is affected by their social status and legal environment. Their social position can be illustrated by the explicit assumption that the men in a household are the spokespersons for the collective household. There are social and cultural processes that deny women authority and rights; the conditioning continues to perpetuate the belief that women are not entitled to the same authority and rights as men. The underlying threat of violence against women, and society's acceptance of this behavior, is a simple and profound testimony to the unilateral exercise of authority and rights.⁷⁹ In *Mafokate v. Mafokate*⁸⁰ the High Court in Lobatse, Botswana, ruled that traditional marriages are best dealt with by customary courts. The decision followed an attempt by Jane Mafokate to divorce her husband, Isaac Mafokate, before the court. The Chief Justice and Justices did agree that the High Court had original jurisdiction to hear any matter before it. The provisions of the Act do not apply to customary marriages, which are still regulated by customary law. The grounds for divorce in a customary marriage must be based on the customary rules of law which apply in a particular tribe or community in Botswana to which the parties belong and which give legal right to a party to divorce in case of breach.

The custody of the children was not decided either. The implications of the case are far reaching, at this juncture to say more in disfavor of women. It indicates that women are completely locked in the customary system with no recourse to lean on. This definitely is

⁷⁸ Parliament was told that it would be misguided to amend laws to provide for cattle theft cases to be tried only before the kgotla. *BOPA*, 11 March 2008

⁷⁹ *Supra* n.38

⁸⁰ 2000 (2) BLR 430 (HC)

contrary to the international obligations under Articles 5 and 22 of CEDAW to which Botswana is a party.

HIV/AIDS Issues and Customary Law

It is a settled fact that HIV is not just a health issue, but a social one too. It is commonly believed that the chiefs are omniscient.⁸¹ They, however, are not adequately trained to handle HIV/AIDS matters, as it is a relatively new disease. The NGOs working in the field are very often compelled to handle cases that are beyond their capacity. In a factual case, an HIV positive married woman, was instructed by her mother-in-law to leave her marital home, as she was likely to infect her son. The victim ended up dying a poor and lonely woman away from the joy of her life, her son. The case demonstrates the shortcomings of customary law and natural justice.⁸² The instance is just a tip of the iceberg, evincing lack of expertise about handling of similar cases under customary law.

Customary Court System: A blessing or misery

No other authority has more influence than customary courts as custodians of culture and tradition to mobilise communities.⁸³ The traditional courts continue to enjoy legitimacy among the people and they have played a vital role in justice delivery mainly because it is part of *Setswana* culture. These courts are free and often considered to be more accessible to the public. To the extent that cases are eligible to be held in a Customary Court and they deliver justice, ensuring Botswana do have access to justice. However, it seems that the age-old justice system is currently under the axe, for some justified reasons. It is administered by non-trained lay individuals, without a codified guide; it is more likely to reflect discriminatory perceptions such as the second-rate, subordinate place for women in society. The *Ntlo ya Dikgosi* (House of Chiefs) response to changes in Common Law, such as the Abolition of Marital Power Act, which

81 Lawyers Urged to Increase Human Rights Contributions, seminar for the legal fraternity on emerging legal issues in HIV/AIDS BONELA, 27 November 2006

82 *Ibid*

83 Combat anti-social behavior – Skelemani, *Mmegi*, 3rd may 2006

they considered to be in conflict with Customary Law, is just an illustration.⁸⁴ The drawbacks of the system are evidenced by the Botswana Country Reports on Human Rights Practices (2007) in the following words:

Customary courts often do not afford due process. Defendants do not have legal counsel, and there are no standardized rules of evidence. Tribal judges are appointed by the tribal leader or elected by the community; determine sentences, which may be appealed through the civil court system. Many judges are poorly trained and ill-equipped to make legal decisions. The quality of decisions reached in the customary courts varied considerably and often lacked a presumption of innocence.⁸⁵

On a similar note, Athaliah(AG), reflected her concern earlier, that customary courts, are a familiar territory, and easily accessible to most Batswana; but given the rapid changes in lifestyle, such an assumption needs to be revisited. She adds that "customary law remains largely unwritten, its precise rules often contested and largely unknown to young Batswana, creates fluidity and uncertainty, which leads to the perception that customary justice is, at best, unpredictable and, at worst, arbitrary."⁸⁶

It will not be outrageous and is presumed within context to reflect public confidence in the current system in the words of a journalist Mr. Gasego R. Lekgowe, as appeared in a national daily. In his own words:

Like heartless blood sucking ghouls, chiefs, the little-knowing merciless messiahs of the system, continue to suck poor and unrepresented accused persons into crammed jails, utterly oblivious to their constitutionally entrenched fundamental right to fair trial. With charlatan confidence and myopic faith from the government (the three branches), these courts are, in effect, crushing to

84 Accessed at <http://www.ditshwanelo.org/bw/botswana.html>

85 *Supra* n.27

86 Reform customary courts, *Daily News*, 2nd August, 2002

nothing and eating away at the essentials of justice and making ultimate nonsense out of the doctrine of the rule of law, a concept we profess to sanctify.

87

According to the same author, the underlying rationale and entire fabric of the institution of customary law rest on a mistaken belief. It is wrongly assumed that Chiefs (born or elected) are matchless repositories of customary law; it is also believed that they are well vested in basic principles of fair decision-making.⁸⁸

The following is another illustration of concern shared in another national daily:

First customary law exists in our minds only. It is what an old man or chief in the village tells you what it is. Each tribe has its own customary law. Children are subject to the laws of their father. Land under customary law is communally owned and belongs to the father and his descendants who are males. Women are expected to marry and eat from their husband's maintenance. If the husband dies without leaving a male heir, his brothers take over his estate even if his widow is alive.⁸⁹

Additionally, the minister may authorize these courts to administer the provisions of any written law.⁹⁰ These courts are also empowered to effect certain provisions of the Constitution (and thereby, interpreting the Constitution).⁹¹ It is submitted that mere familiarity with the system, not

87 Customary courts system: A diabolical nuisance, *Supra* n. 72.

88 *Ibid.*

89 *Supra* n. 63

90 Customary Courts Act, Cap04: 05. Section 6. Minister may empower customary courts to enforce specified laws-The Minister may, by order in the Gazette, authorize any customary court to administer any written law specified in the order.

91 Man Complains About Customary Court Procedures, *Mmegi*, 14th January 2008 He said he was denied his constitutional right to legal representation and that the customary courts oppressed the suspects they tried.

backed up by legal education is inadequate as it can never furnish one with a complete set of skills and the knowledge fundamental to interpreting and constructing laws.⁹²

Recourse from customary courts: Superior courts a road closed ahead?

The effectiveness of the Bill of Rights as enshrined in the Constitution depends on the orders and decisions of the courts being enforced and respected. Where parties to the case wish to have legal representation, or the case involves a 'serious' crime or constitutional issue, it will be transferred to a Magistrate's Court or Superior court in the 'Received' Court system. Citizens also have the right to appeal a customary court decision to a higher customary court or, on a restricted basis, to the High Court.⁹³

The High Court is the centerpiece of the whole judiciary. Under section 95(1) of the Constitution, the High Court had unlimited original jurisdiction for hearing and determining any civil or criminal proceedings under any law, without any constraint on the issue of its jurisdiction. Consequently, the Court could hear any matter that would be determined under customary law. On a parallel note, section 18(2)(b) of the Constitution gives the High Court wide powers appropriate for the purpose of enforcement of rights. However, the precedence of constitutional law over customary law is not always ensured in practice, due especially to the low level of awareness the population has of its rights, such as the entitlement to request a case to be transferred to a constitutional law court and the right to appeal customary courts' decisions before the constitutional law courts.⁹⁴ In addition, the Court has been too hesitant to use such powers, whenever a matter has been referred to in its original and appellate jurisdiction or through referral system.⁹⁵ The insufficiency of this provision was exposed in *Mafokate v. Mafokate*.⁹⁶ The sole question before the court was whether it had jurisdiction to dissolve a

92 *Ibid*. See also Customary Court of Appeal sets precedent on adultery evidence, accessed at [http:// www.allAfrica.com](http://www.allAfrica.com) 7th April 2008.

93 *Supra* n. 90 Ss. 10, 12, and 41. Currently, when High Court Judges are called upon to apply Customary Law, they are assisted by assessors (elders from the particular tribe who confirm what is considered correct practice in the tribe).

94 Accessed at [CPR/C/BWA/CO/1http://www.universalhumanrightsindex.org/hrsearch/viewAnnotation.do;jsessionnotation](http://www.universalhumanrightsindex.org/hrsearch/viewAnnotation.do;jsessionnotation)

95 *Mafokate v. Mafokate* 2000 (2) BLR 430 (HC) 2000 (2) BLR p431; *Kamankao I and Others v. AG and Others*, (2001) 2 BLR 654.

96 *Ibid*

marriage contracted under customary law and whether it should indeed exercise the jurisdiction or decline to do so.

The High Court instead held that the dissolution of customary law marriages and other matters ancillary thereto were matters eminently more suited to be brought before a customary court than the High Court as it would have special advantage against the High Court in ascertaining the proper grounds for divorce in the tribal community. The court agreed with the appellant's attorney on its powers under section 95 in principle, but disagreed that the case could not be argued under the Matrimonial Act. The Court, therefore, dismissed the case on the simple ground that it is erroneously grounded and misconceived.⁹⁷ While it can be argued that the dual legal system provides a certain degree of choice, in practice, the two systems can at times be contradictory.⁹⁸

A current trend of decisions by the common courts on the matters appealed from customary courts,⁹⁹ reflects the concern of Lekgowe, that while our legal stalwarts believe that these men and women are indeed authorities of customary law they do not bear any sensible illustrations of how it is that being a chief spontaneously anoints one with such profound knowledge of this so called unwritten law (is it not time to say 'partly written' considering Schapera's text and judicial decisions?)¹⁰⁰

Conclusion

Customary law is often tribe-specific. When traditional culture does effectively provide protection of human life, liberty and security, then human rights by definition would be compatible, posing no threat to traditional culture. As such, culture can absorb and apply human

97 Botswana Railways' Organisation v. Setsogo and Others [1996] B.L.R. 763, C.A. G (Full Bench) at p. 801 F -G considered.

98 *Supra* n.5 Section 5.

99 Botswana High Court leaves traditional marriages to the customary courts, 4 December 2000 at <http://www.afrol.com/News;Farmers> query stock theft law, *Mmegi*, 18th September 2008;;Man Complaints About Customary Court Procedures, 14th January 2008.

100 *Supra* n. 48

rights, and the governing State should be in a better position not only to ratify, but to effectively implement international standards.

Botswana's international obligations and commitment to basic human rights may be interpreted to require some recognition of customary law. On the other hand, conduct called for under customary law may be contrary to the country's obligations. Most of the measures taken by the Government in reviewing laws, and the enactment of legislation to amend such laws have illustrated the centrality of the state as a bastion of democracy and observer of human rights. These processes, however, have been devoid of political commitment – as evidenced by the delay in passing the Policy on Women in development. While the Citizenship Case and the Abolition of Marital Power Act have illustrated a possibility of legal reform in Botswana, their benefits do not cover a significant proportion of women under the customary legal system. State intervention must take account of the reality of pluralism.

Like other government institutions, customary courts have been affected by the rapid transformation that Botswana has gone through since independence. It is a matter of contention now for the traditional courts that citizens are now more assertive and will not compromise on their rights. To deal with these complex problems, the government should continually adjust its strategies as the circumstances dictate. The extent to which human rights under the traditional system of law can be merged into Constitutional legislation is limited. Clearly, this age-old system continues to fling the rule of law, undermining the dignity of Botswana. It is high time customary court system employed trained personnel in law; it is high time Botswana had their constitutional rights observed and respected.