

# Women's Access to Justice in Botswana: Identifying the Obstacles & Need for Change

Identifying the Obstacles & Need for Change



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# **Women's Access to Justice in Botswana: Identifying the Obstacles & Need for Change**

A project of Metlhaetsile, the International Commission of Jurists & Friedrich  
Ebert Stiftung Botswana

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## 1. INTRODUCTION

Ensuring access to justice is at once both a fundamental component of the rule of law and an indispensable element of human rights protection.

Yet, in a wide range of contexts across the world, women's access to justice remains elusive. Considerable legal, structural and practical obstacles continue to impede women's ability to claim their rights as legal entitlements, seek and ensure the accountability of those who transgress them and turn to the law for viable protection and meaningful redress.

Law and justice systems provide the building blocks of our societies. Where law and justice systems work for women, they create the foundations for an end to inequality. Where they fail to respond to the realities of women's lives, they perpetuate discrimination and disempowerment.

Even in those jurisdictions regarded as reflective of best practice, ensuring women's access to justice is an ongoing endeavor. Continuous and rigorous engagement and scrutiny is required to close the circle between the enactment of appropriate laws and procedures, the assurance of an effective justice sector response, and the empowerment of women, especially the most marginalized, to claim their rights and seek remedies in practice.

In 2011 the International Commission of Jurists (ICJ) initiated work with local partners in a range of countries with the purpose of contributing to their ongoing efforts to advance women's access to justice. Through these projects it works to explore the obstacles to justice women continue to face in the relevant contexts, identify recommendations for change and take steps to advance their implementation.

Together with local partners, *Metlhaetsile* and *Friedrich Ebert Stiftung* (FES), the ICJ began this process of exploration in Botswana in August 2011. It was conducted through: legal review and analysis of relevant law and procedures; field visits to Francistown, Gaborone and Maun; a series of interviews and roundtable consultations with over 65 women human rights defenders, lawyers, civil society representatives, police officials, judges, court services officials, prosecutors, legal aid officials and other stakeholders.<sup>1</sup>

This report presents the main findings from that process.

It encapsulates what was heard from participants, identifies a number of the key issues that emerged and presents a series of recommendations for change.

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<sup>1</sup> A list of stakeholders consulted is available upon request from the ICJ.

### **1.1 Report Content & Structure**

The issues raised in this report are not new. They are common knowledge to those working to advance gender equality, human rights protection and access to justice across Botswana. They are the obstacles these actors encounter and seek to transcend everyday.

Although all those we spoke to acknowledged that important progress has been made towards improving women's access to justice in Botswana, they also expressed concern at the extent to which access to justice remains a remote possibility for most women. Their key concerns are summarized and explored in this report.

Section 2 provides brief context and background, describing accounts of progress made and reflecting on the impact of Botswana's HIV/AIDS pandemic.

Section 3 outlines the way in which international human rights law and standards require Botswana to ensure women's access to justice and address the challenges and barriers they face.

Section 4 addresses four fundamental cross-cutting issues that emerged time and again in consultations. These matters were identified as central considerations in any exploration of women's access to justice in Botswana.

- Section 4.1 considers the implications for women's access to justice that arise in the context of Botswana's plural legal system, and specifically the customary law framework. In particular it addresses the way in which operational failures to ensure constitutional and legislative oversight of customary law in Botswana may be compounded by normative exceptions, thereby enabling discriminatory application of customary law to continue.<sup>2</sup>
- Section 4.2 summarizes the ways in which access to resources is a core determinant in women's ability to claim their rights and seek remedies. It highlights the important role which the newly established legal aid system will play in addressing some aspects of this problem, but also underlines that despite the new scheme serious resource challenges will persist for many women.

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<sup>2</sup> As discussed in more detail in Section 4, we use the term customary law throughout the report in a manner which corresponds to its usage in national legislation such as the Customary Law Act and Customary Courts Act i.e. to encompass the law of tribes and tribal communities in Botswana.



- Section 4.3 outlines the accounts we received of limited justice sector infrastructural and human capacity. It provides some examples of the ways in which such deficits may affect women's access to justice and address the need for appropriate resource allocation by the Government and the donor community.
- Section 4.4 identifies specific access to justice impacts on certain groups of women arising from legal frameworks which criminalize certain conduct and identities or deny them legal recognition. In particular it describes the accounts received of the way in which criminalization, discrimination and lack of legal recognition impede lesbians and trans women from claiming their rights and seeking legal remedies.

Section 5 outlines the specific justice seeking challenges which were said to impede women from making claims of gender discrimination and inequality. In particular it highlights the extent to which ambiguity remains as to the scope of constitutional guarantees of equal protection and non-discrimination. It addresses the way in which such normative barriers appear to intersect with resource and information deficits to undermine women's access to justice. It notes that although the Constitution provides the only generally applicable legal basis for claims of inequality and discrimination, just three claims of sex discrimination have so far been made by women thereunder.

Section 6 addresses the particular difficulties which women in Botswana appear to face when applying for, or seeking the enforcement of, child-maintenance orders. It explains how, as a combined effect of normative gaps, system overload and inefficiencies, applications that should be relatively simple to process often take years to resolve and are replete with disfunctionalities.

Section 7 summarizes the accounts received of factors which undermine women's recourse to the justice system in situations of gender-based violence. It describes a mix of practical and normative obstacles, focusing on the problematic responses on the part of justice sector officials and on barriers posed by gaps in the legal framework. Specifically it considers the lack of clarity as to whether marital rape can be prosecuted, the continuing application of problematic rules of evidence in cases of sexual violence and the lack of a generally applicable prohibition of sexual harassment.

A series of responsive recommendations are presented at the end of Sections 4 – 7.

Throughout the report the wide range of actors who participated in the project, through interviews or roundtable discussions, are referred to collectively as '*participants*.' As noted above, they include a broad cross-section of individuals working to advance access to justice in Botswana including: human rights defenders, lawyers, civil society representatives, police officials, judges and magistrates, senior chiefs, court officials, prosecutors, and legal aid officials.

This report does not aim to provide a comprehensive overview of all the obstacles to justice faced by women in Botswana. It prioritizes description of concerns and obstacles that were repeatedly raised by participants. Resource and capacity constraints limited the remit and reach of relevant research. Moreover although the report seeks to highlight expressed concerns which deserve attention and action, it does not represent an empirical study or present statistical information or data.

**Box 1: Key Definitions****Access to Justice**

Access to justice is a term that has divergent meanings when used in various contexts and by different stakeholders.

For the purposes of this report access to justice is described with reference to international human rights law and standards. Access to justice means that rights and their correlative legal protections are recognized and incorporated in law and that the right to an effective, accessible and prompt legal remedy, including reparation, for the violation or abuse of rights be guaranteed. As a result it entails the ability and empowerment to claim rights as legal entitlements, to seek the accountability of those who transgress them, and to turn to the law for viable protection and meaningful redress.

Although the provisions of international human rights treaties do not explicitly use the term 'access to justice,' the obligations they impose on States parties require that these central components of access to justice be ensured. Section 3 outlines and explores these international human rights obligations in more detail.

**Obstacles to Justice Faced by Women**

The thematic focus of this report is not discrimination against women vis-à-vis men, but the obstacles to justice faced by women.

Such obstacles include legal, structural, economic, practical, and social factors that impede or reduce women's ability and willingness to claim their rights, benefit from legal protection, and enjoy effective legal remedies in cases of violations. They may range from normative discrepancies, such as discriminatory laws or inadequate remedial and regulatory frameworks, to failures of the administration of justice in practice, to social stigma, to practical day-to-day realities such as a lack of resources or information.

The obstacles considered are not limited to those that involve discrimination or that solely or predominantly affect women. Indeed certain barriers addressed may also affect men in equally serious ways. In such cases the focus on women should not be seen as an overstatement of the gender dimensions of justice deficiencies. The report simply seeks to capture the ways in which women experience these shared obstacles.

## 2. CONTEXT & BACKGROUND: PROGRESS MADE & THE REALITIES OF HIV/AIDS

Work to advance women's access to justice is nothing new in Botswana. Vibrant civil society activism and engagement has paved the way for numerous and significant structural, legislative and policy developments.

Indeed such are the effects of this advocacy that at times they have resonated far beyond Botswana's borders. For example in 1992 in *Dow v. the Attorney General* the Court of Appeal issued what would become perhaps one of the world's most often cited examples of national constitutional litigation to advance gender equality.<sup>3</sup> There the Court held that Botswana's citizenship law, which prevented women (but not men) from Botswana who were married to foreigners from passing their nationality to their children, was unconstitutional. In doing so it specified that the Constitution's prohibition of discrimination included sex discrimination, although it was not expressly encompassed therein. Over the past twenty years, *Dow* has become a touchstone for lawyers and advocates everywhere working to advance the protection of women's human rights.

### **A Loss of Momentum?**

A number of participants who had worked towards gender equality and justice in the 1980's and 1990's explained that in the years immediately following *Dow* there was a phase of intense action. For example Botswana ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) in 1996 and endorsed the Southern African Development Community (SADC) Declaration on Gender and Development in 1997. The same year the Women's Affairs Department in the Ministry of Labour and Home Affairs, which had initially been a unit and then a division, was established as fully fledged department. Simultaneously a series of laws were revised.<sup>4</sup>

Participants, however, also expressed the view that after this flurry of activity, progress stalled. During an initial roundtable consultation, participants noted that while such multi-stakeholder discussions had once been regular occurrences, they had subsequently declined in frequency. There was also discussion of the way in which previously active women's rights organisations had dissolved entirely or become dormant. Meanwhile they pointed out that many of the serious legal flaws and gaps identified by stakeholders in the 1990's are still to be addressed.

3 Ammisah J (for the Majority), *Attorney General v. Dow*, Court of Appeal, Botswana, 2 July 1992.

4 See for example Penal Code (Amendment) Act 5 of 1998, Sections 141 and 142 (Broadening the definition of rape so as to encompass a range of sexual acts and ensure gender neutrality, and to increase the penalties); Criminal Procedure and Evidence (Amendment) Act of 1997, Section 2 (ensuring that rape cases could be held in camera).

For example, a number of participants referred to two seminal reports on women and the law in Botswana that were published in 1998 and 1999. The first of these, produced by the Women's Affairs Department of the Ministry of Labour and Home Affairs (WAD), is entitled *a Review of all Laws Affecting the Status of Women in Botswana*.<sup>5</sup> Published two years after Botswana's ratification of CEDAW, it presented a comprehensive review of the status of women under public and private law and made relevant proposals for change to Government. It covered areas such as constitutional law, criminal law, labour law, family law, property and inheritance. Its remit encompassed legislation, common law and customary law and in total it made 88 specific recommendations for change. One year later the NGO Women and Law in Southern Africa, Botswana (WLSA) released a related report, entitled *Chasing the Mirage: Women and the Administration of Justice*.<sup>6</sup> This report focused on the experience of women victims of gender-based violence in navigating Botswana's justice system and outlined approximately 26 broad recommendations.

Participants explained that these WAD and WLSA reports and their recommendations had presented Botswana's authorities with a clearly articulated action plan. They also identified them as yardsticks by which to measure advancement on women's access to justice in Botswana. They noted that some of the recommendations have been implemented.<sup>7</sup> However, they also highlighted that a large number remain pending.

Indeed fifteen years after their publication, many of these reports' key recommendations remain outstanding. Most of these do not concern peripheral matters, but instead relate to fundamental issues that have a considerable impact on the legal framework and justice system as a whole, such as key exceptions to constitutional rights guarantees.

### ***The HIV/AIDS Pandemic***

In reflecting on this loss of momentum, participants pointed, not necessarily to a lack of will or good intention in Government policy, but to the severe and profound impact of Botswana's HIV/AIDS epidemic which emerged in the 1990's.

5 A Review of all Laws Affecting the Status of Women in Botswana, Women's Affairs Department of the Ministry of Labour and Home Affairs (WAD), 1998.

6 *Chasing the Mirage: Women and the Administration of Justice*, Women and Law in Southern Africa (WLSA), Botswana, 1999.

7 For example they pointed to the abolition of the common law notion of a husband's marital power from Botswana law granting women in civil marriages equal legal capacity and decision making rights; the establishment of a system for the imposition and enforcement of protection orders in situations of domestic violence; the prohibition of sexual harassment between public sector employees. Abolition of Marital Power Act, 2004; Domestic Violence Act, 2008; Public Service Act 2008; Employment Act & Employment Amendment Act 2010

Not only did this necessitate rapid Government response, dedicated focus and resource mobilization, it also had radical and long-lasting social and economic impacts, leaving no aspect of life untouched.

The trajectory of the epidemic was severe. In the space of ten years, life expectancy in Botswana fell from 65 years in 1995 to 35 years in 2005.<sup>8</sup> In 2003 the prevalence of the virus among adults had reached an approximate national level of 37% and of 45% in the urban centres of Gaborone and Francistown.<sup>9</sup> In 2000 the World Health Organization estimated that two-thirds of fifteen year olds in Botswana would eventually die of AIDS.<sup>10</sup>

In response to this existential threat, the country instituted what is commonly lauded as one of Africa's most comprehensive and successful programmes of HIV/AIDS prevention, treatment and care. Resources, donor engagement, political capital and activism were devoted to the urgent and immediate task of saving and prolonging lives and advancing rights protection and tackling discrimination against those living with the virus. The pandemic also diverted considerable personal resources, as individuals throughout the country, among them women's rights activists, attorneys and justice sector officials, grappled with their own private realities in the context of the epidemic and those of their loved ones.

In many respects the Government's response has paid off. In 2012 life expectancy had risen to 61 years<sup>11</sup> and over 95% of those in need of ART were receiving treatment.<sup>12</sup> Yet despite these immense achievements the figures remain stark. Currently 25% percent of adults in Botswana are infected with the virus, the second highest rate in the world.<sup>13</sup>

### **Renewing Focus?**

Identifying a welcome trajectory, participants expressed the view that to some extent recent years have witnessed an emerging renewal of commitment to address women's rights and justice needs.

8 United Nations Department of Economic and Social Affairs/Population Division, *The Impact of AIDS*, 2004. p. 17.

9 Aged between 15 – 49 years. World Health Organization, *Botswana: Summary Country Profile for HIV/AIDS Treatment Scale-Up*, 2005, p. 1.

10 Joint United Nations Programme on HIV/AIDS, *Report on the Global HIV/AIDS Epidemic*, June 2000, p. 26.

11 World Health Organization, *World Health Statistics 2012*, p. 52.

12 World Health Organization, *World Health Statistics 2012*, p. 99.

13 UNAIDS Country Progress Reports, Botswana 2012 Global AIDS Response Report, p. 8.

Certainly, as explored in Section 7, recent efforts have been made to address the country's high rates of gender-based violence. As noted above, the Domestic Violence Act was enacted in 2008, establishing a system of protection orders for domestic violence.<sup>14</sup> In the same year the first legislative prohibition of sexual harassment was established, applicable between public sector employees.<sup>15</sup>

More broadly, as outlined in Section 4.2, the recent establishment of a fully fledged legal aid system is likely to lead to significant positive changes in the functioning of the justice system.

Meanwhile, as discussed in Section 4.1 and Section 5, the recent High Court and Court of Appeal decisions in *Mmusi and Others v. Ramantele and Another*,<sup>16</sup> placed the scope and extent of constitutional rights guarantees and prohibitions of discrimination back on the agenda.

Yet, although keen to underline the importance of recent progress, participants repeatedly emphasized the need for an ongoing renewal of attention to women's rights and justice. They highlighted the extent to which progress remains to be made, stressing that ensuring meaningful improvement in the justice-seeking possibilities and experiences of the majority of women across the country remains a key challenge. They highlighted that while further legislative reform is vital, it is also insufficient in and of itself, and must be accompanied by action to address administrative, operational and practical deficits. In addition, attention must be paid to the particular legal and practical barriers to justice and intersectional forms of discrimination faced by marginalized groups of women in Botswana.

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14 Domestic Violence Act, 2008

15 Public Service Act 2008

16 *Mmusi and Others v. Ramantele and Another* (MAHLB-000836-10), [2012] BWHC 1(12 October 2012, High Court) and *Ramantele v. Mmusi and Others*, 3 September 2013, Court of Appeal.

### 3. BOTSWANA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS & WOMEN'S ACCESS TO JUSTICE

Botswana is a party to a number of international and regional human rights treaties, including: the African Charter on Human and Peoples Rights,<sup>17</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its optional protocol relating to a communication procedure,<sup>18</sup> the International Covenant on Civil and Political Right (ICCPR),<sup>19</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>20</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>21</sup> the Convention on the Rights of the Child (CRC)<sup>22</sup> and its Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography and on the involvement of Children in armed Conflict.

These treaties require Botswana to respect, protect and fulfill the human rights of all those within its territory and jurisdiction. This means that all State officials, including government agents and those who act under its instructions, direction or control or through delegation of governmental authority, must refrain from interference with the enjoyment of human rights. It also means that the Government is required to protect individuals from the impairment or nullification of rights by third parties, including non-State actors such as business enterprises and private individuals, and to take a range of other pro-active steps to enable the enjoyment of rights. To give effect to these obligations Botswana must ensure a legal framework is in place that gives effect to the human rights obligations to which it is bound.<sup>23</sup> It must also enable the realization of rights in practice, including by taking effective legislative, judicial, administrative,

17 Ratified in 1986. Notably Botswana has neither signed nor ratified the Maputo Protocol on the Rights of Women in Africa or the SADC Protocol on Gender and Development.

18 Ratified in 1996. No reservations. In 2007 Botswana also became a party to the Optional Protocol to the CEDAW Convention recognizing the competence of the CEDAW Committee to receive communications from individuals within its jurisdiction alleging violations of the Convention.

19 Ratified in 2000. Reservations relating to Articles 7 and 12(3) of the Covenant which specify that Botswana is bound by the provisions to the extent that they accord with the corresponding Section 7 and Section 14 of its Constitution.

20 Ratified in 1974. No declaration accepting jurisdiction of the Committee under Article 14.

21 Ratified in 2000. No declaration accepting jurisdiction of the Committee under Article 21.

22 Ratified in 1995.

23 See for example Article 2(2) ICCPR; Articles 2 (a)-(g) CEDAW.



educative and other appropriate implementation measures to ensure the ability of individuals to enjoy their rights.<sup>24</sup>

In the paragraphs below we provide a short summary of the way that these international obligations require Botswana to address the obstacles that women face in access to justice. We begin with the requirement to enable access to justice in general and then turn to the responsibility to address the specific barriers to justice encountered by women.

### **3.1 Access to Justice**

Although the provisions of the treaties do not explicitly use the term 'access to justice,' it is clear from their provisions, and the relevant pronouncements by international authorities, that the interrelated obligations they impose on Botswana necessitate that the components of access to justice be ensured.

Four specific requirements are of particular relevance:

- (i) **Recognize and incorporate rights in law.** Botswana must ensure that its human rights obligations, including those contained in the treaties to which it is party, are incorporated in its domestic legal order.<sup>25</sup> Although these treaties do not prescribe a precise and uniform means and modality of incorporation, this obligation will be most effectively discharged where a State has adopted implementing legislation, and the rights themselves should be codified in law.<sup>26</sup> The legal recognition of rights in this way is a vital component of access to justice as it provides the foundation for individuals to claim their rights as entitlements under the law. Simply put, if a right is not recognized in law an individual may not be able to invoke it or claim it has been infringed.

24 Human Rights Committee, *General Comment 3, Implementation at the National Level*, HRI/GEN/1/Rev.1, 1981 (hereinafter HRC General Comment 3); Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, Para. 7 (hereinafter HRC General Comment No.31); Committee Against Torture, *General Comment No.2, Implementation of Article 2 by States Parties*, CAT/C/GC/2, 24 January 2008 (hereinafter CAT *General Comment No. 2.*); CEDAW, *General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW *General Recommendation 28*); Committee on the Rights of the Child, *General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003.

25 See for example: HRC, *General Comment No. 31*, Para. 13 (hereinafter HRC General Comment No.31); See also Article 2 (a)-(g) CEDAW and CEDAW *General Recommendation 28*.

26 *Ibid.*

- (ii) **Provide effective legal protection for rights.** It is not enough for Botswana to simply recognize rights in law. Its legal system must also serve in actuality to regulate the conduct of public and private actors to prevent abuses and ensure accountability when they do occur.<sup>27</sup> This means that certain conduct must be prohibited in law, and systems and mechanisms put in place to ensure consistent enforcement, accountability and sanctions. For example, Botswana is required to *protect* the rights to life, personal integrity and freedom from torture and other forms of ill treatment through the enactment of criminal laws prohibiting certain forms of violence and the establishment of effective procedures and mechanisms for law enforcement, investigation, and prosecution.<sup>28</sup>
- (iii) **Make effective, accessible and prompt legal remedies available.** In addition to recognizing rights in law and regulating the conduct of public and private actors, Botswana must also ensure that individuals can seek and receive effective legal remedies and redress when they face human rights abuses.<sup>29</sup> This means that the law must provide individuals with recourse to independent and impartial authorities with the power and capacity to investigate and decide whether an abuse has taken place and order cessation and redress.<sup>30</sup> Without this access to justice is impossible.

27 Article 2(b)-(f) CEDAW and CEDAW General Recommendation 28, Paras. 17,31,36; HRC, *General Comment No.31*, Para. 8.

28 See for example Articles 2,4,12 & 16 CAT and in general CAT *General Comment No. 2*. See also ICCPR Articles 2, 6 & 7 and HRC, *General Comment No.31*, Para. 8. And see CEDAW, *General Recommendation 19*, Violence Against Women, U.N. Doc. CEDAW/C/1992/L.1/Add.15, Paras. 19, 24(b) and 24(t) (hereinafter CEDAW General Recommendation 19); CEDAW, *General Recommendation 28*, Para. 34;

29 For a general account of what constitutes effective remedy and reparation see for example Article 2(3) ICCPR and HRC *General Comment No. 31*, Paras. 15-20; Article 2 CEDAW and CEDAW *General Recommendation 28*, Paras. 32,34,36. This obligation is not only set out in the major human rights treaties, but is also a principle of general international law as expressed in UN Principles and Guidelines, adopted by consensus of all UN member States at the General Assembly. It requires that Botswana make available "adequate, effective, prompt and appropriate remedies, including reparation." Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

30 In order to be effective, a remedy must not be theoretical or illusory but meaningful in practice. It must be affordable and timely. In a wide range of circumstances access to a judicial remedy must be provided and even in situations where access to a judicial forum is not required at first instance, an ultimate right of appeal to a judicial body will be necessary. Meanwhile ensuring the right to redress requires a range of available reparative measures to make a victim whole, including restitution, rehabilitation, satisfaction, guarantees of non-repetition and compensation. The stated needs and wishes of the victims are paramount must be taken into account in determining the appropriate forms of redress. See for example, HRC *General Comment No. 31*, Paras. 15-20; CEDAW *General Recommendation 28*, Paras. 32,34,36. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

- (iv) **Address practical barriers to justice and accountability.** Finally, although legal frameworks that recognize rights and provide legal protection and effective remedies are vital, they are insufficient. Botswana must also take proactive measures to ensure that in practice individuals can avail of them.<sup>31</sup> For example legal processes must be affordable and accessible for ordinary people;<sup>32</sup> interpreters and translators must be provided when necessary;<sup>33</sup> individuals must be given legal information so that they know about their rights and the content of relevant laws and procedures.<sup>34</sup>

### 3.2 Women's Access to Justice

Where the State fails to deliver on these four requirements, the resulting access to justice hurdles will regularly affect both men and women. However, as noted previously, women will often face additional and specific obstacles to justice that arise because of their status as women. Moreover, certain shared barriers may affect women and men differently or be predominantly experienced by women.

Compliance with each of the international obligations outlined above requires Botswana to take specific steps to address the particular justice seeking experiences and circumstances of women. This follows from Botswana's obligation to respect, protect and fulfill the human rights of women on a basis of equality and non-discrimination.<sup>35</sup> It means that in taking proactive legal and practical measures to meet the four requirements detailed above, Botswana must take account of and address the particular needs and problems facing women in the country.

For example, international authorities have outlined that necessary measures include:

- Recognizing women as equal rights bearers and according women equal legal capacity and protection of the law in all spheres and circumstances.<sup>36</sup>

31 HRC, *General Comment 3, Implementation at the National Level*, HRI/GEN/1/Rev.1, 1981 (hereinafter HRC General Comment 3); CEDAW, *General Recommendation 28*.

32 CEDAW, *General Recommendation No. 28*, Para. 34; HRC *General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial*, Para. 10 (hereinafter HRC General Comment No. 32).

33 See for example, HRC *General Comment No. 32*, Paras. 13, 32 & 40.

34 See for example, HRC *General Comment No. 3*; CEDAW *General Recommendation 28*, Para.2; CEDAW, *General Recommendation 26, Women Migrant Workers*, U.N. Doc. CEDAW/C/2009/WP.1/R (2008), Para. 26 (hereinafter CEDAW General Recommendation 26).

35 For an account of this obligation see: Article 2, CEDAW; Articles 2,3 & 26 ICCPR; CEDAW, *General Recommendation 28*; HRC, *General Recommendation 28*.

36 See in general HRC *General Comment No. 32*; HRC, *General Comment 28, Article 3: The Equality of Rights between Women and Men*, 2000, HRI/GEN/1/Rev.9, Para. 19 (hereinafter HRC General Comment 28); CEDAW *General Recommendation 28*; CEDAW, *General Recommendation 29, Economic consequences of marriage, family relations and their dissolution*, General Recommendation on Article 16, CEDAW/C/GC/29, 26 February 2013, (hereinafter CEDAW, General Recommendation 29);

- Revising and removing all discriminatory laws.<sup>37</sup>
- Establishing adequate and accessible legal protection from discrimination and unequal treatment in law and practice.<sup>38</sup>
- Ensuring that the definition and content given to legal rights takes account of the particular needs of women as women, arising for example from biological differences as well as social and culturally constructed differences.<sup>39</sup>
- Ensuring laws and law-enforcement procedures effectively prohibit and safeguard against human rights abuses which women face as women in public and private spheres or which effect women in distinct or disproportionate ways.<sup>40</sup>
- Establishing gender-sensitive legal procedures and processes and ensuring the forms of redress available are designed to respond to the particular needs of women.<sup>41</sup>
- Taking steps to address the wide range of social and practical factors that can often impede women's ability to claim their rights, including the status of women, their lack of independent access to resources, and pejorative gender-based stereotypes, prejudices and norms in operation in a society.<sup>42</sup>

These obligations have been elaborated in particular detail in relation to a range of rights and issues addressed in this report:

### **Gender Equality and Non-Discrimination**

- Botswana's law must incorporate the principles of equality between women and men and of non-discrimination in the enjoyment of human rights and they must be given overriding and enforceable status.<sup>43</sup>
- In addition to constitutional protections, States should adopt legislation guaranteeing equality and prohibiting discrimination in all fields of women's lives.<sup>44</sup>

37 CEDAW *General Recommendation 28*, Para. 35

38 CEDAW *General Recommendation 28*, Para.31

39 CEDAW, *General Recommendation 25, On article 4, paragraph 1, on temporary special measures*, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004) (hereinafter CEDAW *General Recommendation 25*).

40 CEDAW *General Recommendation 28*, in general and specifically Paras. 10, 17.

41 See in general Article 2 CEDAW; CEDAW *General Recommendation 28*; CEDAW, *VK v. Bulgaria*, Communication No. 20/2008, 25 July 2011, Para. 9.9 and 9.11-9.16; CEDAW, *Vertido v. Philippines*, Communication No. 18/2008, 16 July 2010, Paras. 8.5-8.9; See also CAT *General Comment No. 2*.

42 Article 5 CEDAW, CEDAW *General Recommendation 28*.

43 Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 18(3) ACHPR; CEDAW, *General Recommendation 28*, Para. 31. HRC, *General Comment 28*, in general, and specifically Para. 31.

44 CEDAW, *General Recommendation 28*, Para. 31.

- Among other things, such legislation should define discrimination in conformity with CEDAW and other international treaties, should prohibit discrimination by both public and private actors (including public authorities, the judiciary, private organizations, business enterprises or individuals) and should clearly outline appropriate sanctions and remedies, including access to courts or tribunals established by law.<sup>45</sup>
- International law, including CEDAW, does not allow for exceptions to the prohibition of discrimination.<sup>46</sup>
- Meanwhile it is not enough to ensure laws, policies, and practices do not *explicitly* or *prima facie* discriminate against women. It is also necessary to ensure they do not have a discriminatory effect and effective measures must be taken to prevent and address discrimination in practice and to guarantee substantive equality in the enjoyment of rights.<sup>47</sup>

### Multiple & Intersectional Discrimination

- Women will often face discrimination not only on the basis sex, but also on other grounds, for example race, ethnicity, nationality, religion, language, marital status, social and economic status, age, place of residence, birth, descent, disability, sexual orientation and gender identity. Such *intersecting* forms of discrimination will often have compounded negative impacts on these women and will often affect them differently than it will male members of these groups.<sup>48</sup>
- Botswana’s law should protect women from such forms of multiple or intersectional discrimination. The adoption of legal provisions that prohibit discrimination on a range of grounds other than sex, including each of those listed above, is indispensable not least to protect women from marginalized groups.<sup>49</sup>

### Customary Law

- Domestic customary laws that discriminate against women must be abolished.<sup>50</sup>

45 Article 2, CEDAW; CEDAW, *General Recommendation 28*, Paras. 17, 31-34; HRC, *General Comment 28*, Para. 31.

46 Article 1, CEDAW; CEDAW, *General Recommendation 28*, Paras. 31 & 33.

47 CEDAW, *General Recommendation No. 25*; CEDAW, *General Recommendation No. 28*; HRC, *General Comment No. 28*.

48 CEDAW, *General Recommendation 28*, Paras. 18, 26 & 31; Para.17; CERD, *General Recommendation 25*.

49 Articles 2(1) & 26 ICCPR; CEDAW, *General Recommendation 28*, Paras.18 & 31; CERD, *General Recommendation 25*.

50 CEDAW, *General Recommendation 28*, Para.31.

- Where constitutions or legal frameworks provide that personal status laws (i.e. relating to marriage, divorce, distribution of marital property, inheritance, guardianship, adoption and other such matters), including as dealt with under customary law, are exempt from constitutional provisions prohibiting discrimination, they amount to discrimination.<sup>51</sup>
- Where a State entrusts customary courts with judicial tasks, it must protect the rights of individuals concerned, which include the rights of women to non-discrimination and equality.<sup>52</sup>
- All courts, including those applying customary law or religious law, should be required to apply the principle of equality and to interpret the law, in line with non-discrimination and equality requirements. Where it is not possible for them to interpret the law in this way, they should draw any inconsistency between the requirements of equality and non-discrimination and provisions of customary or religious law to the attention of the appropriate authorities.<sup>53</sup>

### Gender Based Violence

- Effective due diligence must be exercised to prevent, investigate, sanction and ensure access to remedies in instances of gender-based violence by public and private actors.<sup>54</sup>
- For example, States must adopt and implement legislative frameworks, dealing with various forms of gender-based violence, and providing adequate protection to all women, respecting their integrity and dignity. Such frameworks must provide for penal sanctions, civil remedies, and remedial and protective provisions. Where officials fail to conduct an effective investigation into incidents of gender-based violence that are

51 CEDAW, General Recommendation 29, Para. 10.

52 HRC, General Comment 32, Para. 24.

53 CEDAW, General Recommendation 28, Para. 33. See CEDAW, Article 2.

54 CEDAW, *General Recommendation 19*, Para. 9; CEDAW, *General Recommendation 28*, Para.19; CAT, General Comment 2, Para. 18; Article 4(c), *UN Declaration on the Elimination of Violence Against Women*, 20 December 1993, General Assembly, Resolution A/RES/48/104; CEDAW, *Vertido v. The Philippines*, Communication No. 18/2008, 16 July 2010, Para. 8.4; *Şahide Goekce v. Austria* CEDAW, *AT v. Hungary*, Communication No. 2/2003, 26 January 2005, Paras. 9.6. See also, CEDAW, *Şahide Goekce v. Austria* Communication No. 5/2005, 5 August 2007, Para. 12.1.4; *Fatma Yildirim v. Austria*, Communication No. 6/2005, 6 August 2007, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, *Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29. HRC, *General Comment 31*, Para.8 (regarding private actors generally).

brought to their attention, with a view to pursuing the accountability of the perpetrator, such omission to act will give rise to a breach of obligations.<sup>55</sup>

- An effective investigation entails a number of components, but always requires that officials investigate allegations of such violence, “promptly, thoroughly, impartially and seriously”<sup>56</sup> and of their own volition.
- In addition a gender sensitive judicial process must be ensured in cases of such violence.<sup>57</sup>
- Other required steps include training and awareness raising exercises for officials at all levels, the establishment of effective oversight and monitoring mechanisms, the elaboration of clear codes of conduct, guidelines and directives and the accountability of officials who do not adhere to them.

### Resources & Capacity

- Adequate human and financial resources must be ensured to advance gender equality and non-discrimination against women. Administrative and financial support must be provided so that legal and other measures make a real difference in women’s lives. Women should be provided with legal aid where necessary, particularly in respect of discrimination claims and family law matters.<sup>58</sup>
- Where justice system delays are caused by a lack of resources and under-funding the allocation of possible supplementary budgetary resources for the administration of justice is required.<sup>59</sup>
- Education and training on human rights and equality should be directed to public officials, the legal profession and the judiciary.<sup>60</sup>

55 Articles 2(3) & 7 ICCPR; Article 2 CEDAW; Articles 12,13 & 16 CAT. See also: CEDAW, *General Recommendation 19*, Para. 9. CEDAW, *General Recommendation 28*, Para.19; CAT, *General Comment 2*, Para. 18; HRC, *General Comment 31*, Para.8.

56 CEDAW, *AT v. Hungary*, Communication No. 2/2003, 26 January 2005, Paras. 9.6. See also, CEDAW, *Şahide Goekce v. Austria* Communication No. 5/2005, 5 August 2007; CEDAW, *Fatma Yildirim v. Austria*, Communication No. 6/2005, 1 October 2007.

57 CEDAW, *VK v. Bulgaria*, Communication No. 20/2008, 25 July 2011, Para. 9.9 and 9.11-9.16; CEDAW, *Vertido v. Philippines*, Communication No. 18/2008, 16 July 2010, Paras. 8.5-8.9; CEDAW *General Recommendation 28*. 18/2008, 16 July 2010, Paras. 8.5-8.9.

58 CEDAW, *General Recommendation 28*, Para. 34; CEDAW, *General Recommendation 29*, Para.42

59 HRC, *General Comment 32*, Para. 27

60 CEDAW *General Recommendation 28*; HRC *General Comment 31*. CEDAW, *General Recommendation 28*, Paras. 17, 38(d)

## Child Maintenance

- Children must be enabled to enjoy an adequate standard of living necessary for the child's physical, mental, spiritual, moral and social development. All necessary measures must be taken to secure the recovery of maintenance for the child from the parents or others having financial responsibility for the child.<sup>61</sup>
- Botswana must take steps to ensure that, even where relevant laws appear neutral, its maintenance schemes and relevant court practices do not give rise to discrimination against women or favor male family members.<sup>62</sup>
- It must ensure measures of effective support are in place to enable single parent women to discharge their parental functions on a basis of equality.<sup>63</sup>

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61 Article 27(1) and (4) of the Convention on the Rights of the Child.

62 CEDAW, General Recommendation No. 29.

63 HRC, General Comment No. 28.



### **BOX 2: Botswana's Constitutional Rights Framework**

Botswana's Constitution, adopted in 1966, is the foundational and primary instrument through which its legal system guarantees equal rights and prohibits discrimination. Indeed, apart from the Employment Act, which includes some provisions addressing the protection of certain rights at work, including non-discrimination,<sup>64</sup> no subsidiary legislation is in place which specifically guarantees human rights or prohibits sex discrimination or guarantees gender equality. Although Section 94 of the Penal Code criminalizes discrimination on grounds of colour, race, nationality and creed, it does not include discrimination on grounds of sex or gender.<sup>65</sup>

International human rights treaties to which the State is a party give rise to binding international legal obligations to which they are bound irrespective of their domestic legal arrangements. However, Botswana's legal system is 'dualist.' Therefore, international law, unless incorporated into national law through legislation, has been interpreted as not providing a basis of claim for enforceable rights in Botswana's Courts. None of the human rights treaties to which Botswana is party have been the subject of implementing legislation.

As a result, relevant constitutional provisions and related High Court and Court of Appeal jurisprudence provide the key reference point for rights protection, gender equality and non-discrimination against women in Botswana and are a recurring focus of discussion throughout this report. Participants' views as to the general role of constitutional provisions in enabling or disabling women's access to justice are discussed in **Section 5**, as are their impressions of the effects of the lack of discrimination legislation. Meanwhile **Section 4.1** addresses the specific matter of constitutional oversight of customary law and the implications of relevant constitutional exceptions for women's access to justice.

For ease of reference the text of relevant provisions of the Constitution are outlined below.

Chapter II of the Constitution contains what is commonly referred to as the 'bill of rights,' with Sections 3 – 19 enshrining certain fundamental rights and freedoms and providing a route to remedy in case of breach.

Section 3 specifies that: "*Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individuals, 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 –*

*(a) life, liberty, security of the person and the protection of the law;*

64 Sections 23(d) & 112-118 of the Employment Act specifically address the employment rights of women workers.

65 Section 94, Penal Code 1964

*(b) freedom of conscience, of expression and of assembly and association;*

*(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."*

Sections 4 – 14 enshrine a range of individual rights in some detail, including: life, personal liberty, freedom from slavery and forced labour, freedom from torture and inhuman treatment, property, privacy of the home, protection of law, freedom of conscience, expression, assembly and association and movement.

Section 15 addresses protection from discrimination. Section 15(1) states that "no law shall make any provision that is discriminatory either of itself or in its effect," and Section 15(2) proclaims that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority." Section 15(3) specifies that, "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 or creed 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."

As discussed in detail in Section 5 below, Sections 15(4)-15(9) also enshrine a series of broadly framed exceptions which on their face appear to exempt certain situations from the prohibition of discrimination, including laws dealing with non-citizens, adoption, marriage, divorce, burial, devolution of property on death, or "other matters of personal law," and customary law.

Section 18, is entitled, 'enforcement of protective provisions.' It provides that any person alleging that Section 3 – 16 of the Constitution, "has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matters which is lawfully available, that person may apply to the High Court for redress." Sub-section 18(2) attributes original jurisdiction to the High Court to hear and determine any application by an individual or referred to it by a subordinate Court in respect of Sections 3-16 and to, "make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Section 3-16."

## **4. CROSS-CUTTING ISSUES & OBSTACLES**

As outlined above, this report is the result of consultations with a diverse group of participants, including lawyers, human rights defenders, magistrates and industrial court judges, senior chiefs and customary court staff, social workers, police officers, and women providing support and advice to other women in instances of violence. Each has his or her own vantage point on women's access to justice in Botswana. Thus, they regularly raised different concerns and at times voiced divergent perspectives.

However, despite their diversity and different points of departure, these varied actors commonly referred to the same core group of issues as central considerations in discussions of women's access to justice.

Specifically, they emphasized: failures in constitutional and legislative oversight of customary law; women's lack of access to resources; capacity and infrastructural constraints effecting the justice sector. In addition, although rarely mentioned by justice sector officials, most of the activists and attorneys we spoke to highlighted the impact of criminalization and discrimination on access to justice by certain groups of women.

The sub-sections that follow briefly describe the accounts we received concerning each of these four issues. They each arise again, in Sections 5,6 and 7, in the context of the discussions of discrimination, child maintenance and gender-based violence. However they are addressed individually here so as to highlight their importance and to provide context for the analysis which follows.

Although different in nature, each of these issues represents a cross-cutting matter that impacts women's access to justice in Botswana. While they are general issues which do not only affect women, participants clearly identified the ways in which they give rise to distinctive or exacerbated impacts for women. The extent to which efforts to advance change effectively take account of and address these issues will be a key factor in determining long-term success.

### ***4.1 Botswana's Plural Legal System and Customary Law: Operational and Normative Challenges***

Botswana's legal system is a plural one. Systems of common law and customary law co-exist and overlap, each with their own regulated structures and procedures.

All participants pointed to the importance of encompassing this pluralist system in any reflection on women's access to justice in the country. Identifying and exploring the justice-seeking challenges women face requires an awareness of

the central role of the customary law framework and of customary courts in the ordinary day-to-day business of justice and remedies in Botswana. Participants stressed the importance going forward of ensuring that engagement to address discriminatory aspects of the customary law framework goes hand in hand with similar work to reform and renew the common law.

The paragraphs below briefly summarize the views of the participants in this respect. They begin with a short description of the way in which the parallel systems of customary and common law coexist and interrelate and the extent to which legal matters in Botswana are dealt with by the Customary Courts. They then outline the concerns of participants regarding the extent to which customary law is still applied in a manner that discriminates against women and summarize the reasons they identified for this continuing practice.

#### *4.1.1 Customary Law & Common Law: Definitions, Remit & Interaction*

In Botswana the term 'customary law' describes the laws of tribes and tribal communities, while 'common law' essentially refers to all other law, including Acts of Parliament, judicial precedent (decisions of the Industrial Court, High Court and Court of Appeal), and Roman-Dutch 'Common' Law which remains in force.<sup>66</sup> Customary law is unwritten, evolves and changes over time, and in principle is a plural body of law in and of itself, in that its content varies among tribal groups. Although the content of customary law is distinct from common law, the general framework for its application and the structures which enforce it are subject to legislative regulation, in particular through the Customary Law Act and the Customary Courts Act.<sup>67</sup>

Both Acts provide guidance as to whether a dispute is to be dealt with under customary or common law. For example, certain criminal offences are excluded from the jurisdiction of customary courts under the Customary Courts Act, such as murder, manslaughter, rape and robbery. Some civil disputes, such as divorce proceedings for parties married under common law, are similarly excluded.<sup>68</sup> Meanwhile, certain legislation covering specific themes, such as the Employment Act, the Children's Act, the Domestic Violence Act vest sole

<sup>66</sup> Section 2, Customary Law Act, 1969.

<sup>67</sup> The Customary Law Act (1969) defines the scope of application of customary law, applying customary law mainly to civil disputes between tribesmen unless they consent to application of common law, with the exception of several substantive areas carved out for application of common law only. The Customary Courts Act (1961) establishes and defines the functions and jurisdictions of customary courts.

<sup>68</sup> Section 13, Customary Courts Act, 1961.

jurisdiction in ordinary courts<sup>69</sup> to deal with the civil procedures they establish.<sup>70</sup> In contrast, inheritance disputes in cases of a tribe member's death intestate are always subject to customary law.<sup>71</sup>

Beyond these express jurisdictional provisions, the Customary Law Act specifies that customary law shall be applied in all civil cases between tribal members unless the parties expressly agree otherwise, or relevant circumstances indicate their intention, to determine the matter under common law.<sup>72</sup> The Customary Courts Act provides that if one party to civil or criminal proceedings in a customary court requests transfer of the matter to an ordinary court and the application of common law, the Customary Court of Appeal shall agree to the transfer if it is, "in the interests of justice."<sup>73</sup> Decisions of the Customary Court of Appeal are subject to appeal to the High Court.<sup>74</sup>

The Customary Law Act also attempts to reconcile possible conflicts between customary law and written law. It does this through its definition of customary law, specifying that customary law as applied by the customary courts includes only that tribal law which, "is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice." It follows that where a custom or tribal rule does not comply with written common law, including legislation, it is not considered to be part of customary law and is not applicable by the customary courts. The Court of Appeal has reiterated this principle and has simultaneously held that customary law is also subject to, and must be applied and interpreted in accordance with, the Constitution: "*Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must a fortiori ... yield to the Constitution. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform with the Constitution. But where this is impossible,*

69 The ordinary court structure comprises of magistrates courts, the Industrial Court, the High Court and the Court of Appeal.

70 The Employment Act authorizes the Attorney General or any of his designated labor officers to commence actions arising under the act in any common law, magistrate court. Section 10, Employment Act, 1982. The Children's Act mandates that every common law magistrate court shall serve also as a children's court, to enforce the rights and remedies specified in the Act. Section 36, Children's Act, 2009. The Domestic Violence Act empowers all common law magistrate courts to hear matters arising under the Act. Section 2-3, Domestic Violence Act, 2008. Although the same section specifies that jurisdiction may be afforded to customary courts under the act where such has been authorized by statute, no such statutory instrument has yet been drafted or adopted. See, A Report on the Development of the Regulations for the Domestic Violence Act of 2008, Women's Affairs Department, September 2012, pg. 82.

71 Section 7, Customary Law Act, 1969

72 Section 4, Customary Law Act, 196

73 Section 37, Customary Courts Act, 1961

74 Section 42, Customary Courts Act, 1961

*it is custom not the Constitution which must go.*<sup>75</sup> However, as will be discussed below, ensuring the application of this system in practice remains an operational challenge with specific impacts for women's access to justice.

#### *Extent of Recourse to the Customary Courts*

Participants emphasized the key role of customary law and customary courts in the day-to-day business of justice and remedies in Botswana. For most individuals, justice and dispute resolution implies recourse to the customary legal system. The customary courts deal with over three quarters of minor criminal matters and of civil disputes arising between individuals, such as inheritance and property claims, and marital and child custody issues. Although some expressed the view that recent years have begun to witness a shift, with younger generations in urban centres increasingly turning to the common law system for dispute resolution, nonetheless customary law and the customary courts remain the point of departure for most legal matters throughout Botswana.

Participants pointed to a number of factors which explain the predominance of customary law. Customary courts involve relatively low costs, not least because legal representation is prohibited. Customary courts tend to be located closer to those living in rural areas, thus reducing transport needs and time. For many individuals the customary law system is not only physically and financially more accessible, it is also more familiar and less intimidating and confrontational in a personal and social sense. Many communities emphasize the importance of resolving disputes within the family, community and tribe. In such contexts recourse to the customary system is considered by many as more socially acceptable than an application to an ordinary court.

In addition, some participants pointed to the fact that the Customary Law Act and Customary Courts Act prioritize the application of customary law in the majority of civil matters, placing the onus on the individual to explicitly invoke common law or seek transfer of the matter to the ordinary courts. Meanwhile requests to transfer civil matters to ordinary courts are not always granted and constitutional challenges in cases of refusal have sometimes been dismissed by the High Court, as explained below.<sup>76</sup>

75 Ammisah J (for the Majority), *Attorney General v. Dow*, Court of Appeal, Botswana, 2 July 1992. See also, *Mmusi and Others v. Ramantele and Another* (MAHLB-000836-10), [2012] BWHC 1(12 October 2012), Paras. 86-88 (discussed in more detail below).

76 See *Tirelo v. Doris Bosadibo Moleu & Attorney General* MAHLB 000405/2006 2008 (2) BLR 38

#### 4.1.2 *Women's Access to Justice: Realities and Concerns*

As recourse to customary courts is so common, it is especially important to ensure that women are able to enjoy equal rights and access to justice in customary courts and under customary law. Yet despite progress in the common law system, participants expressed the view that in some respects similar change has been slower in the customary law framework. For example, they highlighted that customary law is still sometimes interpreted or applied in a manner which discriminates against women in the areas of legal capacity, rights within marriage, inheritance and child custody. As a result, women may be impaired in their capacity to seek equal justice and rights before the customary courts.

Such concerns are not new. They have been expressed repeatedly. For example a significant portion of the analysis and recommendations included in the 1998 WAD Report on Laws Affecting the Status of Women in Botswana are concerned with customary law and echo the issues identified by those we consulted. Yet, fifteen years later, these concerns persist.

Participants identified a number of related legal system failures behind this lack of change.

**Operational Lack of Scrutiny & Oversight:** There appears to be a significant gap between principle and practice. Participants explained that there is a systematic failure to ensure the application of the basic principle, outlined above, that customary law is not to be applied in a manner which is incompatible with the provisions of legislation or the Constitution or with the principles of morality, humanity or natural justice.<sup>77</sup> Indeed, they noted that a significant degree of confusion persists, including among legal actors, regarding the extent to which customary law is subject to legislation and constitutional provisions. Participants explained that many do not take into account the fact that customary law must be applied in a manner that is compatible with legislation, the constitution and principles of morality, humanity or natural justice.

They specified that a range of actors bear responsibility in this regard. For example customary courts often may not consider these basic requirements and develop interpretations of customary law accordingly. Meanwhile, the High Court may not always ensure relevant or appropriate judicial review and scrutiny. In this regard the failure of attorneys to make relevant arguments and the general lack of appeals, both from first instance customary courts to

<sup>77</sup> Article 2, Customary Law Act, 1968, and see: *Attorney General v. Dow*, Court of Appeal, 1992, and *Ramantele v. Mmusi and Others*, Court of Appeal, 3 September 2013 (and see also *Mmusi and Others v. Ramantele and Another*, High Court, 12 October 2012).

the Customary Court of Appeal, and from the Customary Court of Appeal to the High Court, were also noted. Of particular concern were government failures to ensure that information about common law and constitutional developments is systematically brought to the attention of chiefs and customary court officials; to undertake regular human rights and gender-equality training and educational initiatives; and to expand the reporting and dissemination of decisions of the Customary Court of Appeal.

**Legal Exceptions:** Participants highlighted that to some extent these operational and practical failures are also the result of express constitutional and legislative exceptions. On their face certain legal provisions appear to exempt customary law and other areas of law from their remit. Of particular effect in this regard is the exception in Section 15 of the Constitution which, as outlined in Box 2, exempts customary law and all laws dealing with, "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" from its prohibition of discrimination.<sup>78</sup>

The extent and impact of this exception, which is discussed in more detail in Section 5 below, has long been a topic of considerable discussion, advocacy and calls for change in Botswana.

In a recent development, the High Court and Court of Appeal directly addressed the matter in *Mmusi and Others v. Ramantele and Another and Ramantele v. Mmusi and Others, Court of Appeal*.<sup>79</sup> That case concerned a complicated inheritance dispute between a nephew and his aunts, as to who should inherit the home of the aunts' parents, in which one of them had lived for over 20 years. The women claimed that as their parents surviving children they should inherit. Ramantele contested this claim. He maintained that he had inherited the property from his deceased father, the applicants' half brother, who had obtained the property in a swap with the applicants' deceased full brother, and their parent's last born male son. The Customary Court of Appeal overturned a lower Customary Court's decision in favour of the aunts, to find in favour of the nephew. In doing so it held that according to Ngwaketse Customary Law it is the last born male son that inherits a parents homestead. As a result the Customary Court of Appeal ordered Mmusi to vacate the property in which she had resided for 20 years. The applicants appealed to the High Court, maintaining that the Customary Court of Appeal's decision discriminated against them on the basis of gender and was unconstitutional.

<sup>78</sup> Section 15(4)(c), Constitution of Botswana, 1966.

<sup>79</sup> *Mmusi and Others v. Ramantele and Another*, High Court, 12 October 2012, *Ramantele v. Mmusi and Others*, Court of Appeal, 3 September 2013



They based their claim on the equal rights protection guarantee in Section 3 of the Constitution. In response, the Attorney General argued that Section 3 must be interpreted in light of the Section 15 provision which excepts customary law from constitutional scrutiny for discrimination. The High Court dismissed the argument, holding that although Section 15 of the Constitution includes an exception for customary law, Section 3, which guarantees women's equal rights and protection of the law, does not. Applying Section 3 of the Constitution, the High Court found the alleged Ngwaketse Customary law rule and its application in the instant case to be unconstitutional. It therefore found in favour of the aunts and set aside the Customary Court of Appeal's decision.

However the Court of Appeal found that the High Court had erred in its treatment of the case and was mistaken in its constitutional analysis. Although the Court of Appeal also set aside the Customary Court of Appeal decision, it did so for different reasons and did not consider that there was a constitutional question to answer.

It underlined that where it is possible to decide a case without having to decide a constitutional question, the court must follow that approach. Setting aside the High Court's decision, the Court of Appeal considered that Ramantele's claim failed on a number of different grounds. First it noted that it did not appear that the applicants brother had ever inherited the homestead or laid a claim thereto. Second, there did not appear to be an established inflexible practice of Ngwaketse Custom providing that only the last born son can inherit the parents homestead. Third, even if such a practice or rule did exist, it could not constitute a customary law, as defined by the Customary Law Act, because it failed to comply with the requirement that it be consistent with the principles of natural justice, humanity and conscience. In that regard the Court of Appeal specified that, *"a customary rule to receive the status of a law and thus be enforceable by the courts must not be inconsistent with the values of or principles of natural justice. It must not be unconscionable either or itself or in its effect. Nor should it be inhuman...a customary rule that denies those children of a deceased parent who played a major role in developing a particular part of the estate for the benefit of the deceased, a right on intestacy to any share of the asset, in favour of a child who has refused to play any part in the building up and maintenance of that part of the estate, without any compensatory award, goes against any notion of fairness, equity and good conscience. It does not qualify to be given the status of a law nor should it be applied or enforced by the courts."*

Although it did not deal with the matter at length, the Court of Appeal also provided some guidance on the interpretation of Section 15 of the Constitution.

It noted that at the outset a Court should attempt to give laws a construction which is consistent with the Constitution. It also underlined that it is not possible to separate Section 3 and Section 15 of the Constitution from one another, such that a law could be held constitutional under one provision but fall under another. Instead it held that Section 15 is "subordinate to the umbrella Section 3 provision," and the derogations it contains must comply with the terms of Section 3, namely they must be "rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest."

In many respects the Court of Appeal's decision clarifies that, notwithstanding the terms of Section 15 of the Constitution, where customary rules and the decisions of customary courts give rise to discrimination against women they can and will be overturned because of failure to meet the Customary Law Act's standard of compliance with the principles of natural justice, humanity and morality. Moreover its decision indicates that Section 15 of the Constitution does not provide a blanket exception from the prohibition of discrimination for customary law. Instead any discrimination with which the Section 15 exceptions are concerned must be justified under Section 3 as necessary to ensure the rights and freedoms of others or the public interest.

Participants agreed that the effects of this decision may be important and far-reaching. However, as explored in greater detail in Section 5, participants also underscored that, one way or another maintaining the explicit exception in Section 15 would continue to perpetuate impediments to women's access to justice in the customary law context. Most individuals are not aware of the complexities of High Court jurisprudence. Thus, the explicit wording of the Section may continue to perpetuate misunderstandings and confusion as to the extent to which discriminatory customary law will be upheld.

**Refusals to Transfer Jurisdiction:** Concern was also expressed regarding the ability of Customary Courts to refuse women's requests to transfer civil matters to ordinary courts. Participants explained that this possibility may undermine women's ability to enjoy equal access to justice, particularly while the operational and normative gaps outlined above persist. They highlighted that the High Court has dismissed Constitutional challenges concerning such refusals. They pointed in particular to the Court's decision in *Tirelo v. Doris Bosadibo Moleu & Attorney General*,<sup>80</sup> where it upheld the Customary Court of Appeal's refusal to transfer a civil claim of adultery against the applicant to the ordinary courts. In that case, the applicant alleged that the Customary Court of Appeal's refusal to transfer

80 *Tirelo v. Doris Bosadibo Moleu & Attorney General* MAHLB 000405/2006 2008 (2) BLR 38

contravened her constitutional rights to a fair hearing and legal representation. The High Court dismissed her appeal. It held that although in criminal cases the Customary Court of Appeal must accede to a defendant's request to transfer the matter to the ordinary courts, so that he or she could avail of legal representation, no such obligation exists in civil cases. It specified that no constitutional right to legal representation exists in civil cases and the Customary Court of Appeal must balance the interests of two competing citizens to reach a decision which is in the interests of justice. It attributed particular weight to the rights of the plaintiff to have the case decided in the forum of his choice, speedily and at low financial cost, observing that, "it is well-known that the magistrates' courts are overloaded, and seldom hear a civil case expeditiously, and to hire a lawyer to counter that of the defendant would probably be unaffordable."<sup>81</sup>

#### 4.1.3 Recommendations

*As the analysis in Section 3 outlines, the continuing existence of customary laws that discriminate against women, and the existence of constitutional exemptions for customary law and personal status laws from provisions prohibiting discrimination, contravene Botswana's international obligations. International law requires that all courts in Botswana interpret the laws within their jurisdiction in accordance with non-discrimination and equality requirements or, if this is not possible, draw inconsistencies to the attention of higher courts or other appropriate authorities.*

In order to address the operational and normative weaknesses outlined above participants outlined a range of recommended action steps which the Government should take. It should:

- Initiate a process of meaningful consultation and dialogue with chiefs, customary court officials, other tribal authorities, civil society experts and advocates, lawyers and members of the judiciary to identify and implement a series of collaborative measures to ensure that customary law is not applied in a manner which discriminates against women, undermines gender equality or contravenes other human rights.
- Implement a comprehensive human rights and gender equality analysis of customary law, identifying potential incompatibility with human rights, equal protection and non-discrimination requirements.

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81 Ibid.

- Disseminate to chiefs, customary court officials, and other tribal authorities, information concerning guarantees of gender equality and non discrimination.
- Provide ongoing and regular advice and education to chiefs, customary court officials, other tribal authorities and members of the judiciary concerning these requirements and ensuring compatibility of customary law.
- Initiate a process to amend Section 15 of the Constitution to remove customary law and personal status law exceptions from the prohibition of discrimination. This process should involve close consultation with chiefs, customary court officials and civil society experts, among others.
- Ensure that any future gender equality or non-discrimination legislation explicitly encompasses customary law within its remit.

#### **4.2 Women's Access to Resources**

Throughout the world access to justice is often an illusion for those living in poverty.<sup>82</sup> Navigating the complex legal processes necessary to claim rights and seek accountability, remedies and redress when abuses occur presents considerable challenges in the best of circumstances. For those without adequate and necessary resources, meaningful access to justice is often simply not an option. In addition there is frequently a stark connection between a lack of resources and a lack of access to information concerning rights and legal entitlements.

These issues are particularly pronounced for women and girls, who not only comprise the majority of the world's poor, but who face a series of additional constraints in terms of access to resources. For example, even women living in wealthy families may not have independent financial means or may have little or no control over how family resources are allocated. Similarly, women are often not the legal owners of family property. In such situations women may only afford to seek and access legal protection and remedies with the consent of the relevant family members. Such constraints may well have considerable implications in certain circumstances, for example in situations of domestic violence.

Indeed throughout the world the intersection of gender inequalities and forms of discrimination which combine to limit women's and girls' access to financial and personal resources are at the heart of the obstacles to justice they face.

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<sup>82</sup> See generally, UN Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda*, 9 August 2012, A/67/278. See also, *Making the Law Work for Everyone, Report of the Commission on Legal Empowerment of the Poor*, UNDP, 2008.

The situation is no different in Botswana. Despite improvements, women in Botswana still comprise the majority of those those living in poverty, the majority of informal sector workers, and the majority of the unemployed.<sup>83</sup> Women in paid employment dominate low-paying occupations such as domestic work, service and clerical positions.<sup>84</sup> Meanwhile pay inequity is as ordinary a reality for working women in Botswana as it is throughout the world.<sup>85</sup> Indeed although women in formal employment relationships enjoy protection under the Employment Act, such as maternity leave and protection from gender discrimination in relation to termination, and although Botswana has ratified the International Labour Organization Conventions on Equal Pay (No. 100) and Discrimination at Work (No. 111),<sup>86</sup> the principle of equal remuneration for work of equal value has yet to be explicitly reflected in the Employment Act or clearly encompassed under its non-discrimination clause, which currently applies only to termination situations.<sup>87</sup>

In addition, at 46% Botswana has one of the highest percentages of female-headed households in the world.<sup>88</sup> Yet, as outlined in Section 6, significant difficulties arise for many women who seek to obtain or enforce child maintenance orders, thereby doing little to alleviate poverty levels. Similarly, although progress has been made, women's ownership of land and livestock and other assets also remains limited.<sup>89</sup> As noted in Section 4.1, this is reinforced by the reality that women's equal enjoyment of inheritance and property ownership under customary law in Botswana has yet to be ensured.

83 See generally: Botswana, Millennium Development Goals, Status report 2010, Republic of Botswana & United Nations, pg. 31 et seq; Gender in Employment Case Study of Botswana, African Development Bank, April 2011; World Economic Forum, the Global Gender Gap Report 2012, p. 122-23; International Labor Organization, *Decent Work Country Programme for Botswana 2011 – 2015*, p. 11-13.

84 Ibid.

85 In 2012, women were paid at a female-to-male ratio of 0.75. World Economic Forum, Gender Gap Report 2012, p. 122. 50% of female-headed households live below the national poverty line in comparison to 44% of male-headed households. International Labor Organization, *Decent Work Country Programme*, p. 13.

86 Equal Remuneration Convention, 1951 (no. 100), ratified by Botswana 5 June 1997. Discrimination (Employment and Occupation) Convention, 1958 (no. 111), ratified by Botswana 5 June 1997.

87 Currently, the Employment Act acknowledges the need to promote gender equality in remuneration in Section 133, where it asks the Minimum Wages Advisory Board to take into account: "the desirability of eliminating discrimination between the sexes in respect of wages for equal work (...)".

88 Botswana, Millennium Development Goals, Status report 2010, Republic of Botswana & United Nations, pg. 34

89 Ibid. Oladele, O. I., and Monkhei, M., *Gender Ownership Patterns of Livestock in Botswana*, Livestock Research for Rural Development 20 (10) 2008; USAID, *Property Rights and Resource Governance: Botswana*, June 2010, p. 7.

Participants throughout the country identified access to resources as one of the key determinants in women's ability to claim their rights and seek remedies, especially through recourse to Botswana's common law system. Although they applauded the establishment of a new legal aid system in 2012 and expressed the view that it would give rise to significant improvements, they also feared that resource implications would continue to undermine women's ability to seek justice via the common law system. This is of particular concerns in relation to situations not covered by customary law or in circumstances where relevant customary law is still applied in a discriminatory manner.

The paragraphs below, seek to capture the hopes expressed by participants for the legal aid system and present their views as to how it should operate. They then turn to describe broader concerns.

#### *4.2.1 Botswana's New Legal Aid System: A Vital Step Forward*

The establishment in 2012 of the country's first legal aid system has the potential to revolutionize access to justice in Botswana. It makes the possibility of recourse to the common law justice system a viable prospect for women and men whose lack of access to adequate resources previously prohibited their obtaining necessary legal advice and representation.

Indeed, before the establishment of the legal aid regime, there were no state legal aid services in Botswana and there was extremely limited provision for legal aid. Although the Legal Practitioners Act placed an obligation on attorneys to undertake *pro deo* and *pro bono* work when so assigned by the Registrar of the High Court,<sup>90</sup> in practice this duty did not give rise to a system of free legal representation.

There was an entitlement to free legal representation only for criminal defendants charged with offenses that were punishable by death.<sup>91</sup> Beyond such situations, stakeholders explained that in large part those who could not afford legal fees, either represented themselves or relied on the goodwill of attorneys or the assistance of NGO's and university legal clinics. As a result, most individuals without adequate resources simply did not turn to the common law justice system to claim their rights or seek redress. Its complexity was generally too great for them to navigate without legal advice and their fear of resulting cost orders was too extensive. Although some brought complaints to the customary courts,

90 Section 56(a), Legal Practitioners Act, 1997.

91 Court of Appeal Rules of Botswana, rule 48, Apr. 25, 1975.

their avenues to justice were limited in respect of matters in which common law affords greater protection than customary law, or in respect of matters beyond the customary courts' jurisdiction, such as under the Domestic Violence Act, the Employment Act, the Marriage Act, or the Constitution.

This situation has now changed. Following a pilot project launched in 2011-2012, the Attorney General established Legal Aid Botswana and legislation providing for and regulating the operation of comprehensive state legal aid services is now pending adoption in Parliament.<sup>92</sup> The scheme will guarantee qualified individuals representation in criminal matters before the High Court and Court of Appeal. It will also extend to Magistrates Courts where specifically authorized by the Interim legal Aid Coordinator.<sup>93</sup> It also explicitly entitles qualified individuals to legal representation in civil claims concerning divorce, child custody, maintenance and protection from domestic violence.<sup>94</sup> Legal representation in other matters, such as claims related to constitutional rights or discrimination, may be provided upon authorization on a case-by-case basis by the Interim legal Aid Coordinator.<sup>95</sup>

Participants were generally hopeful about the legal aid scheme's prospects. They lauded the scheme's explicit goal of providing legal services in relation to issues of prominent concern to women. However, they stressed the importance of enabling the sustainability and success of the scheme over time, including through guaranteeing sufficient resources for its effective operation and ensuring regular review and revision of its remit so as to enable the inclusion of problematic gaps in coverage which may emerge. They also expressed the view that the approach of the Attorney General, the Interim Legal Aid Coordinator and Legal Aid Board staff will have an important influence on the success of the scheme.

Participants called on these actors to adopt a broad and inclusive construction of the scheme's scope and of their own mandate.

Currently, the list of legal issues explicitly encompassed within the scheme is limited to divorce, child custody, maintenance and protection from domestic violence, and to criminal trials at High Court level. Until this list can be expanded, participants observed that the provision in the Legal Aid Guidelines which allows the Interim Legal Aid Coordinator to grant legal aid in other instances will be crucial in order to ensure the protection of rights and the guarantee of justice.

92 Shabani, Thamani, *Legal aid bill to be presented to Parliament*, Botswana Daily News, 8 February 2013.

93 Chapter 3 § 2, Proposed Legal Aid Guidelines Draft 3, 11 April 2011.

94 Chapter 3 § 3.9, Proposed Legal Aid Guidelines Draft 3, 11 April 2011.

95 Chapter 3 § 4.2, Proposed Legal Aid Guidelines Draft 3, 11 April 2011.

It will be of particular importance in relation to issues and situations to which customary law does not apply, for example redress for rights abuses or discrimination. Meanwhile, the very nature of constitutional rights and discrimination cases is such that for the scheme to be effective such rights must not be excluded with reference to a strict interpretation of the requirement that aid be confined to cases with a reasonable prospect of success.

The need for flexibility and care in the assessment of a woman's income for the purposes of qualification under the scheme was also underlined. Except in respect of divorce cases, the Legal Aid Guidelines specify that a married individual's income be assessed in terms of the combined wealth of the spousal unit.<sup>96</sup>

Participants stressed the importance of avoiding the exclusion, on this basis, of women who do not in fact have access to independent resources. This will be especially vital to ensure effective access to protection and justice by women in domestic violence and maintenance cases.

Emphasis was also placed on the need for outreach and practical engagement to ensure those who can benefit from the scheme are aware of its existence, and that its establishment is meaningful for women living in poverty in rural areas. Currently the Legal Aid Board has an outlet in Gaborone and Francistown, while another is planned for Maun. Similarly the NGOs to whom the Board has sub-contracted a number of services are largely located in urban centres. This may limit the utility of the scheme to women who are unable to afford transport to these locations. Participants underscored the necessity of taking steps to ensure meaningful access for women living in remote areas.

#### *4.2.2 Beyond the Costs of Legal Representation: Remaining Resource Realities for Women*

Notwithstanding expectations that Botswana's new legal aid system will address a number of obstacles to justice facing women living in poverty, we were repeatedly told that a lack of resources would continue to undermine women's ability to claim their rights and seek legal protection. Indeed these impressions mirror experiences in other jurisdictions where, despite the vital role that sustainable and comprehensive legal aid services have played in reducing the obstacles to justice faced by those living in poverty, resource barriers persist and work to transcend them continues.

<sup>96</sup> Chapter 2 § 3.2, Proposed Legal Aid Guidelines Draft 3, 11 April 2011.



In particular, participants explained that, in addition to the costs of legal advice and representation, there are usually indirect costs involved in engagement with the justice system which will not be covered under the legal aid scheme. These costs will continue to bar the way to justice for many women. Participants spoke to the importance of ensuring that the new scheme does not detract attention from the prevailing impact which a lack of personal resources will continue to have for women seeking justice in Botswana.

**Rural Realities:** Particular resource limitations arise for rural women. Noting that many lawyers, service providers and justice sector bodies are based in urban areas, participants explained that transport cost and availability will often be a factor undermining access to justice for rural women living in poverty. The time involved in such travel may also be prohibitive, as women may be unable to take the necessary time out of their daily lives and away from activities that are vital to their livelihood and that of their families. This may be especially true for the high numbers of women in the informal sector or in part-time or service jobs where they are paid an hourly rate. Similarly, those working with survivors of gender-based violence highlighted the way in which a lack of access to telephones sometimes gives rise to particular exigencies for rural women who may simply not be able to report, or seek emergency help in situations of violence.

**Housing & Subsistence:** In addition, victims of domestic violence have unique housing and subsistence needs. When seeking to leave an abusive partner or other family member, women often face short-term exigencies, related to transport, housing and subsistence needs for themselves and children, which may simply be prohibitive for women living in poverty or without access to independent resources. The lack of adequate women's shelters in Botswana, discussed further in Section 4.3, was identified as a key obstacle in this regard. In addition, the fears of economically-dependent women of destitution upon leaving their partners were repeatedly said to play a central part in failures to report violence or the subsequent withdrawal of complaints.

**Cost Orders:** Cost orders, where the costs of legal proceedings are awarded against the losing party, were also cited as a prevalent consideration for women, particularly when the case outcome is clearly uncertain. This will remain a concern even for those women who qualify for legal aid under the new scheme since it explicitly excludes cost orders.<sup>97</sup>

<sup>97</sup> Chapter 5 § 12.5, 13.2, 14.12, 22, Annexure H § 6, Proposed Legal Aid Guidelines Draft 3, 11 April 2011.

This was identified as a particularly prohibitive consideration for women for whom a constitutional rights or discrimination application provides the only potential route to justice and, as discussed further in Section 5, in relation to which outcomes will often be particularly unclear.

**Legal Representation:** Participants also noted that, despite the development of the new legal aid scheme, legal representation costs will continue to affect women's access to justice. Not only does the scheme place limitations on the matters for which legal aid will be granted, but there are many women in Botswana for whom, although they are not poor enough to qualify for free legal representation, the resource commitments involved in seeking justice are nonetheless out of reach. The costs of legal representation in Botswana are not low. Frequent court delays can turn a simple matter into something protracted and thereby costly. One example is child maintenance claims which typically take years to resolve. Meanwhile as explained in more detail in Section 5 below, legal representation costs have a particular impact on women's willingness to instigate complex constitutional rights and discrimination claims. There have been only three constitutional claims of discrimination by women since Botswana's Constitution was adopted in 1966. Participants put resource constraints front and centre of the reasons behind this deficit.

#### 4.2.3 Recommendations

*International law requires that Botswana guarantee that legal protections and remedies are effective and accessible to women in practice. As explained in Section 3, this requires effective measures to address the particular access barriers which rural women and those living in poverty face.*

To this end, participants outlined a number of recommended steps. Among other things they indicated that Government actors should:

- Direct the legal aid coordinator and relevant staff to ensure flexibility in the assessment of a woman's income so as to enable women who do not have independent access to family resources to benefit from the scheme, particularly in respect of domestic violence and child maintenance disputes.
- Initiate a process towards the medium-term establishment of a scheme under which supplementary assistance such as transport and subsistence is provided to women who qualify for legal aid services.

- Issue guidance to the effect that cost orders are not sought or awarded against applicants who make unsuccessful claims against the State for discrimination, inequality or rights infringements.
- Institute regular outreach and consultation visits by legal aid board and attorneys to rural areas.
- Disseminate information on the new legal aid scheme and relevant local consultations via commonly used means of public information, such as radio broadcasts.

### **4.3. Justice System Capacity**

Participants constantly emphasized that a lack of resources, and resulting deficits in human and infrastructural capacity, also undermine the effective functioning of Botswana's justice sector. In particular judges, magistrates and police officers repeatedly spoke of considerable frustration and demoralization in grappling with the challenges of ensuring an effective response in the context of serious practical and infrastructural constraints. A number of magistrates questioned their courts ability to deliver justice in a timely, efficient manner as a result. Activists and lawyers echoed the serious concerns of officials as to the impact which resulting inefficient or poor quality responses often have on the experiences and circumstances of those seeking justice. Although these are general problems, they give rise to a number of particularly adverse implications for women.

At the heart of these deficits participants identified a lack of adequate funding and budgetary provision, which effects the operational capacity of a cross-section of both state and non-state actors and impedes the extent to which relevant bodies and services can function. There is an urgent need to address deficits in justice system infrastructural and human resources. Although recognizing the considerable resource allocation involved in the establishment of the new legal aid system, participants highlighted the need for increased budget prioritization, both to the advancement and protection of women's human rights and to justice system reform more generally.

Participants underlined the particular responsibilities of the government in this regard, not least given Botswana's economic success and high income per capita compared with other Sub-Saharan African jurisdictions. However, they also emphasized that addressing this situation effectively would also require action by bilateral and multilateral donors. Botswana's financial progress must be seen in context, especially considering the ongoing cost of an effective response to the HIV/AIDS. Donors must not allow Botswana's status as a "middle income" country to prevent or reduce their financing of justice sector infrastructure and capacity.

There have been expressions of concern that this upgraded status coupled with the global financial crisis has reduced the development assistance available to Botswana. Participants underlined that donors should not put the government in a position whereby it has to choose between shoring up and expanding its response to HIV/AIDS on the one hand, and advancing women's rights and general justice delivery on the other.

The paragraphs below concisely describe some of the capacity issues identified. Although participants acknowledged the macro-level system and structural implications which insufficient resource allocation have, the actual examples they provided were of ordinary day-to-day realities. In this way they emphasized the important impacts which relatively basic, small-scale deficits can have in practice.

#### *4.3.1 Vehicles & Transport*

In light of the large geographical areas under their jurisdiction, a number of customary court staff, magistrates, and police officials viewed the lack of available vehicles as an impediment to the effective discharge of their responsibilities.

Magistrates and customary court staff explained that their Courts share a small number of vehicles with other Governmental departments. Transportation problems arise frequently, giving rise to significant delays. For instance, a number of magistrates indicated that summonses concerning women's applications for child maintenance are often served late or not on time, thus delaying and complicating what should otherwise be straightforward proceedings.

Such problems are particularly acute in rural areas. A number of police and prosecution officials and service providers working with women in rural areas described the serious impacts that the lack of vehicles available to police services can have in cases of gender-based violence in rural areas. At times this jeopardises the capacity of police to respond to urgent requests for assistance or undermine the timely collection of medical evidence in instances of sexual violence. For example on a number of occasions a lack of transport caused considerable delays between when a woman reported a sexual assault and when she saw a medical professional, thereby delaying the collection of potential evidence.

In addition, officials spoke of difficulties that arise because the type of vehicles available are not fit for purpose. Police officers in Maun described marshy or swampy areas that regular terrain vehicles cannot navigate. Yet local police divisions are not allocated appropriate vehicles and when called to a crime scene in these areas must request transport assistance from safari companies or the Botswana Defense Force, which is not always available at short notice. In their experience this reduces their ability to respond to requests for assistance in a timely manner or to effectively control and process a crime scene.

#### 4.3.2 Human Resources: Numbers and Expertise

Magistrates throughout the country highlighted severe staff shortages coupled with extensive case dockets, which gave rise to considerable delays and inefficiencies. For example the Chief Magistrate in Maun explained that the court is always dealing with a backlog of at least three months. As discussed in Section 6 below, magistrates expressed the view that such capacity constraints are a significant factor in the serious delays which often arise in respect of deciding women's applications for child maintenance.

Similar concerns were raised by staff at customary courts in urban areas such as Gaborone and Francistown, which cover large geographic areas. For example, the Phase IV Customary Court in Francistown has jurisdiction over approximately 30,000 people yet only has two judicial officers: the President and his Deputy. Meanwhile, a restructuring of the Botswana Police Services between 2009 and April 2010 meant that large numbers of in-house police officers who had been staffing the Customary Courts were replaced with much smaller numbers of Court Bailiffs. For instance, participants explained that at the Gaborone West Customary Court, one Court Bailiff replaced a previous allocation of thirteen police officers, while at the Phase IV Customary Court in Francistown ten police officers, were replaced by one court bailiff.

In addition to issues of staffing numbers and overburdened services, a cross-section of participants raised concerns about inadequate expertise among justice sector staff dealing with gender-based violence and related training deficits. Although certain training initiatives have been conducted, and improvements made, particularly through the establishment of focal points on gender-based violence in each police station, concerns persist about the lack of system-wide expertise. Participants drew a correlation between this lack of training and education the way in which, as described in Section 7, officials sometimes respond to survivors.

These gaps are described in more detail in two recent comprehensive reports on gender based violence in Botswana: the *Womens Affairs Department & Gender Links Study on Gender-Based Violence Indicators* and the *Women's Affairs Department Report on the Development of the Regulations for the Domestic Violence Act of 2008*.

#### 4.3.3 Appropriate Facilities: Gender Based Violence

A great number of participants also spoke of what they perceived to be a serious lack of appropriate facilities and services to assist survivors of gender-based violence in Botswana. These deficiencies are discussed in much greater detail in the aforementioned *Womens Affairs Department & Gender Links Study on Gender-Based Violence* and the *Women's Affairs Department Report on the Development of the Regulations for the Domestic Violence Act of 2008*.

Considerable concern was expressed at the lack of sheltered housing for survivors of domestic violence. Those we spoke to regularly stressed that only two shelters exist in the country, run by NGOs in Maun and Gaborone, each providing only a relatively very small number of spaces. The services these facilities provide to women were regularly described as exceptional and vital. They are seen not only as a safe space, but as providing crucial support such as crisis counselling, legal advice and life skills building. However, their staff underlined that because of resource constraints their ability to provide services to women in other locations is limited and they emphasized that women in remote areas remain particularly vulnerable without crisis support.

In addition, a number of participants expressed the view that, despite some improvements, many police stations throughout the country lack appropriate facilities to deal with complaints of gender-based violence in confidence and in private. Previously, all complaints were lodged at police stations in public entrance areas known as 'charge offices,' and in practice everyone in the room could overhear what was being said. In recent years efforts have been made to afford more privacy to those seeking police assistance, particularly victims of gender-based violence, through the establishment of Community Service Centres in each police station. However, through field visits to a number of police stations researchers learned that essentially the Community Service Centres have been placed in the same space as the former charge offices and often comprise of an open-plan room divided into two sections by a low counter. On one side of the counter is a front desk, while on the other side is the Service Centre. Individuals in the Centre are interviewed within hearing distance of the front desk, which has a heavy stream of public traffic, and those in the front desk area are able to see who is behind the counter.

Despite good intentions, this change does little to address the needs of survivors or to alleviate the trauma or stigma that may result from their attempts to report violence. Even in the absence of more developed facilities or adequate resources, it may be possible to identify interim salutations so as to ensure complaints of gender-based violence can be made privately. For example, some actors

have worked together to come up with practical ways in which to circumvent the problem to some degree. In Maun, Women Against Rape (WAR)<sup>98</sup> and the Maun Police Service have developed a working protocol whereby when WAR accompanies survivors to the police station they are permitted to by-pass the front desk and the Community Service Centre and are immediately taken to a private interview room.

#### 4.3.4 Recommendations

*As noted in Section 3, Botswana's international obligations require that it ensure adequate human and financial resources to advance gender equality and non-discrimination against women. This requires active measures and the allocation of adequate financial resources to ensure that justice sector infrastructure and capacity can respond effectively to the access to justice needs of women.*

In this context participants recommendations to Government included:

- Review of budgetary allocations in order to ensure adequate provision is made to accomplish gender equality goals and improve justice sector functioning.
- Ensure sufficient and sustainable funding for the new legal aid board to enable it to fulfill its mandate effectively.
- Increase financial provision for sheltered housing for survivors of gender-based violence.
- Provide police stations and magistrates and customary courts with basic infrastructural needs.
- Establish new arrangements for the collection of medical evidence in sexual violence cases, including by enabling nurses to collect evidence and provide expert testimony thereto in relevant legal proceedings.
- Adopt innovative models to enable survivors of gender violence to file reports and be interviewed in confidence in appropriate settings in police stations.
- Ensure ongoing education and training on rights and equality for public officials, the legal profession and the judiciary.

98 <http://www.womenagainstrape.co.bw/>

#### **4.4 Criminalization, Lack of Legal Recognition & Discrimination**

As outlined in Section 3 the ability of women to claim rights and seek remedies is not only undermined by the various forms of discrimination and inequality they may face as a result of their sex, but as a result of the intersectional forms of discrimination which they may face. Their status as women may intersect with other characteristics, such as ethnicity nationality, marital status, social and economic status, age, place of residence, sexual orientation and gender identity, giving rise to compounded negative impacts, including heightened or specific barriers to justice.

The causes of such exacerbated obstacles take different forms. Often they result from social or practical realities. However, for certain groups of women the terms of the law itself sometimes plays an important role, giving rise to particularly extreme forms of exclusion and protection gaps. Although such laws usually do not explicitly address women's access to justice and in principle do not deny them equal protection of the law or access to remedies, in practice their effect is problematic.

For example, strict immigration legal regimes often effectively prevent undocumented women migrants from seeking justice for fear of arrest or deportation. This can have particularly grave implications, for example in situations of gender-based violence. Similarly, sex workers will often desist from claiming their rights or reporting instances of gender-based violence, for fear, among other things, of detention, prosecution and fines under criminal prohibitions related to selling sex. During consultations in Botswana, participants working with both these groups of women did identify the particularly exacerbated access to justice barriers which they face.

However, it was the particular situation of lesbian and trans women that was repeatedly emphasized, with participants identifying serious access to justice realities for these women resulting from a web of interlinked legal discrimination and social stigma. In the paragraphs below, we seek to briefly capture their concerns. We first address the obstacles faced by lesbian women and then turn to the barriers encountered by trans women.

##### *4.4.1 Lesbians*

Botswana's criminal law prohibits consensual adult sexual conduct when it is 'against the order of nature' or constitutes 'gross indecency.' Although the former phrase is interpreted as describing anal sex, regardless of the sex of the partners, the latter phrase is considered to refer to same-sex sexual activity.



It was interpreted exclusively as referring to sexual activity between men until 1998, when amendments changed the law to recast them in gender-neutral terms, thereby also criminalising sex between women.<sup>99</sup> Meanwhile in 2003 the Court of Appeal found that discrimination on the basis of sexual orientation was not prohibited by the Constitution because it was not one of the explicit enumerated grounds in Section 15 which concerns discrimination.<sup>100</sup> Although the Court recognized that the list of grounds in Section 15 was intended to be illustrative rather than exclusive it declined to add sexual orientation to the list, specifying that, “gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.”<sup>101</sup> On this basis it upheld the constitutionality of the criminal prohibition of same-sex sexual activity.

A number of participants noted that in *Kanane* the Court’s phrasing, and use of terms such as “at this stage” and “the time has not yet arrived”<sup>102</sup> opened the door to the possibility of a different approach in the future. Meanwhile in a recent positive development the Employment Act was amended by Parliament in 2010 to include sexual orientation, among other grounds, in prohibiting discrimination in termination decisions. However for the time being sex between two women remains a criminal offence.

Not only do such laws violate international human rights law,<sup>103</sup> but courts and human rights authorities throughout the world have repeatedly recognized that, even when unenforced, laws that criminalize same-sex sexual activity also effectively criminalize gay and lesbian identity and perpetuate social stigma and exclusion.<sup>104</sup>

This was confirmed by the activists and attorneys we spoke to across Botswana who stressed that the criminal prohibition and the lack of constitutional protection from discrimination underly what appears to be a widespread belief that just being lesbian, regardless of sexual activity, is illegal in Botswana and that lesbians have no rights under the law.

99 Penal Code Amendment Act, 1998.

100 *Kanane v. The State*, 2003 (2) BLR 67 (CA)

101 *Ibid.*

102 *Kanane v. The State*, 2003 (2) BLR 67 (CA)

103 HRC, *Toonen v. Australia*, Communication No. 488/1992, 31 March 2004. See for broader analysis: *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*, ICJ 2011 and *Sexual Orientation and Gender Identity in Human Rights law, References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 5<sup>th</sup> Edition, ICJ, 2013.

104 *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (South Africa Constitutional Court 1998); *Lawrence v. Texas* (U.S. Supreme Court 2003); *Naz Foundation v. Government of India* (High Court of Delhi 2009); *Dudgeon v. United Kingdom* (European Court of Human Rights 1981). It is really just the introduction to chapter 1 of the SOGI Casebook!

They highlighted that not only does the legal situation compound the social discrimination and stigma that many lesbians face, but it also makes it difficult for them to claim their rights and seek legal protection and remedies.

Particular problems arise in relation to situations where lesbian women face discrimination because of their sexual orientation. As noted above, beyond the specific circumstances of discrimination in termination of employment, there is no prohibition of such discrimination and, as a result, lesbians do not have a solid legal basis on which to seek justice and challenge discriminatory treatment. Participants explained that because of this many lesbians in Botswana simply do not see the law and legal processes as a viable source of support or redress.

Moreover, participants noted that this legal gap contributes to a widespread and significant unwillingness or fear of coming out as a lesbian in Botswana. Although social stigma is a significant factor in this regard, it appears that lesbians are fearful that if they are known to be a lesbian they will be permissibly denied equal treatment in the context of justice-seeking processes, for example in child custody disputes, or in the context of access to services and employment opportunities.

This fear of coming out was also identified as impeding access to justice in broader contexts, even where the relevant legal protection is available in principle or where the matter at stake does not concern sexual orientation. One participant stressed that lesbians will not ordinarily report incidents of sexual violence or domestic violence for fear of being identified as homosexual by the authorities. On the rare occasions when lesbian women do report sexual assault, they often conceal their sexual orientation. This means that any hate crime dimension to the crime, for example where the woman's sexual orientation is a factor leading to the violence, is missing from any investigation or prosecution. Similarly participants explained that often women who face job dismissal because they are thought to be lesbians do not file reports with the labour authorities, despite the recent amendment to the Employment Act prohibiting termination on this ground. This fear is compounded by lack of knowledge and information as to the protection available.

#### 4.4.2 *Trans Women*

A number of similar justice-seeking barriers appear to arise for trans women in Botswana who face the same lack of Constitutional protection from discrimination on grounds of gender identity. Moreover trans individuals are not legally protected from discrimination in employment termination, since gender identity was not included in the list of grounds protected by the recent Employment Act Amendment.

As a result, trans women lack a firm legal basis on which to challenge forms of discrimination they encounter, and many remain fearful that they may be denied equal treatment in the context of access to services, employment opportunities, and justice-seeking processes such as child custody disputes.

In addition, participants explained that trans women face a range of significant difficulties as a result of the lack of a procedural vehicle for altering sex markers on birth certificates and other identity documents, such as passports and identity cards. Although trans women have been able to change their forenames through applications to the Registrar under the Births and Deaths Registration Act,<sup>105</sup> this procedure does not apply to changes to sex markers. Such changes can only be made following an order of the High Court and only in the event of an “error.”

Trans people are thus trapped in a legal limbo. Their outward gender expression, including physical modification via hormones or surgery, does not match the sex recorded on their personal documents. Participants noted that, as a result, trans women often simply avoid contact with justice sector officials, rather than seeking legal protection and remedies. They have considerable fears concerning the potential reactions of officials whose responses can range from confusion to intrusive questioning, from ridicule to outright disgust. Meanwhile there are reports of trans women being singled out for abuse by police, detained for fraud because of their identity documents, and held in immigration detention overseas because their appearance does not correspond to the sex noted on their passports.

#### 4.4.3 Recommendations

*As explained in Section 3, international obligations not only require Botswana to prohibit discrimination on the basis of sex, but also on a wide range of additional grounds, including sexual orientation and gender identity. Specifically, the criminalization of consensual adult sex between same sex couples contravenes international law.*

In order to ensure lesbian and trans women can enjoy equal access to justice in practice, participants outlined a range of recommended action steps. Among other things they called on Government actors to:

<sup>105</sup> Section 13, Births and Deaths Registration Act, 1969. The Act provides that individuals may change their forenames upon application to the Registrar if the Registrar is satisfied that “the person has a settled wish and intention to be and to continue to be generally known by the new forename or forenames either in substitution for or in addition to the forename or forenames under which his birth was registered” and that “there is a reasonable expectation, in all the circumstances, that he will continue to be generally so known.”

- Initiate a process towards the development of comprehensive legislative protection against discrimination on the basis of internationally prohibited grounds, including sexual orientation and gender identity. The process should involve meaningful consultation and outreach with a wide range of stakeholders, including civil society representatives, and take account of best practices and comparative lessons learned.
- Initiate a law reform process towards the abolition of the Penal Code criminalization of consensual adult same sex conduct.
- Establish an effective system which enables trans people to change sex markers on identity documents to reflect their gender identity and clearly outlines relevant criteria and conditions which comply with international human rights standards.
- Provide ongoing training and education to a cross section of stakeholders, including judges, prosecutors, civil servants, social workers, education and health professionals, police officers and other officials, concerning the forms of discrimination faced by lesbians and trans women, the obstacles to justice they face, and the responsibilities of public authorities to address them. Such initiatives should be conducted in close cooperation with civil society and experts and take account of best-practice models.

## **5. EQUALITY & NON-DISCRIMINATION: REMAINING PROTECTION GAPS & BARRIERS**

In Botswana, as in all other parts of the world, women face various forms of discrimination and inequality because they are women. Such discrimination takes diverse forms and results from the conduct of a wide range of actors across public and private spheres.

In as much as the forms of discrimination against women and the factors behind it vary, so too do the measures required by international law to address it.

Ensuring an appropriate legal framework is in place which prohibits, protects against and provides for accountability and redress in relation to discrimination is just one piece of the puzzle. Yet it is vital. An effective legal framework provides women with the normative basis and procedural mechanisms they need to seek justice when they face discrimination and inequality. However, it also plays a broader social role. It sends the important signal that discrimination against women is unlawful conduct which will not be tolerated and it provides for standards against which various actors can measure and improve their conduct. It thereby constitutes a crucial element in preventative and regulatory efforts.

Although most States, including Botswana, have adopted some form of constitutional or legislative protection against discrimination, the mere existence of standards is insufficient. As outlined in Section 3, their scope and content needs to be appropriate as well. To serve their purpose, and to comply with the requirements of international human rights law and standards, laws and procedures must be in place that provide women with effective, accessible and enforceable protection against the full range of discrimination and inequalities they face.

Beyond the sphere of employer-employee relations, Botswana's Constitution currently provides the only legal basis on which a woman can make a direct and explicit claim of discrimination or inequality, while a High Court application or appeal constitutes her only route to remedy. It also appears to constitute the only law prohibiting discrimination against women and the sole basis for accountability. For although Section 94 of the Penal Code criminalizes discrimination on grounds of colour, race, nationality and creed, it does not explicitly include discrimination on grounds of sex or gender and a relevant prosecution has never taken place.<sup>106</sup>

<sup>106</sup> Section 94, Penal Code: (1) Any person who discriminates against any other person shall be guilty of an offence and liable to a fine not exceeding P500 or to imprisonment for a term not exceeding six months, or to both. (2) For the purposes of this section a person discriminates against another if on the grounds of colour, race, nationality or creed he treats such person less favourably or in a manner different to that in which he treats or would treat any other person.

The text of the relevant constitutional provisions is included in Box 2 above. Section 3 of the Constitution lists a number of guaranteed rights and freedoms and states that everyone is entitled to enjoy them regardless of race, place of origin, political opinions, colour, creed or sex. In Sections 4 – 14 it describes each of those individual rights in some detail. In Section 15 it specifically prohibits discrimination on grounds of race, tribe, place of origin, political opinions, colour, creed and sex. In Section 18 it provides that individuals may make an application to the High Court for redress if they consider they have faced a denial of any the rights enshrined in Sections 3 – 16 or are at risk thereof.

As the only generally applicable mechanism by which women can challenge sex-based discrimination, it is unsurprising that participants emphasized the important space which the Constitution occupies in Botswana's legal system in terms of enabling women's access to justice in respect of discrimination and inequality. In the absence of other mechanisms, it needs to deliver adequate and accessible protection to women. Although, as explored in more detail below, participants welcomed the Courts' willingness to construe the relevant guarantees expansively when afforded the opportunity, they pointed to the fact that only three applications alleging discrimination have been brought by women since 1966. Although these three cases, **Dow**,<sup>107</sup> **Molepole**,<sup>108</sup> **Mmusi**,<sup>109</sup> have played a seminal role in confirming that judicial review can provide a relevant route to remedy, the small number is of considerable concern. Many participants identified it as reflective of the fact that the Constitution has not served to provide women with the necessary effective, accessible and enforceable protection from discrimination.

A series of normative obstacles and practical realities appears to undermine the ability of women to enforce their equality rights through the Constitution. In particular, alongside resource constraints and a lack of legal knowledge and

107 Attorney General v. Dow, 3 July 1992, Court of Appeal. As noted above this case concerned citizenship laws that prevented Botswana women married to foreign men from passing their nationality to their children. The legal issues involved in the case are discussed below.

108 Student Representative Council of Molepolole College of Education v. Attorney General, 1995 BLR 178. This case concerned a college rule that required pregnant students to disclose their pregnancy and leave the college for a certain period. In that case the Court of Appeal overturned the High Court earlier dismissal of the case, finding that the college regulation did in fact contravene Sections 3 and 15 of the Constitution in its effect. It considered that in order to show a measure effecting only one sex was not discriminatory it would be necessary to demonstrate it was reasonable, fair, enacted for the welfare of the gender in question and not punitive. It held that the measure in question did constitute discrimination in that it was not intended to benefit pregnant female students but rather to keep them away from the college and it considered it to be punitive in nature.

109 Mmusi and Others v. Ramantele and Another, High Court, 12 October 2012, Ramantele v. Mmusi and Others, Court of Appeal, 3 September 2013. As discussed previously this case concerned inheritance decisions under customary law.

information, participants emphasized a lack of clarity as to the scope of the Constitutional guarantees. They explained that for many women, the extent to which the Constitution provides them with protection from discrimination would be unclear upon a simple reading of the document. At the outset many women might turn to Section 15 for guidance and from its text be led to believe that the scope of the protection from discrimination available is limited or nebulous. For example the series of broad exceptions in Section 15 would be read as excluding many of the spheres in which women encounter discrimination from the prohibition's scope. Meanwhile the wording of Section 15 could lead to a belief that only discrimination enshrined in law or perpetrated by public officials or authorities is impermissible. The limited enumeration of protected grounds in Section 15 and Section 3 could lead women from certain marginalized communities to be unsure of the extent to which the Constitution affords them protection from intersectional discrimination. Although participants noted that lawyer's would advise clients, upon consultation, that certain relevant matters have been clarified by the Courts, they would also be bound to explain that uncertainties do remain in relation to a number of important aspects.

Participants stressed that these issues combine with resource realities to impede applications for constitutional review by women facing discrimination. This means that the Courts are not often afforded the opportunity to address ambiguities and ensure expansive protection. Moreover, beyond the 'redress' which can be ordered by the High Court under Section 18, no criminal or civil sanctions are currently provided for in instances of discrimination against women. Ultimately, participants queried whether requiring women to invoke a system of constitutional review to address forms of discrimination they face on a day-to-day basis is effective. They stressed that additional legislative prohibitions and mechanisms could play an important role in supplementing the protection offered by the Constitution and providing women with an accessible remedy.

In the following paragraphs, we consider each of these matters in more detail. We begin by addressing: (i) who is protected from discrimination; (ii) whether discrimination is really permissible in all the contexts that Section 15 exempts from its application; (iii) whether discrimination in the private sphere is prohibited. We then turn to participants' views as to whether additional laws prohibiting discrimination and providing remedies are needed.

### **5.1 Who is Protected from Discrimination? Are Forms of Intersectional Discrimination Adequately Encompassed?**

For a number of years, uncertainty prevailed as to whether the Constitution prohibited discrimination on the basis of sex. Although Section 3 includes sex within the list of grounds to which it guarantees equal rights protection, Section 15, the specific provision prohibiting discrimination, did not.

However, this question was resolved by the Courts in *Attorney General v. Dow*.<sup>110</sup> In that case, which concerned citizenship laws that prevented Botswana women married to foreign men from passing their nationality to their children, first the High Court and then the Court of Appeal held the lack of an explicit reference to discrimination on grounds of sex in Section 15 to be neither intentional or material. They found that the Section's prohibition included sex discrimination and deemed the explicit list of prohibited grounds of discrimination in Section 15 to be non-exhaustive. Instead, the enumerated grounds simply presented examples of the types of discrimination the provision was intended to prevent.

In reaching this conclusion, the Court of Appeal found the fact that Section 3 referred to equality of rights on the basis of sex to be material. It held that Section 3 is the 'key or umbrella provision...under which all rights and freedoms protected under that chapter must be subsumed.'<sup>111</sup> The Court specified that Sections 4 – 15 have to be read in conjunction with Section 3 and, "be construed within the context of that section...Section 3 encapsulates the sum total of the individual's rights and freedoms under the Constitution in general terms."<sup>112</sup> It went on to hold that Section 3 protects the right to equal treatment of all persons irrespective of sex and that as a result it would not follow that there had been an intentional omission of sex discrimination from Section 15. It considered that the framers of the Constitution had not intended to provide a closed or exhaustive list of groups against whom discrimination was prohibited. To find otherwise would mean that all differential treatment on the basis of sex would be permissible under the Constitution, an impossible interpretation that, "boggles the mind."<sup>113</sup> Therefore, the relevant citizenship laws contravened Sections 3, 14 and 15 of the Constitution.

*Dow* was the first constitutional application in Botswana by a woman alleging sex discrimination. It clarified that the Constitution does provide women with a remedy in cases of sex discrimination, providing the basis for a Constitutional

110 *Dow v. Attorney General* 1991 BLR 233 (High Court); *Attorney General v. Dow*, 3 July 1992, Court of Appeal.

111 *Attorney General v. Dow*, 3 July 1992, Court of Appeal

112 *Ibid.*

113 *Ibid.*



Amendment to that effect in 2005. It also had a broader impact, confirming that the explicit list of grounds in Section 15 is not exhaustive or closed. Forms of discrimination which are not explicitly incorporated within Section 15 (or indeed Section 3) may nonetheless fall foul of the Constitution. This approach was confirmed in two later cases where the High Court held that discrimination based on *marital status* and *HIV status*, both unenumerated grounds, is prohibited by Section 15.<sup>114</sup>

Despite these precedents, participants explained that the extent to which this approach will stretch in practice remains ambiguous. Certainly the Courts have not been willing to encompass all those grounds that international law and standards require be afforded protection. For example participants pointed to the Court of Appeal decision in *Kanane v. State*,<sup>115</sup> discussed in Section 4.4 above. There, the Court declined to include discrimination based on sexual orientation within the Constitutional prohibition, holding that at the time of its decision gay men and lesbian women did not represent a group requiring Constitutional protection.

Participants emphasized that *Kanane* demonstrates that Botswana's Courts may take a restrictive approach to questions of whether discrimination on a particular ground is prohibited by the Constitution. Meanwhile the list of grounds explicitly protected remains short. These realities were identified as placing individuals in a difficult position. For example, where a woman faces discrimination on an unenumerated ground, she must make an application for constitutional review without knowing whether protection and redress will be available in the instance at hand. In addition, they observed that the lack of clarity undermines the ability of the Constitution to play the important role of shaping attitudes and behaviors, which could prevent discrimination in the first place.

## **5.2 What is the Effect of all the Exceptions to the Prohibition of Discrimination in Section 15?**

As outlined above, Section 15 of the Constitution proscribes laws that are discriminatory, in and of themselves or in effect, and bars discriminatory treatment by individuals acting by virtue of law or fulfilling the functions of public office or public authority.<sup>116</sup> However its sub-sections contain a lengthy list of exemptions.<sup>117</sup> They specifically exclude law or conduct concerned with:

<sup>114</sup> *Ndlovu v. Mache* 2008 3 BLR 230 HC and *Diau v. Botswana Building Society*, 2003 (2) BLR 409.

<sup>115</sup> *Kanane v. The State* 2003 (2) BLR 67 (CA)

<sup>116</sup> Sections 15 (1), (2)

<sup>117</sup> Sections 15 (4), (5), (6), (7), (8) (9)

- (i) the appropriation of public revenues or other public funds,<sup>118</sup>
- (ii) non-citizens,<sup>119</sup>
- (iii) adoption, marriage, divorce, burial, devolution of property on death or "other matters of personal law,"<sup>120</sup>
- (iv) customary law,<sup>121</sup>
- (v) the "institution, conduct or discontinuance of civil or criminal proceedings in any court,"<sup>122</sup>
- (vi) laws that have remained in force since before the existence of the Constitution,<sup>123</sup>

Participants expressed considerable concern regarding these exceptions. On their face they limit the protection of Section 15 and narrow its relevance to many of the situations in which women actually face discrimination. Among other things they appear to sanction discrimination in matters of personal and family law. As discussed in more detail in Section 4.1, they also appear to exempt the wide range of issues covered by customary law from scrutiny. Meanwhile they appear to enable discriminatory laws which existed prior to the Constitution to remain in force and seemingly provide a basis through which to legislate discrimination against migrant, or 'non-citizen,' women. In each respect, they undermine Botswana's compliance with international law and standards.

However, as discussed in Section 4.1, in the case of *Ramantele v. Mmusi and Others* the Court of Appeal indicated that the exceptions contained in Section 15(4) of the Constitution are not unchecked. The provision does not provide for blanket exclusion's from the prohibition of discrimination. Instead any discrimination with which the Section 15 exceptions are concerned must be justified under Section 3 as necessary to ensure the rights and freedoms of others or the public interest.<sup>124</sup>

The Court thus outlined a possible route to remedy for discrimination even in circumstances where Section 15 exemptions appear to apply. If a woman can show that the discrimination she faces is not in the public interest and is not

118 Sections 15(4) & 15(6)

119 Ibid.

120 Ibid.

121 Ibid.

122 Section 15(8)

123 Section 15(9)

124 *Mmusi and Others v. Ramantele and Another*, High Court, 12 October 2012, (MAHLB-000836-10), [2012] BWHC 1

*necessary to ensure the rights and freedoms of others then the relevant Section 15(4) exception will not bar a finding of unconstitutionality and impermissible discrimination.*<sup>125</sup>

The Court of Appeal's decision was specifically concerned with the exception provided to customary law under Section 15(4) and participants emphasized the importance of this decision in this context. Since the majority of individuals in Botswana seek justice and dispute resolution through the Customary Courts, ensuring that customary law is not applied in a manner that discriminates against women is vital. Until *Mmusi* many advocates believed that, as a result of the Section 15(4) exception, the Constitution allowed all discriminatory application of customary law. Now that assumption has been called into question. Moreover, the implications of *Mmusi* may well extend beyond the customary law exception. The Court's reasoning would appear to apply irrespective of the specific Section 15(4) exception invoked. As a result, it was noted that the decision may go some way to providing women and their lawyers with the clarification they need to confidently invoke the Constitution in discrimination and gender equality claims concerning both customary law and other matters which currently fall under Section 15 exceptions. Moreover, relevant Government authorities are now on notice as to the need to review law and practice in terms of the Court of Appeal's approach.

At the same time, while welcoming *Mmusi*, participants observed that as long as the Section 15 exceptions remain in place they will continue to inform the conduct of many actors and perpetuate the belief that the Constitution does not provide a remedy in many situations of sex discrimination. Moreover, it remains to be seen whether reasoning similar to *Mmusi* will be applied across the board to all the Section 15 exceptions. A number of participants expressed the view that there may well be women's human rights issues and situations of gender inequality in relation to which the Court is far more willing to find that the public interest is served and as a result deem an instance of discrimination constitutionally permissible.

### **5.3 Is Discrimination in the Private Sphere Prohibited?**

Participants also raised questions about the extent to which discrimination against women by private/non-state actors is covered by the Constitutional provisions. Indeed, the importance of legal prohibitions of discrimination against women by private actors cannot be overstated. Much of the discrimination women face on a day-to-day basis is experienced in the context of private sphere interactions.

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<sup>125</sup> Ibid.

Prohibiting discrimination by private actors in key contexts, such as the provision of goods and services, and ensuring the perpetrators face penalties is a key step towards reducing discrimination. In the short term it ensures individual women can seek remedies for the most common forms of discriminatory treatment.

As noted above, the Employment Act includes a range of provisions prohibiting sex discrimination in the workplace that are applicable to private sector employers, but these apply only in the employment sphere and are limited even there, to maternity protection and protection from termination.<sup>126</sup> Meanwhile, Section 94 of the Penal Code does not appear encompass discrimination on grounds of sex. The scope of constitutional protection therefore takes on critical importance.

Here too participants observed a divergence between the explicit terminology of Section 15, which limits the prohibition of discrimination to discriminatory laws and regulations or discriminatory conduct by individuals acting in a public capacity, and the approach taken in a small number of High Court decisions. For example, in *Diau v. Botswana Building Society*, the Industrial Court held that Sections 3 – 16 of the Constitution were not restricted to 'organs of the State.'<sup>127</sup> It found that the provisions could be binding on private entities in certain circumstances. Specifically it found that Section 15 applied to the conduct of a private employer with respect to its employees.

However at the same time the Court noted that subjecting private actors to constitutional scrutiny should only be done under exceptional circumstances. It held that whether the Constitution should apply "cannot be determined in the abstract, and extreme care must always be taken to guard against the over-proliferation of horizontal application of the bill of rights."<sup>128</sup> However, it also specified that "the purpose of a provision ... is an important consideration in determining whether it is applicable to private conduct" and remarked that rights such as liberty, equality before the law and human dignity would appear to be applicable between private persons.<sup>129</sup>

#### **5.4 A Role for Non-Discrimination & Gender Equality Legislation & Mechanisms?**

Participants expressed the view that currently a heavy burden is placed on women to seek remedies and justice for discrimination through constitutional challenges, without certainty as to the extent of the protection available.

<sup>126</sup> Sections 23(d) & 112-118 of the Employment Act

<sup>127</sup> *Diau v. Botswana Building Society*, 2003 (2) BLR 409.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

In many instances women and their lawyers may simply be unwilling or unable to commit the time and resources necessary to test the extent of constitutional protection. Similarly, the possibility of appealing a first instance or customary court decision on constitutional grounds may not be viable. Meanwhile some participants observed that attorneys sometimes fail to invoke constitutional prohibitions of discrimination or magistrates overlook their relevance. One way or another the situation perpetuates itself: a lack of applications from women means that the Courts are not afforded the opportunity to provide greater interpretive guidance as to the content of relevant provisions and visa versa.

Ultimately participants considered that the small number of applications concerning discrimination against women is testimony to the problems that arise where constitutional review provides the only method by which individuals can claim and enforce their equality rights. They highlighted the need for greater legal clarity and expanded protection and the establishment of additional mechanisms through which women can seek remedies for discrimination.

In this regard, the positive role that dedicated non-discrimination and equality legislation could have in Botswana was highlighted. Among other things such legislation would provide the Government with an important opportunity to address the prevailing constitutional ambiguities and discrepancies. It would allow public and private actors to measure their conduct against specific standards and to take steps to redress deficiencies and ensure compliance. It would also provide women with a clear basis for legal challenges to discrimination.

### **5.5 Recommendations**

*Botswana's international obligations require that domestic law guarantee equality between women and men and prohibit discrimination in the enjoyment of rights. As outlined in Section 3, in addition to constitutional protections, Botswana should adopt legislation guaranteeing equality and prohibiting discrimination against women by public and private actors in all spheres, and clearly providing for appropriate sanctions and accessible and effective remedies. Legislation should also prohibit discrimination on a wide range of grounds other than sex, listed in Section 3, and consistent with international law and standards, not least to protect marginalized groups of women from forms of multiple or intersectional discrimination.*

Participants identified a number of recommended steps the Government should take to address current deficits in Botswana's legal framework prohibiting discrimination and providing remedies and sanctions. These include:

- Initiate a process towards the development of gender equality and non-discrimination legislation which would give full effect to Botswana's obligations under CEDAW and other international treaties. This process should involve close consultation with civil society experts and representatives of marginalized groups, legal professionals and tribal authorities. It should involve recourse to best practice models, drawing on lessons learned from other contexts.
- The specific terms of such legislation must: (a) include an appropriate definition of discrimination which complies with international law, and specifically CEDAW; (b) prohibit discrimination by public and private actors in public and private spheres; (c) ensure no exceptions to the prohibition of discrimination or application of the legislation are envisaged; (d) ensure accessible administrative and judicial remedies, including right of appeal, are provided for; (e) provide for appropriate sanctions and penalties for public and private actors who contravene the prohibition of discrimination; (f) provide for the rights of victims to redress, including but not limited to compensation; (g) direct that relevant budgetary provision be made for effective implementation of the legislation.
- Initiate a process towards the amendment of Section 15 of the Constitution, so as to remove exemptions to the prohibition of discrimination which contravene CEDAW and other international treaties binding on Botswana.
- As discussed in Section 4.2 take steps to ensure women living in poverty can benefit from the new legal aid scheme to pursue claims of discrimination and inequality, both under the current constitutional framework, and under any future legislative provisions.
- Provide ongoing and regular training and education on the content and implications of gender equality and non-discrimination guarantees to a cross-section of stakeholders including: judges, tribal authorities, prosecutors, civil servants, lawyers, and legal aid board officials. Such initiatives should be conducted in close cooperation with civil society and experts and take account of best-practice models.
- Disseminate information to women on guarantees of equality and non-discrimination in easy to use formats and via commonly used means of public information, such as radio broadcasts. Relevant materials and communication should be conducted in close cooperation with civil society and experts and take account of best-practice models.

**Box 3: The Legal Recognition of Women's Economic, Social and Cultural Rights: Gaps and Opportunities**

Economic, social and cultural rights include rights to work and decent working conditions, social security and care, an adequate standard of living, food, housing, water, sanitation, health, education and participation in cultural life. They are an integral part of international human rights law and are the focus of a dedicated instrument, the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition to the Covenant they are also enshrined in different ways in a range of other international treaties.

As a result although Botswana has not yet ratified the ICESCR and its Optional Protocol, a number of other binding international instruments to which it is a party impose obligations on Botswana to respect, protect and fulfill ESCR, especially to the benefit of certain sectors of its population. For example CEDAW contains crucial provisions requiring the realization of women's economic, social and cultural rights, especially in the area of health, labour and access to resources and income. Compliance with these obligations requires Botswana to recognize these rights and take a range of measures to ensure they are respected, protected and fulfilled, including establishing appropriate remedies and mechanisms of redress that can be invoked in case of abuse.<sup>130</sup>

However, beyond the sphere of labour law, legal provisions guaranteeing these rights are largely absent from Botswana's domestic legal framework, including the Constitutional bill of rights. Indeed in Botswana, as in other jurisdictions, economic, social and cultural rights are still largely considered to constitute political aspirations and general policy or development objectives rather than legal and justiciable rights that can be claimed as legal entitlements and adjudicated and enforced by courts.

As a result, in the absence of domestic legal recognition, women usually will not have a clear basis on which to seek justice when these internationally guaranteed rights are infringed. Moreover the lack of recognition of health-care, education and social security, among other things, as involving specific legal entitlements which must be upheld, exacerbates the resource-constraints faced by women living in poverty in Botswana, thereby undermining their ability to 'afford' justice more generally.

<sup>130</sup> See CEDAW Articles 10 (education), 11 (work), 12 (health), 13 (economic and social life), 16 (family). See also for example, CEDAW, General Recommendation 24, Women and Health, 1999; CEDAW General Recommendation No. 29.

In order to comply with its obligations under CEDAW and other international treaties Botswana must take steps to ensure its national legal framework gives effect to these rights and provides women with access to remedies in case of infringement. In addition, the legal protection of economic, social and cultural rights is a fundamental element of any sustainable anti-poverty and development strategy.

There was some discussion with participants of the way in which, in an increasing number of jurisdictions, the role of the justice system in monitoring implementation of economic, social and cultural rights and, when necessary, in sanctioning and redressing violations, has become increasingly uncontroversial.

In 2008, this trend towards the 'justiciability' of economic, social and cultural rights was confirmed at an international level by the unanimous adoption at the UN General Assembly of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) introducing an individual complaint and inquiry procedure at the UN for violations of the rights of the Covenant.<sup>131</sup> A range of participants we spoke to advocated for Botswana's ratification of the ICESCR and its Optional Protocol. In the interim they urged the Government to give effect to relevant CEDAW provisions addressing women's economic, social and cultural rights.

Meanwhile, even where a domestic legal framework does not include specific provisions enshrining women's economic, social and cultural rights, it was noted that aspects of the rights can be enforced and claimed by invoking legal provisions guaranteeing certain civil and political rights. For example in numerous jurisdictions Courts have held that access to health care, water or food are necessary to protect rights to life or freedom from ill-treatment. In addition where violations of women's economic, social and cultural rights occur because of discrimination legal provisions guaranteeing equality before the law or non-discrimination may provide a basis for claim.

In a number of recent cases the Botswana Courts have demonstrated a willingness to follow this approach. For example on the basis of the constitutional obligation to refrain from inflicting degrading treatment, the right of access to water of San communities in the Central Kalahari Game Reserve was upheld in *Mosethanyane and others v. Attorney General of Botswana*.<sup>132</sup>

131 The Optional Protocol is in force since the 5<sup>th</sup> of May 2013.

132 *Mosethanyane and others v. Attorney General of Botswana*, Civil Appeal No. CACLB-074-10, Botswana, 27 January 2011.



## 6. CHILD MAINTENANCE

Establishing and operating an effective child support payment system is not easy. In most jurisdictions, ensuring that the appropriate and necessary legal rules, procedures and structures are in place, functional and effective presents a persistent challenge.

However, in Botswana participants painted a particularly grim picture of hurdle after hurdle awaiting those who are seeking to obtain and enforce child maintenance orders. The interaction of a range of legal, structural and social issues seriously undermines the system, transforming what should be a relatively simple process into an labyrinth.

It is not uncommon for several years to pass between when an application for maintenance is first made and when an order is finally granted and enforced. One lawyer described a situation in which an application for maintenance was filed when a child was two years old. The child was fourteen when the applicant first received a payment.

Specific problems identified by participants include:

- Multiple legal provisions combined with legal gaps (such as the lack of a clear process by which to determine maintenance amounts).
- Backlogs and understaffed courts and government offices.
- Inefficient serving and accounting processes.
- Negative social perceptions concerning maintenance claims that manifest in courtrooms.
- Women's lack of knowledge of both their rights and how to maneuver the legal process.

Although the new legal aid system will likely have a positive impact, providing support and legal representation to many women seeking maintenance, it will not meaningfully address many of these broader systemic problems.

These concerns are not new. They have been the subject of critiques for decades. Yet they continue without amelioration and they have a particular impact on women, who comprise the vast majority of individuals seeking child maintenance.

Moreover their implications are considerable in a country with one of the highest percentages of female-headed households in the world. Additionally, because many women's primary engagement with the common law system occurs in relation to child maintenance, the dysfunctions taint and undermine their faith in that system more generally.

In the paragraphs below we briefly summarize participants' accounts. Each of the matters addressed are discussed in more detail in a recent *Metlhaetsile* report on the need for maintenance reform.<sup>133</sup>

### **6.1 Normative Flaws & Gaps**

Child maintenance is currently addressed in three key pieces of legislation: the Affiliation Proceedings Act, the Deserted Wives and Child Protection Act, and the Maintenance Enforcement Act.<sup>134</sup> These laws outline when maintenance may be granted and the application and enforcement procedures available.

The Deserted Wives and Children Protection Act provides only for a departed husband's maintenance of his wife and children. Participants expressed the view that, as a remnant of colonial rule, much of the Act's language is antiquated and its premise and approach based on problematic gender stereotypes and roles.

In some respects, the gaps in its remit have been circumvented by the Affiliation Proceedings Act, which provides a basis for maintenance for children born outside of marriage, and envisages applications being made by both male and female parents. However it specifies that while fathers may make an application for maintenance at any time, mothers may only apply once they have obtained a paternity order. These orders, with a few exceptions, must be obtained before a child is five years of age. Both laws establish similar procedures for the granting of maintenance orders. An application for maintenance is made to a magistrate who, following a summons served on the other parent and a hearing, may make an order and determines the 'proper' amount of maintenance to be paid, taking into account the means of the parties.

Neither of these pieces of legislation provide for specific enforcement measures. This function is the purview of the Maintenance Enforcement Act, which specifies that in cases of non-payment, an affidavit by the parent seeking payment should be lodged with the court clerk. Notice is then served on the respondent parent

<sup>133</sup> Metlhaetsile, Maintenance Reform Report, 2012.

<sup>134</sup> Deserted Wives and Children Protection Act, 1963; Affiliation Proceedings Act 1970 & Affiliation Proceedings (Amendment) Act 1999; Maintenance Enforcement Proceedings Act, 1970.

to make payment or explain why doing so is not possible. A subsequent order can then be made for payment through the court clerk. Breach of this order is an offence subject to fines or imprisonment.

Participants identified a range of flaws and gaps in this legal framework:

- **Lack of Income Assessment Criteria:** They highlighted the absence of reliable and clear protocols and mechanisms for an assessment of maintenance needs and parents' income and means. This can often result in inequitable initial awards, subsequent disputes and sustained delays.
- **Timeframe Restrictions:** In addition the restrictions on when a woman can apply for maintenance orders under the Affiliation Proceedings Act were identified as problematic. Not only do they discriminate between men and women in terms of requiring medical verification of parentage, but they also impose a tightly circumscribed timeframe.
- **Lack of Enforcement Options:** The lack of a range of flexible and effective enforcement mechanisms was also a subject of considerable concern. Ultimately, the only avenue available to women when maintenance payments are not made is to write repeatedly requesting payment or to seek the initiation of criminal proceedings under the Maintenance Enforcement Act. Lawyers observed that very few maintenance orders are complied with when issued and as a result non-compliance and enforcement are significant concerns for many women. Yet most are loath to initiate criminal proceedings against their child's parent. Participants noted that other options are available to the courts in practice, such as garnishee orders, whereby maintenance amounts can be deducted on a regular basis from the parent's salary. However, in the absence of their explicit mention, most women, lawyers and magistrates usually do not pursue such possibilities.
- **Lack of Knowledge.** Participants expressed the view that enforcement failures are also exacerbated by a general lack of knowledge and information among women as to their legal entitlements and the way in which legal processes function. Often women do not have information concerning the enforcement mechanisms available to them and as a result take no action when faced with non-compliance. Court officials sometimes do little to provide women with basic information as to their entitlements. As a result, many women simply queue at Court each month in the hope that payment has been lodged and go home empty-handed when they learn it has not.

## **6.2 Approach of Magistrates: "Why are you bothering this man?"**

Participants indicated that the attitude of the assigned magistrate often plays an important role in the outcome of a maintenance application process and the efficiency with which it is handled. They expressed concern regarding tendencies for inertia and a lack of initiative and provided repeated accounts of perceived bias on the parts of individual magistrates against women applicants.

**Assessing Income:** It appears the approach of magistrates can sometimes exacerbate the hurdles created by the lack of a verifiable method of calculating the means of the parties. A number of lawyers pointed to a disposition by magistrates to accept a father's testimony as to his financial means without demanding proof. They noted that this has led to significant inequities and situations where wealthy professionals are required to pay a very small amount of maintenance each month. They explained that in some instances magistrates have refused to hear responding arguments concerning the father's financial means on behalf of the applicant.

**Postponements:** Participants also gave examples of situations in which magistrates have repeatedly postponed hearing dates at the father's request, while dismissing respective scheduling requests from the mother. In addition they explained that sometimes magistrates ignore repeated failures to appear by a father following summons and simply order a postponement without reprimand or the imposition of sanctions. They explained that this reinforces a dynamic in which child maintenance claims are not taken seriously and individuals repeatedly fail to comply with requirements without consequence. This can also play a significant role in prolonging the application process, sometimes over years.

**Bias:** Some lawyers said that on a number of occasions magistrates had overtly expressed bias during court proceedings. Some provided accounts of magistrates directly asking applicants, "Why are you bothering this man?" Others related accounts of situations in which magistrates have told women they are "lucky" to be receiving maintenance or should be grateful for an award as "most women get much less." Others provided accounts of expressions of sympathy by magistrates to fathers for having to put up with "troublesome" maintenance proceedings.

## **6.3 Backlog & System Overload: "Operation Tsa Bana"**

Despite these problems, participants also stressed that a great number of magistrates seek to deal with maintenance applications effectively, expeditiously and appropriately. However these attempts are often stymied by overcommitted court dockets and corresponding staff shortages that appear to lead to very serious backlogs.

Indeed, as discussed in Section 4.3, magistrate courts in Botswana deal with a high percentage of all criminal and civil cases and are also the designated forum for most family law matters. Each court serves large geographic areas and populations with a small number of staff.<sup>135</sup>

Several magistrates explained that in this context it often takes years for a child maintenance order to be granted and enforced. Magistrates expressed frustration in this regard, noting that 'justice delayed is justice denied'.

In attempts to overcome backlogs many courts have developed ad hoc strategies and action plans.

For example, we were told that in Maun, a district in which three magistrates serve an extensive rural area with a population of over 90,000, over one hundred child maintenance cases are usually in process at any one time. There is typically at least a three-month backlog in dealing with cases. In an attempt to address the situation the magistrates set aside one day a week on which each of them would handle at least fifteen child maintenance cases.

Accounts of similar strategies also emerged in other districts. For example, in Francistown, where six magistrates serve a population of over 98,000, we were told that in an attempt to deal with the serious backlog the Court had instituted, "Operation *TsaBana*," whereby it designated one week during which it was agreed that all six magistrates would handle only maintenance cases.

However despite their efforts they reported continuing delays.

#### **6.4 Inefficient Filing, Serving and Payment Processes**

Significant delays and confusion also appear to arise as a result of inappropriate practices concerning the serving of relevant summonses and ad hoc issuance of payments.

**Serving Summonses:** Although both the Affiliation Proceedings Act and the Deserted Wives and Child Protection Act place the onus for serving relevant summonses on the Botswana Police Services, and specify that no charge or fee shall be imposed on the applicant, participants explained that these responsibilities are not always discharged effectively. For example often courts services staff will inform applicants in child maintenance cases that they must serve the summons on the other parent themselves. Yet in many instances women are afraid or reluctant to do so and, although they could pay a third

<sup>135</sup> Currently there are fifty Magistrates for a total population of over two million.

party, the costs involved are often prohibitive. Even where the authorities do attempt to serve the summons themselves, problems arise due to initial failures to trace and locate the respondent. The authorities often simply stop trying. As a result of these practices maintenance cases are delayed indefinitely due to failure of service on the other party.

**Issuing Payments:** Participants also observed that even where an order has been issued and payments made, women often encounter further practical hurdles when seeking to collect payment. This results from a lack of clarity as to court services payout schedules and modalities. For example following proceedings under the Maintenance Enforcement Act it may be specified that payments should be lodged with the court clerk, who will then issue payment to the applicant. However there is confusion as to when women should collect payment and women often wait for a number of days at the registrar's office each month but are unable to collect payment. This appears to relate to a practice by some court services of recording payments received in registers and only preparing and issuing payments once the relevant page of the register is full. As a result, dates on which payments can be issued are unreliable, ad hoc and based on arbitrary accounting practices. Moreover participants noted that in such instances often women are not given clear information as to why it is not possible to collect the money. We received a number of accounts from fathers who having lodged payments to a court clerk were subsequently contacted by their child's mother who complained about their failure to make payments.

## 6.5 Recommendations

*As outlined in Section 3 International law requires Botswana to ensure that children enjoy an adequate standard of living. To this end it must take appropriate measures to ensure the recovery of child maintenance from parents or other persons with financial responsibility for a child.*

Participants expressed the view that social practices and attitudes towards child maintenance claims underlie many of the problems identified above. Although changing mindsets and conduct will take time, in the meantime there are a number of concrete steps that could address these obstacles. For example, among other things they recommended that Government actors:

- Issue interim directives to magistrates courts which: (a) identify clear criteria and formula by which to make verifiable means assessments, and (b) point to garnishee orders as an available method of enforcement.

- Take steps to support magistrates' courts in improving the handling of child maintenance applications. Examples of necessary measures include:
  - (i) Provision of ongoing education and training for magistrates and court services to address pejorative gender stereotypes and belittling attitudes towards women seeking maintenance.
  - (ii) Review of court practice with a view to identifying best practices and models for overcoming delays and inefficiencies.
  - (iii) Review of court services administrative and accounting practices with a view to instituting modern procedures and eradicating outmoded and inefficient practices.
  
- A number of participants suggested that replacing the current multiple laws with one single piece of legislation would provide the Government with an important opportunity to harmonize the system, eradicate remaining discriminatory provisions and requirements, and fill important gaps. Such legislation could:
  - (i) Outline criteria and formula by which to make verifiable means assessments.
  - (ii) Extend the range of enforcement options, for example explicitly referencing garnishee orders as a method of enforcement.
  - (iii) Provide for the establishment of a modern system through which failures to make payment are recorded and dealt with by the court service.

Any such legislative process should involve close consultation with civil society experts and legal professionals and should involve recourse to best practice models, drawing on lessons learned from other contexts.

## 7. GENDER BASED VIOLENCE

Gender-based violence includes a wide variety of conduct, including, but not limited to sexual assault, physical and emotional domestic violence, and sexual harassment. Incidents will usually involve multiple abuses of human rights, such as rights to bodily integrity, to freedom from torture and cruel, inhuman or degrading treatment, to equality and non-discrimination and sometimes to life.

Rates of gender based violence against women remain extreme throughout the world. Statistics indicate that one in every three women worldwide has faced a form of such violence.<sup>136</sup>

In some countries the figures reach even higher proportions. In Botswana a recent study outlines that as many as:

- 67% percent of the women surveyed had experienced at least one form of gender-based violence.
- 35% had experienced physical violence by an intimate partner.
- 27% had suffered rape or attempted rape in the community.
- 23% had been sexually harassed.<sup>137</sup>

The extent and gravity of gender based violence, and the complex and entrenched reasons underlying it, necessitate that multiple forms of action be taken to prevent and address it. Establishing the necessary legal framework and ensuring appropriate and effective justice sector response is a vital step toward ensuring the accountability of perpetrators and enabling survivors' access to justice. Yet, even where basic legal foundations are in place, ensuring they are meaningful in practice, remains a constant challenge in jurisdictions across the world.

In Botswana participants explained that a range of important steps have been taken over the past two decades to improve the way in which the legal system and justice sector responds to gender based violence. Various normative and structural measures have been implemented.<sup>138</sup>

136 WHO, Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence, Global Report, 2013.

137 Study on Gender-Based Violence Indicators, Gender Based Violence Indicators Project 2012, Botswana Ministry of Labour and Home Affairs (Women's Affairs Department) & Gender Links International

138 As previously noted, in 1998 the Penal Code was revised to broaden the definition of rape from vaginal penetration to all forms of penetration and by any instrument. It also increased the penalties for various forms of sexual assault. The same year the Criminal Procedure and Evidence Act was amended to provide for in-camera hearings in sexual offences cases. In 2008 the Domestic Violence Act was adopted, for the first time establishing a system of protection orders applicable in situations of domestic violence.



Yet, notwithstanding this, recent figures document a serious lack of recourse by women to the justice system and relevant protective mechanisms when they face gender based violence. They also highlight serious accountability deficits and point to high levels of impunity for those who perpetrate gender based violence.

For example, in 2011, of those women subjected to intimate partner violence, as little as one in three brought it to the attention of the police.<sup>139</sup> In the same timeframe, of those women who had been raped, three out of every four did not report their abuse.<sup>140</sup>

Participants expressed the view that, among other things, these figures point to low levels of confidence among women in the ability of the justice sector to play a meaningful role in preventing gender based violence and offering them protection and redress.

They identified a number of interconnected reasons for this, pointing in particular to remaining gaps in the legal framework, and flaws and deficits in justice sector response and capacity.

The paragraphs below summarise some of their central concerns. They focus in particular on domestic violence, sexual assault and harassment. They begin with a brief description of remaining normative and regulatory problems, and then turn to accounts received of problematic responses by officials to survivors of domestic violence. These and other key barriers are captured in more detail in far more detail in other recent reports dedicated to the subject.<sup>141</sup>

### **7.1 Botswana's Legal Framework: Room for Improvement**

Botswana's Penal Code, Criminal Procedure and Evidence Act, Domestic Violence Act and Public Service Act comprise the key laws prohibiting, and providing protection from, various forms of gender based violence, including domestic violence, sexual assault and harassment. Although, as noted above, a number of important improvements and revisions have been made to these laws, participants also highlighted that important deficits and problems remain.

139 Study on Gender-Based Violence Indicators, Gender Based Violence Indicators Project 2012, Botswana Ministry of Labour and Home Affairs (Women's Affairs Department) & Gender Links International

140 Ibid.

141 Study on Gender-Based Violence Indicators, Gender Based Violence Indicators Project 2012, Botswana Ministry of Labour and Home Affairs (Women's Affairs Department) & Gender Links International; Women's Affairs Department Report on the Development of the Regulations for the Domestic Violence Act of 2008 (2012).

These are not new issues. Indeed they were all identified as key concerns in the Women's Affairs Department 1998 Report on a Review of All Laws Affecting the Status of Women in Botswana.

### *Sexual Assault*

As noted above Botswana's Penal Code prohibits rape, which it now defines as unlawful carnal knowledge of another person or non-consensual penetration of a sexual organ or instrument into the person of another, and indecent assault.<sup>142</sup> It specifies a minimum sentence of 10 years for rape, increasing to a minimum of 15 years where injury results or where the perpetrator had HIV at the time of the rape, a minimum of five years for attempted rape and a maximum of seven years for indecent assault.<sup>143</sup> Its Criminal Evidence and Procedure Act provides for the hearing of relevant prosecutions in-camera.<sup>144</sup>

However despite improvements in definitions, sentencing and procedures, a number of problems remain:

- **Marital Rape:** Participants identified considerable confusion as to whether marital rape can attract criminal responsibility in Botswana. The penal code is silent on the matter and does not exclude marital rape from its prohibition or definition of rape. The Domestic Violence Act includes sexual violence within its definition of what can constitute domestic violence, including between husbands and wives. However the prevailing view is that rape within marriage does not constitute a prosecutable offence in light of old common law judicial precedents excluding marital rape from criminal prohibitions. Certainly participants were not aware of any instances in which marital rape had been prosecuted and many of them were of the view that it is not a criminal offence. Yet legal research presented at least some evidence to the contrary. In 2008 the High Court addressed the matter, holding that "to suggest that it should be permitted if the perpetrator is a spouse is ... totally unacceptable and an historic aberration."<sup>145</sup> That case did not involve allegations of rape within marriage and thus the Court's pronouncement was not determinative on the facts. Yet it indicates that, contrary to popular opinion, that criminal prohibitions of rape are not necessarily to be interpreted as excluding marital rape.

142 Sections 141 & 146, Penal Code.

143 Sections 142, 143 & 146, Penal Code. Section 142(4)(b) provides that where a perpetrator knows of their HIV positive status at the time of the rape the minimum sentence increases to 20 years.

144 Section 178(5), Criminal Procedure and Evidence Act

145 Letsholathebe v. The State 2008, 3 BLR 1 HC (Kirby J)

- **The Cautionary Rule:** Participants explained that Botswana's Criminal Procedure and Evidence Act now clearly provides that convictions may stand on the basis of evidence of a single credible witness<sup>146</sup> and thereby eradicates the application of blanket corroboration requirements which previously deemed convictions based on uncorroborated testimony from victims of sexual assault unsafe.<sup>147</sup> However, nonetheless courts continue to invoke a 'cautionary rule' requirement, meaning that even where a witness has been found credible a court should nonetheless exercise caution and 'warn' itself before convicting on the uncorroborated testimony of the victim of an alleged sexual assault.<sup>148</sup> Participants explained that this is a much milder rule than previous corroboration requirements. Yet it remains problematic as it distinguishes victims in sexual assault cases from victims of other crimes and denotes sexual assault cases as requiring more protection for the accused than is necessary for other crimes. It is predicated on a stereotyped assumption that women often lie about instances of rape and sexual assault and whether or not sex has been consensual and that their testimony must therefore be treated with caution *per se*.

In addition, participants noted that the persistence of the cautionary rule means that in practice judges are often loath to convict without some form of corroborating evidence, although this is no longer legally necessary. As a result they seek corroboration from medical and circumstantial evidence or from witness testimony, for example as to the behaviour of the victim following an alleged assault. At times this can play a role in perpetuating unfounded stereotypes as to the circumstances in which sexual assault and rape occur and as to the behaviour of victims during and after incidents. It can also give rise to significant practical problems as supporting evidence may simply not exist. Most instances of rape and sexual assault take place in private without witnesses. Often there is no evidence of a struggle or resistance by the victim, yet the lack of physical resistance clearly cannot be taken as tantamount to consent. Furthermore, following sexual violence women often go to great lengths to remove evidence of the assault from their person and in many instances do not seek any medical attention. Stigma, shame, trauma and fear regularly prevent women from reporting incidents promptly and can impact the clarity and certainty of their initial statements.

<sup>146</sup> Section 139, Criminal Procedure and Evidence Act.

<sup>147</sup> *Moses v. State* 2009 1 BLR 41 (CA), *Tlhowe v. State* 2008 (1) BLR 356 (CA)

<sup>148</sup> *State v. Maripe* 2010 1 BLR 512 (HC), *Moses v. State* 2009 1 BLR 41 (CA), *Tlhowe v. State* 2008 (1) BLR 356 (CA), *Mathatho v. State* 2009 (2) BLR 362 (HC)

- ***Previous Relationships & Sexual History***: Participants also explained that in the absence of legislative restrictions, the Courts continue to allow defendants in sexual assault cases to freely challenge the victim's credibility introducing into evidence information about the victim's sexual history. The admissibility of such evidence can be highly problematic. Use of a woman's prior sexual history in this way effectively puts her on trial. It reinforces highly problematic stereotypes concerning women who have had multiple sexual partners.

### *Sexual Harassment*

Currently no comprehensive legal prohibition of sexual harassment is in place in Botswana. Where harassment involves acts of rape or indecent assault, it will to some extent be covered by relevant Penal Code provisions. Where one public employee is harassed by another, it is prohibited by the Public Service Act.<sup>149</sup>

However beyond this sexual harassment is not prohibited when it occurs in private workplaces or in the context of service provision, buying and selling goods, or sporting activities. Moreover, although publicly funded teaching staff in schools are now subject to the Public Service Act, its prohibition of harassment does not appear to extend to harassment of students by teachers.

This protection gap was a source of considerable concern for participants. They explained that in many contexts women and girls experiencing sexual harassment do not have a clear legal foundation on which to seek remedies and pursue the accountability of the perpetrator. The absence of enforceable legal consequences causes situations of sexual harassment to escalate and repeat themselves. It enables the existence of a generally permissive approach to many forms of sexual harassment in Botswana's workplaces and schools. In this context participants explained that for many women sexual harassment is simply a fact of life which must be endured.

### *Domestic Violence*

As noted previously, Botswana adopted its first Domestic Violence Act in 2008. It establishes a framework of protective orders available in situations of domestic violence, or risk thereof, which can be granted by magistrates and enforced by the police. It criminalizes breach of these orders and also enables the issuance of arrest warrants where there may be an imminent danger. Participants repeatedly spoke to the importance of the act and welcomed the adoption in 2012 of detailed regulations to guide its implementation.

<sup>149</sup> Section 38, Public Service Act 2008

However, at the same time, they pointed to the fact that no specific criminal offence of domestic violence exists in Botswana. Instead the general Penal Code provisions concerning offences against the person and sexual assault continue to provide the basis for prosecution in instances of domestic violence.

A number of participants, and particularly those providing direct assistance to women in situations of domestic violence, identified this as a problem. They expressed the view that the lack of explicit criminalisation plays a role in perpetuating inadequate justice sector responses to domestic violence. These are discussed in more detail below.

## **7.2 Justice Sector Response to Domestic Violence**

Participants repeatedly highlighted the impact which family and community pressure and expectations can have on women's willingness to seek justice in instances of domestic violence, particularly for women living in rural areas and in small communities. We received numerous accounts from lawyers and service providers of situations in which, immediately after an incident of violence, women seek assistance and legal advice with a view to making an application for protection orders under the Domestic Violence Act. However they usually withdraw the application a few days later following contact with their family members who they describe as angry and embarrassed at their having sought external assistance to deal with personal matters.

In such contexts ensuring an effective and appropriate initial response from authorities is of considerable significance.

Yet participants pointed to a range of ways in which the deeply held belief that domestic violence is a family matter best handled within family units continues to permeate the way in which justice sector and law enforcement personnel handle reported incidents of violence. Such shortcomings are, of course, not unique to Botswana.

**Forgive and Forget:** Participants explained that sometimes when women seek to report incidents of intimate partner violence to the police, they are encouraged to go home and sort out the matter privately. Essentially officials encourage women to 'forgive and forget' and reconcile. They also explained how, particularly in rural areas, it is not uncommon for police officers to assume the role of arbitrators, insisting that women negotiate with their partner and involving the couple's families in reconciliation attempts. Similarly participants noted that some magistrates appear to consider cases of domestic violence to be trivial and that they should be resolved out of Court or dealt with at Customary Courts. They

can thus sometimes respond to applicants with significant degrees of irritation and as though they are a waste of valuable court time better conserved for more serious legal issues. When faced with such responses from authorities, it may be very difficult for women to persist with their efforts to file a report, seek a protective order or advocate for prosecution. Participants highlighted that such responses compound the range of complexities usually at play in circumstances of domestic violence. They can further inhibit women from seeking protection and justice in situations where they are already grappling with significant feelings of fear and guilt and facing family and community pressure to resolve the matter privately. They also underlined that while these responses necessarily affect each individual woman concerned they can also have a more general impact, dissuading other women from filing reports and reducing confidence in justice sector and law enforcement responses.

***Inadequate Discharge of Responsibilities:*** In a similar vein participants explained that some justice sector and law enforcement personnel do not exercise initiative to properly discharge their roles and responsibilities in the implementation and enforcement of the Domestic Violence Act. In their experience, officials may not always be well informed as to the existence of the Act or may not know of the extent to which the legislation envisages their role. For example, officials may sometimes believe that the purpose of the Act is only to provide those facing domestic violence with grounds they can invoke if they so wish, but that the authorities themselves have no foreseen role or responsibilities. Yet the terms of the Act not only clearly require enforcement of protection orders by law enforcement, but also envisage circumstances in which applications for protection orders will be pursued by officials rather than the victim and in which arrest warrants should be issued in circumstances of immediate risk.

***Failures to Investigate & Prosecute:*** Participants also explained that although the Botswana Police Service and Director of Public Prosecution bear the responsibility for the investigation and prosecution of Penal Code offences, officials do not always initiate adequate investigations into incidents of domestic violence. Reasons identified for this included: (i) assumptions that such violence is best resolved at home; (ii) failures to identify incidents of domestic violence as constituent parts of Penal Code offences requiring criminal investigation; (iii) insufficient training and information as to the nature of domestic violence crimes and the needs of survivors; (iv) a lack of prioritization of domestic violence.

In addition participants highlighted that even where the police do carry out investigations and criminal proceedings are initiated, these are usually automatically dropped if a woman withdraws her testimony or seeks to revise

her report. They expressed concern that often in such circumstances no attempts are made to discuss the matter with the woman or to identify ways of addressing her concerns about a prosecution of a family member or partner.

### **7.3 Recommendations**

*International requires authorities in Botswana to exercise due diligence to prevent, impartially, promptly and thoroughly investigate, sanction and ensure access to remedies in instances of gender-based violence by public and private actors. As outlined in Section 3 this means appropriate and effective criminal laws must be in place to deal with domestic violence, sexual assault and sexual harassment and a gender sensitive judicial process must be ensured in cases of such violence. Moreover officials must conduct effective investigations into incidents of gender-based violence that are brought to their attention, with a view to pursuing the accountability of the perpetrator.*

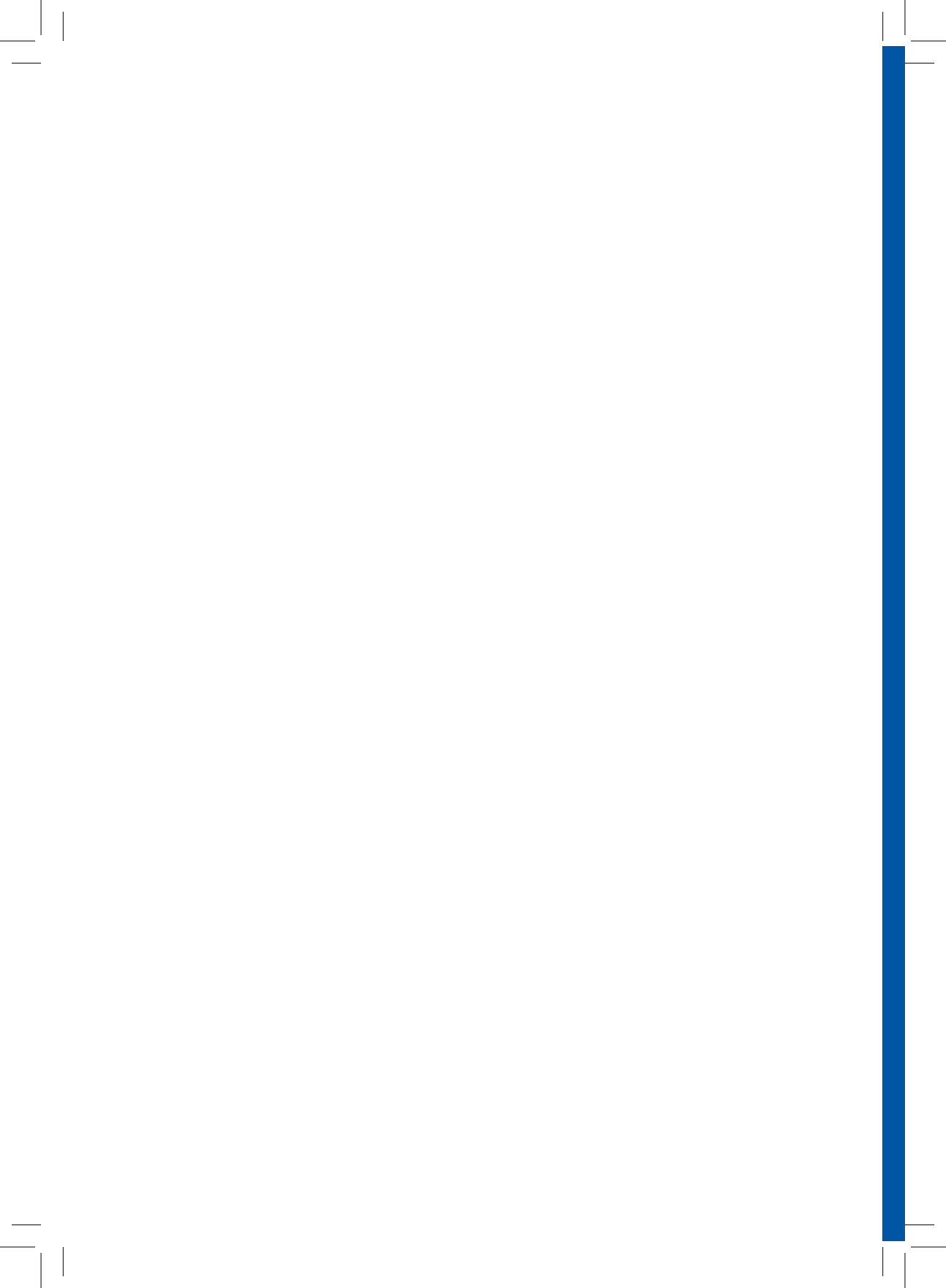
Participants called on Government to take a number of steps to ensure women's access to justice in respect of gender based violence. These include:

- Initiate a number of legislative processes to address gaps or flaws in the normative framework dealing with gender based violence. These should ensure:
  - (i) Unambiguous legislative provision clarifying that rape within marriage falls within the definition of rape in the Penal Code and constitutes a criminal offence under Botswana's criminal law for which individuals can be prosecuted to the full extent of the law.
  - (ii) Comprehensive prohibition of sexual harassment in all public and private sphere and corresponding criminal, civil and administrative penalties.
  - (iii) Legislative exclusion or strict regulation of admissibility of certain forms of evidence in sexual violence prosecutions, such as evidence of prior sexual history or medical evidence related to virginity.
  - (iv) Legislative abolition of the cautionary rule in cases of sexual violence.
- Undertake a meaningful consultation process to consider whether a specific criminal offence of domestic violence should be created.

- Issue directives that spell out the responsibility of identified officials to effectively investigate all instances of gender based violence brought to their attention, with a view to enabling subsequent accountability of the perpetrators, including through prosecution.
- Develop comprehensive guidelines directed at police officers, prosecutors, social workers, health professionals and members of the judiciary, concerning all forms of gender based violence. These guidelines should complement the new Regulations for the Domestic Violence Act which have been developed and the related guidelines for police services. Among other things such guidelines should:
  - (i) Explain the wide variety of conduct which can constitute gender-based violence and outline the applicable criminal laws. Specifically address the necessity of eradicating mistaken assumptions and stereotypes as to what constitutes such violence.
  - (ii) Detail the specific needs of survivors of various forms of gender-based violence, emphasizing that they must be treated with respect and appropriate sensitivity.
  - (iii) Emphasize that such violence must be dealt with as serious criminal conduct and that procedures applied during investigation and legal proceedings must not cause further harm to the survivor.
  - (iv) Provide detailed, and profession specific, procedural guidance on the way in which to handle complaints and cases of gender-based violence.
  - (v) Clarify the for prosecutors and members of the judiciary the appropriate rules of evidence and court room procedures which must be applied in cases of gender-based violence.
- Establish an effective system by which to monitor and review the handling of complaints of gender based violence so as to identify best practices and eradicate problematic approaches.
- Provide ongoing and regular training and education on gender-based violence and relevant legal frameworks to a cross section of stakeholders including: police officials, judges, tribal authorities, prosecutors. Such initiatives should be conducted in close cooperation with civil society and experts and take account of best-practice models.



- Disseminate information to women on the forms of legal protection available to them in situations of gender-based violence via commonly used means of public information, such as radio broadcasts. Relevant materials and communication should be conducted in close cooperation with civil society and experts and take account of best-practice models.



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