

**A HISTORY OF MARRIAGE AND CITIZENSHIP:  
KALANGA WOMEN'S EXPERIENCES IN POST-COLONIAL  
BOTSWANA UNTIL 2005**

**BY**

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### **Declaration**

I declare that the dissertation hereby submitted by me for the Master of Arts degree at the University of the Free State is my own independent work and has not previously been submitted by me at another university/faculty. I furthermore cede copyright of the dissertation in favour of the University of the Free State.

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Unaludo Sechele

## **ABSTRACT**

This study examines Kalanga women's experiences in relation to marriage and citizenship legislation in Botswana between 1966 and 2005. The analyses of the study are based on legislation affecting all women in Botswana, but are specifically focused on a group of rural women of Kalanga origin. A number of legislations in Botswana affected the Kalanga women, but the emphasis of this study falls on the Citizenship Act (1984), leading to its amendment in 1995, and the Abolition of Marital Power Act (2004). The Citizenship Act (1984) had to be amended because it discriminated against women as it rendered the passing on of citizenship to children patrilineal. The Abolition of Marital Power Act (2004), on the other hand, came about as a result of oppression that married women faced as they did not have rights and were considered minors as per common and customary law.

This study also traces the events of the Unity Dow case, and the extent to which it helped improve the status of Kalanga women. Dow took the government to Court in 1990 as she believed that she too had the right to pass citizenship on to her children despite the fact that she was married to a foreign citizen. The High Court and the Court of Appeal ruled in her favour as the Act itself contradicted the country's constitution. Kalanga women who faced the same challenge as Unity Dow benefited from the court ruling. After the Government lost the case it was forced to amend either the Citizenship Act (1984) or the constitution. Amending the constitution so as to allow gender discrimination was not an option. This was because the world had started to pay attention to women's rights in Botswana. The patriarchal nature of the Kalanga ethnic group, gave men marital power. Hence, this study examined how the Abolition of Marital Power Act (2004) improved the status of women in their families and examined whether they benefited from the newly instituted Act.

Keywords: Botswana, Kalanga, citizenship, marriage, patriarchy, women, gender, equality, governance, tradition

## **Opsomming**

Hierdie studie ondersoek Kalanga vroue se ervarings met betrekking tot die huwelik en burgerskap in Botswana tussen 1966 en 2005. Die ontleding van die studie is gebaseer op wetgewing wat alle vroue in Botswana geraak het, maar spesifiek fokus op 'n groep van vroue van Kalanga oorsprong. 'n Aantal wette in Botswana het die Kalanga vroue geraak, maar die klem in hierdie studie is op die Burgerskap Wet (1984), wat gelei het tot die

wysiging in 1995, en die Afskaffing van die Maritale Mag Wet (2004). Die Burgerskap Wet (1984) moes gewysig word omdat dit teen vroue gediskrimineer het in terme van die patrilineêre oordrag van burgerskap aan kinders. Die Afskaffing van die Maritale Mag Wet (2004), aan die ander kant, het ontstaan as gevolg van onderdrukking wat getroude vroue in die gesig gestaar het deur die feit dat hulle nie regte gehad het nie en volgens die gemenereg en gewoontereg as minderjariges beskou is.

Hierdie studie volg ook die gebeure van die Unity Dow hofsak, en hoe dit gehelp het om die status van Kalanga vroue te verbeter. Dow het die regering in 1990 hof toe gevat omdat sy geglo het dat sy ook die reg moes hê om burgerskap aan haar kinders oor te dra ten spyte van die feit dat sy aan 'n buitelandse burger getroud was. Die hooggeregshof en die appèlhof het in haar guns beslis omdat die wet die grondwet van die land weerspreek het. Kalanga vroue met dieselfde uitdagings as Unity Dow het voordeel getrek na die hof se beslissing. Na afloop van die regering se mislukking in die saak is hulle gedwing om óf die Burgerskap Wet (1984) óf die grondwet te wysig. Laasgenoemde was nie 'n opsie nie. Die rede hiervoor was omdat die wêreld begin aandag skenk het aan vroueregte in Botswana. Die patriargale aard van die Kalanga etniese groep het maritale mag aan mans toegeskryf. Hierdie studie ondersoek dus hoe die Afskaffing van die Maritale Mag Wet (2004) die stand van vroue binne hul gesinstruktuur verbeter het en vra die vraag of hulle voordeel getrek het uit die werking van die nuwe Wet.

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## **ABBREVIATIONS**

AMPA - Abolition of Marital Power Act

BDP - Botswana Democratic Party

CNMW - Convention on the Nationality of Married Women

DVR - Digital Voice Recorder

MP - Member of Parliament

UN - United Nations

UN CEDAW - United Nations Convention on the Elimination of Discrimination against Women

UNICEF - United Nations International Children's Emergency Fund

U S -United States

## CHAPTER 1

### INTRODUCTION

This study examines Kalanga women's experiences in relation to marriage and citizenship in North-East Botswana between 1966 and 2005. Botswana is a landlocked country bordered by South Africa to the south, Namibia to the west, Zimbabwe to the east and Zambia to the north. Largely covered by the Kalahari Desert, the country has semi-arid temperatures and below average rainfall. It is well known for its richness in minerals and beef. The country is occupied by many ethnic groups, with the Tswana-descendent ethnic groups comprising the principal groups and non-Tswana constituting the minority. The Tswana-descendent ethnic groups have long dominated the political realm.<sup>1</sup> The country is divided into nine administrative districts with the North-East District being the second smallest.<sup>2</sup> Francistown is the only urban and metropolitan centre in the North East. This district is predominantly populated by the Kalanga speaking people who are also referred to as the Bakalanga, constitutionally defined as a minority group.

The analysis of this dissertation is based on legislation that has affected all women in Botswana, but is specifically focused on a group of women of Kalanga origin. It is important to point out the position of the Kalanga in Botswana and what is meant by defining them as a minority group. Wim van Binsbergen states that as a language, IKalanga is a western Shona dialect which extends from north-western Zimbabwe all the way into the North Central and North East districts of Botswana. In Botswana, Kalanga is very much a minority language. It

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<sup>1</sup>Amelia Cook and Jeremy Sarkin, 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights versus Economic Development', *Transitional Law and Contemporary Problems*, Vol. 19, No. 2 (2010) p. 458.

<sup>2</sup> See Appendix 1.

is not taught in schools, nor is it used in the media. It is not admissible for use in courts of law except in remote villages, and hardly any published materials are in Kalanga.<sup>3</sup>

Peter Fawcus pointed out that Botswana was listed by the United Nations as one of the poorest countries in the world at the time of its independence from Great Britain in September 1966. By 2000, Botswana was widely regarded as a success story in terms of political and economic development; with a flourishing multi-party parliamentary democracy; good governance; rule of law; respect for human rights and cooperation with her neighbours.<sup>4</sup> Arguably, Fawcus and many other scholars of post-colonial Botswana history tend to romanticise Botswana's human rights and rule of law status. By contrast, authors like Kenneth Good and Ian Taylor have questioned Botswana's democratic success story. They have argued that 'whilst Botswana emerged as a deviant democracy, accounts that celebrate Botswana as a 'model' for the rest of Africa need to be much more circumspect and engage far more critically with what is the actual record regarding the country's democratic credentials'.<sup>5</sup> Hence:

this label of success has led to inadequate questioning of what occurs beneath the facade in Botswana. Inequality, discrimination, the dominance of a single political party, the government's aversion to criticism and an array of human rights abuses are among the many problems afflicting Botswana.<sup>6</sup>

Botswana might have won the title of being an African success 'miracle', but in reality freedom and tolerance in the country exist within the limits set by the state.<sup>7</sup> Botswana's attainment of remarkable economic growth and good governance often obscures

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<sup>3</sup>Wim M.J van Binsbergen, 'Minority Language, Ethnicity and the State in Two African Situations: The Nkoya of Zambia and the Kalanga of Botswana', in Richard Fardon and Graham Furniss (eds), *African Languages, Development and the State*, (London: Routledge, 1994), pp. 152-153.

<sup>4</sup> Peter Fawcus, *Botswana: Road to Independence*, (Gaborone: Pula Press and The Botswana Society, 2000), p.xi. See also Cook and Sarkin, 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights versus Economic Development', p. 469.

<sup>5</sup> Kenneth Good and Ian Taylor, 'Botswana: A Minimalist Democracy', *Democratization*, Vol. 15, No. 4 (2008), p. 763.

<sup>6</sup> Cook and Sarkin, 'Is Botswana the Miracle of Africa? Democracy, The Rule of Law, and Human Rights versus Economic Development' p. 455.

<sup>7</sup> Bugalo Maripe, David Sebudubudu and Mokganedi Zara Botlhomilwe, 'Limited Freedom and Intolerance in Botswana', *Journal of Contemporary African Studies*, Vol. 29, No. 3, (2011), p. 331.

human rights which remain on the periphery for most analysts of Botswana. However, human rights issues present a significant threat to Botswana's positive reputation.<sup>8</sup> Since independence Botswana has not received much attention with respect to women's rights. This is evidenced by the writing of authors like Amelia Cook and Jeremy Sarkin. Bugalo Maripe and colleagues argue that while Botswana has been regarded as a unique example of a functioning democracy in Africa, women's rights and other recent events raise a question mark over what has been described as an 'African Miracle'.<sup>9</sup> This study will try to untangle the different arguments put forward by previous authors in regards to women's rights in Botswana. It is also clear that most local studies undertaken about women in Botswana have focused mainly on the women that are in the cities as opposed to those in more rural areas, an example being the Kalanga women who reside in rural Botswana.

The period under investigation begins with the time after independence and the promulgation of the Marriage (Amendment) Act of 1967. It also focuses on the period before the Citizenship Act of 1984 was challenged by a local human rights lawyer, Unity Dow, in 1990 and which was then amended in 1995. It ends with the Abolition of Marital Power Act of 2004 that amended those parts of the legislation specific to marital power relations. This dissertation is based on the testimonies of women about their lived experiences as having been affected by these statutory instruments. For this reason it is important to note that Nancy Cott describes citizenship as:

a distinctive form of social classification that colours personal standing in any community. It confers an identity that may have deep personal and psychological dimensions at the same time that it expresses belonging. The same can be said for marriage. Marriage also is a civil status that can be taken on or ended, yet when in force has powerful impact on personal identity.<sup>10</sup>

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<sup>8</sup> Cook and Sarkin, 'Is Botswana the Miracle of Africa? Democracy, The Rule of Law, and Human Rights versus Economic Development', p. 455.

<sup>9</sup> Maripe et al, 'Limited Freedom and Intolerance in Botswana', p. 346.

<sup>10</sup> Nancy F. Cott, 'Marriage and Women's Citizenship in the United States, 1830-1934', *The American Historical Review*, Vol. 103, No. 5 (1998), pp. 1440-1441.

According to Maithreyi Krishnaraj, citizenship is connected to the rights of belonging to a particular community historically. Those rights entail enjoying one's status as a recognised member of that society and being treated equal to all other citizens. One also has the right to be included in the decision making processes that regulate one's life. Citizens can be part of the decision making process through voting, which is a right.<sup>11</sup> Krishnaraj pointed out that every citizen's capability to vote promotes democracy, which is 'an effective mechanism to promote collective interests and to enforce on the rulers a mandate to pursue the public good'.<sup>12</sup> Furthermore, marriage should not be understood as an arrangement chosen for the living of private family life, but should rather be recognised as a public institution, a part of the public order, as constituted by the state. This is because marriage requirements are created by public authority and are operated as a systematic public sanction, bringing rights and privileges along with duties.<sup>13</sup>

The approach to gender equality should not only focus on the inclusion or incorporation of women into the male dominated world; it is a developmental objective which needs to accommodate, assimilate and incorporate women into the mainstream system.<sup>14</sup> Women's oppression was often caused by cultural practices, which formed the basis of the patriarchal structure in Botswana. Therefore, it was important that when laws changed, values conformed with these changes since those values made people realise the importance of the improved laws that were instituted.<sup>15</sup>

According to Dianne Hubbard, the discrimination against women as well as their oppression can be likened to cancer in the body of humanity as it affects everyone. The main

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<sup>11</sup> Maithreyi Krishnaraj, 'Women's Citizenship and The Private-Public Dichotomy', *Economic and Political Weekly*, Vol. 44, No. 17 (2009), p. 43.

<sup>12</sup> *Ibid.*

<sup>13</sup> Cott, 'Marriage and Women's Citizenship in the United States', p. 1441.

<sup>14</sup> Godfrey Olebogeng Radijeng, 'Customary Law and Gender Equality: The Legal Status of Women in Botswana', (Degree of Doctor of Philosophy, University of Oxford, 2004), pp. 43-44.

<sup>15</sup> Lot Moroka, 'What Animal is Marital Power: Part 3', *The Botswana Guardian*, 4 March 2005, pp. 6-7.

reason why it was deemed important to bring about equality between men and women was because men and women make up the state and therefore it is only reasonable that both parties be involved in the decision making of the nation. It was felt that this would facilitate the smooth running of the country; an impossibility in the face of one part being paralysed.<sup>16</sup>

### **Significance of the study**

Upon independence in 1966, Botswana adopted a constitution that guaranteed equality for everyone regardless of sex. Yet the government still passed two pieces of legislation that limited women's power in marriage, by legislating private relations with their husbands and how they were treated in public, which also affected their daily livelihoods. The Marriage (Amendment) Act of 1967 subordinated women to the authority of their husbands, and in this way restricted their rights to ownership, while the Citizenship Act of 1984 rendered the generational transfer of citizenship to be patrilineal. The Citizenship Act (1984) was amended in 1995 and the Abolition of Marital Power Act was promulgated in 2004 as a way of liberating Botswana women from their legislative societal oppression since independence in 1966. This raises important questions about the nature of Kalanga women's daily lived experiences as influenced by the Marriage (Amendment) Act of 1967 and the Citizenship Act of 1984; the extent to which Kalanga women are aware of changes in legislation that guarantee their equality as citizens and as wives; and, finally, how their daily lives have changed since the amendments to legislation governing citizenship and marriage. The aim of the study is to recover women's voices concerning their experiences of a historical period where the citizenship of married women and private family relations between spouses was controlled by the state.

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<sup>16</sup> Dianne Hubbard, *Guide to the Married Persons Equality Act*, (Windhoek: Legal Assistance Centre, 2009), p. ii.

## Theoretical framework

This dissertation is informed by liberal feminist theory. Beginning with the works of Mary Wollstonecraft, an eighteenth century advocate of women's rights who wrote *A Vindication of the Rights of Women*, published in 1792, and running through to Betty Friedan, a twentieth century liberal feminist who wrote *The Feminine Mystique* published in 1963, this body of literature advocates women's emancipation through legislation. However, because this dissertation is historically oriented, it is not an exploration of African feminism or indeed any kind of feminist theoretical position or agenda. The theory is used to frame the argument put forward by the study; that is, by showing how women can fight for their rights through the use of legislation. George Ritzer claims that liberal feminists aim to eliminate gender as an organising principle in the distribution of social goods, and they are willing to invoke universal principles in their pursuit of equality.<sup>17</sup> Similarly, David Inglis and Christopher Thorpe state that:

Liberal Feminism takes as its central political and analytical focus issues to do with 'equality', the identification of existing inequalities between men and women, and their reformation. Some of the issues that liberal feminism has focused on include women's political rights, for example the winning of votes, economic rights that allow women to have financial independence, the pursuit of equality in the workplace, and the promotion of legislation enhancing a culture of mutual respect between the sexes, in the workplace.<sup>18</sup>

Generally, liberal feminists are understood to fight for women's equality through changes in law and legislation, litigation and regulation.<sup>19</sup> Susan Wendell argues that there has been a long-term commitment by liberal feminists to try and achieve women's equality through legal rights.<sup>20</sup>

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<sup>17</sup> George Ritzer, *Contemporary Sociological Theory and Its Classical Roots: The basics*, 2<sup>nd</sup> Edition (London: McGraw Hill, 2007), p194.

<sup>18</sup> David Inglis and Christopher Thorpe, *An Invitation to Social Theory*, (Cambridge: Polity Press, 2012), p. 239.

<sup>19</sup> Ritzer, *Contemporary Sociological Theory and Its Classical Roots: The basics*, p. 194.

<sup>20</sup> Susan Wendell, 'A (qualified) Defense of Liberal Feminism', *Hypatia*, Vol. 2, No. 2 (1987), p. 87.

## **Objectives**

This study aims to elucidate the impact of national and international legislation and the discourse regarding marriage, citizenship and the human rights on the lived experiences of Kalanga women by:

1. Examining the historical factors that led to the promulgation of the Marriage (Amendment) Act of 1967 and the Citizenship Act of 1984;
2. Documenting Kalanga women's experiences of these Acts in their daily lives;
3. Examining the different historical factors that led to the amendment of the Citizenship Act in 1995 and Kalanga women's responses to these;
4. Examining the historical factors leading to the enactment of the Abolition of Marital Power Act in 2004 and Kalanga women's responses.

## **Justification of the research**

This study disputes the widely held view by post-colonial scholars such as Peter Fawcus who argued that post-colonial Botswana is a 'success story'. It takes as its starting point evidence that marginalisation based on sex and ethnicity persisted in Botswana society after independence and in spite of a liberal constitution. The focus on the experiences of Kalanga women is important, because even the few historical studies of women in Botswana concentrate on urban, professional and prominent women, and exclude the voices of women in deep rural areas such as the Kalanga of the North-East District. Therefore, this research documents the experiences of rural, non-professional women of the Kalanga minority group in the North-East District. Interviews suggest Kalanga women feel disconnected from events and changes to Botswana society at a national level, including amendments to legislation that directly inform their own position. This dissertation examines the specific history of Kalanga women's marginalisation against the broad history of Botswana's democratic transition.



## METHODOLOGY

The methodology employed in this dissertation is historical comparative research combining primary data collection through archival research with empirical data collection from oral histories through face-to-face interviewing. The gathering of oral histories is an effective means of supplementing historical accounts where little or no archival material is available. Informants are able to express their views, show feelings and emotions. Face-to-face interviews as the specific medium for collecting oral histories permit informants to express themselves fully without limitations, such as an inability to express oneself in detail, as compared to questionnaires. Face-to-face meetings have the capacity to enrich the oral interviews; this being because personal and intimate details about the informant's life will be discussed openly. In order to have an open conversation or discussion, there must be trust and mutual understanding between the researcher and the informant. An informant has the right to know how the material will be used.<sup>21</sup> This method allows for dialogue between the researcher and the informant and can produce rich data.

Oral interviews do not necessarily elicit direct answers from informants, nor do they engage with the research question or evaluate the research in a straightforward manner. Interviews are used to explore the lived experiences of the people and what meaning they derive from their experiences.<sup>22</sup> Oral interviews allow the researcher to develop questions depending upon the answers provided by the informant. This gives the researcher a chance to explore and gather more information on the subject matter. There is a possibility that some of the informants would have lived through the experience, thus yielding first-hand information, whereas others may have been told about the events by family elders who had lived through

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<sup>21</sup> Sherna Gluck, 'What's So Special about Women? Women's Oral History', *Frontiers: A Journal of Women Studies*, Vol. 2, No. 2 (1977), p. 8.

<sup>22</sup> Irvin Seidman, *Interviewing as Qualitative Research: A Guide for Research in Education and the Social Sciences*, 3<sup>rd</sup> Edition, (New York: Teachers College Press, 1993), p. 9.

the experiences themselves. Face-to-face interviewing can be challenging, however, when interviews take place across generations and specifically regarding sensitive issues from within the family structure.

Sherna Gluck points out that most women are not comfortable being placed in the spotlight, especially those who have not participated in ‘important’ events or in organisations outside of the home. They usually think certain responsibilities are reserved for important people. These women usually look down on themselves and perceive themselves as people who cannot make history. There is a tremendous initial reluctance to being interviewed; a reluctance which comes from being a socialised female in said society. They are often of the opinion that all responsibilities are the domain of men and that only male voices are to be heard. This is the reason why it is important, from the outset, to establish the researcher’s reasons for believing that women’s life experiences are important. This might mean not only providing an explanation of the specific research, but also discussing how views of their daily life experiences and those of other women can be used as part of history.<sup>23</sup> In this way women are enabled to write their own history. According to Mary Mies this research could also be described as a feminist research since it mostly focused on the issues that were aimed at addressing women’s oppression and exploitation.<sup>24</sup>

A combination of purposive and ‘snow-ball’ non-probability sampling techniques was used to identify informants, while all cultural protocols (for example seeking permission from the village chiefs to conduct interviews) were observed where applicable. The first informant was randomly sampled as a point of departure and new informants were sampled and interviewed until the point where data saturation had been reached and only minimal amounts

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<sup>23</sup> Gluck, ‘What’s So Special about Women? Women’s Oral History’, p. 8.

<sup>24</sup> Maria Mies, ‘Women’s Research of Feminist Research: The Debate Surrounding Feminist Science and Methodology’, in Mary M. Fonow and Judith A. Cook (eds), *Beyond Methodology: Feminist Scholarship as Lived Research*, (Bloomington: Indiana University Press, 1991), p.61.

of new information came to light. Churches, schools and various government offices emerged as valuable connections through which to approach possible informants. Some of the villages in which the researcher conducted interviews included Moroka, Malambakwena, Ramokgwebana and Jackalas No.1. These villages were highlighted because the researcher conducted interviews from the emic position, that is she was familiar with the culture and had existing relations with the local people. Interviews were carried out in the home language of the informant as the researcher is fluent in the languages spoken in the area.

The researcher approached the research from an emic position as she is an insider in terms of the area as well as the phenomenon under investigation. There are both advantages and disadvantages to conducting research as an insider. It is easy to believe that, as an insider, one will obtain more accurate information from the informants. Justine Mercer points out that the fact that the researcher forms part of the community being researched either by ethnicity, nationality or gender does not of itself make the data any richer or more reliable. Although Mercer concedes that 'insiders will undoubtedly have a better initial understanding of the social setting because they know the context; they understand the subtle and diffuse links between situations'.<sup>25</sup> Nevertheless, as a researcher one should be aware of the consequences of carrying out research as an insider and be vigilant about the outcome because it will not always be positive.<sup>26</sup>

Archival sources sometimes provided eye-witness accounts of events in the form of documents that form part of the running or episodic records of a society. According to Dauto:

running or episodic records are documents such as annual reports and case records made, received or maintained by private or non-profit organisations, records, photographs as well as incoming letters, reports received and memoranda from other offices. These records may contain enormous amounts of information.<sup>27</sup>

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<sup>25</sup> Justine Mercer, 'The Challenges of Insider Research in Educational Institutions: Wielding a Double-Edged Sword and Resolving Delicate Dilemmas', *Oxford Review of Education*, Vol. 33, No. 1 (2007), p. 5.

<sup>26</sup> *Ibid.*

<sup>27</sup> Elizabeth Ann Dauto, *Historical research* (Oxford: Oxford University Press, 2008), p. 66.

Archival documents that the researcher found included minutes of meetings, newspapers, Hansard reports, speeches, photographs, official records and manuscripts. Serial publications such as newspapers were found in large numbers at the archives. These too are valuable primary sources because they publish immediate and occasionally quite vivid accounts of historical events and reactions to them. However, newspapers can also pose the distinct disadvantage of being biased in the sense that they can publish stories that bring profit to themselves and overlook certain hard facts that could hamper newspaper sales. Newspapers such as the *Botswana Daily Newspaper*, *Botswana Guardian*, *Mmegi* (the reporter), *The Botswana Gazette*, *The Midweek Sun* and the *Sunday Standard* have played and continue to play an important role in the intellectual and social life of national and local communities. Serials have served the needs of history writers, as they have recorded the breaking news of many individual discoveries and organisational actions, including the verdict for cases taken to court and changes in legislation.<sup>28</sup> Secondary sources and existing literature were also utilised in order to refine the research question and as a way of determining other authors' views on the subject matter.

A further source for data collection constituted the offices and internal archives of *Emang Basadi*<sup>29</sup>, a women's association in Botswana, which played a pivotal role in lobbying for the amendment of the Citizenship Act (1984). The researcher found vital literature in the form of Unity Dow's '*The Citizenship Case*' published in 1995 after the court case of Dow versus The State. An interview was also conducted with one of the current *Emang* members,

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<sup>28</sup> *Ibid*, pp. 66-67.

<sup>29</sup> *Emang Basadi* organisation started as an informal weekly meeting of friends, colleagues at the University of Botswana and others who were interested in women's issues in Botswana and internationally. It was formally registered as an organisation in June 1986. *Emang Basadi* was involved in the fight of the Citizenship Act (1984), during the Dow case they focused on the legal reform. They mobilised women to enlighten them about the discriminative nature of the Citizenship Act through workshops, seminars and conferences. They wanted women to help them and Unity Dow in advocating for women's equality in Botswana, See, Gretchen Bauer, 'Update on the women's movement in Botswana: Have women stopped talking?', *African Studies Review*, Vol. 54, No. 2 (2011), p. 27, and Athaliah Molokomme, 'Emang Basadi (Botswana)', *Signs*, Vol. 16, No. 4 (1991), p. 848.

who were well informed about women's issues in Botswana. An additional interview was conducted with a senior government official in Francistown who is knowledgeable about the two types of marriage recognised in Botswana, under the common law and customary laws.

## **Ethics**

Prior to interviews, respondents were informed of the nature of the research and provided with consent forms explaining the terms and conditions of the interviews.<sup>30</sup> Informants were invited to complete and sign these forms if they volunteered to participate. Where informants declined to take part, their wishes were respected. Anonymity and confidentiality were also ensured where requested and where appropriate.

Source specification forms were used to consistently and accurately record the details of the informant. A digital voice recorder (DVR) was utilised with the permission of each informant. Where consent was refused, the researcher recorded notes manually. Informants were told that if they wished to withdraw from participating in the research, their decision would be respected. Informants were given up to two weeks to review the information they gave during the interview after which they were given the option to withdraw from the research if they so wished. Consent and source specification forms were completed in the presence of informants in order to foster a trust relationship between the researcher and her informants.

## **LITERATURE REVIEW**

Little has been written about Kalanga women and even less about the North-East District itself, where most of these women reside. Existing literature is generalised and peripheral on women's issues, such as in the works of R. Mookodi (1972)<sup>31</sup>, F. Kalabamu

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<sup>30</sup> For a details see, Appendix 7.

<sup>31</sup> R. Mookodi, 'Women's Life in Botswana', *Canadian Journal of African Studies*, Vol. 6 (1972).

(2006)<sup>32</sup>, K. Datta, E. Alexander and B. Khan (1998)<sup>33</sup>, among others. Mookodi points out that with independence, women's access to education and employment opportunities increased, with more women enrolling as students and becoming employed as teachers and administrators. Women were becoming aware of the fact that their contributions were equally crucial to the development of the country as those of men and that they were also capable of achieving high levels of education and performing the same types of jobs. Prior to independence, skilled and high status jobs such as engineering and medicine were reserved for men.<sup>34</sup> After independence, under the new constitution, women were guaranteed equal access to education and equal participation in the social, economic, cultural and political spheres. However, what Mookodi fails to point out is that while women's rights and equality were broadly inscribed in the constitution on the one hand, their specific rights as citizens and wives were restricted on the other by legislation such as the Marriage (Amendment) Act of 1967 and the Citizenship Act of 1984. Furthermore, this made children born to mothers with foreign husbands after 1984 aliens in their own motherland.

Before going any further, it is crucial to point out that Cook and Sarkin stated that Botswana is a parliamentary republic which has a sound institutional structure based on Roman-Dutch law and local customary law.<sup>35</sup> This is supported by Athalia Molokomme who asserts that there are two types of marriage officially recognised in Botswana, that is. marriage under customary law, which encompasses the practices of a particular ethnic group, and marriage under common law, which is regulated by the Roman-Dutch law and legal provision. The majority of the population marry in accordance with their own customary law as this forms part of the culture in many ethnic groups. However, there has also been an

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<sup>32</sup> Faustin Kalabamu, 'Patriarchy and Women's Land Rights in Botswana', *Land Use Policy*, Vol. 23 (2006).

<sup>33</sup> Kussum Datta, Elsie Alexander and Banu A. Khan, *Beyond Inequalities: Women in Botswana*, (Harare, Southern African Research and Documentation Centre, 1998).

<sup>34</sup> Mookodi, 'Women's Life in Botswana', p. 357.

<sup>35</sup> Cook and Sarkin, 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights versus Economic Development', pp. 460-461.

increasing tendency for couples to undergo ceremonies under the statute law. Most people do not understand the difference between the two types of marriage and it continues to be a source of confusion among the general public, many of whom are not sufficiently familiar with the results of statutory marriage.<sup>36</sup>

Furthermore, Rekha Kumar notes that customary law continued to reign supreme in the areas of family and inheritance, since the majority continued to live in a traditional way of life where customary law formed the basis of their lives. Imported common law gradually took over important areas of public law, such as the constitution, after independence. Indigenous laws continued to receive due recognition even after independence, even though these were not incorporated into the general laws of the country.<sup>37</sup>

Since this study deals with women, particularly those who are married, it is important to point out the types of marriage found in Botswana. Kussum Datta, Elsie Alexander and Banu Khan point out that women had few rights in most marriages and that husbands were ‘ordained’ to be heads of the household in African societies. These authors maintain that husbands had control over crucial assets such as land, livestock and other types of property. Husbands would decide on who used what pertaining to household property. Women were seen as being the property of the husband and were dependent on male protectors.<sup>38</sup> This was buttressed by the Botswana legal system which considered a married woman to be a minor. This meant that her rights were comparable to the status of a child. Married women could not sign legal documents, acquire loans or even apply for their own national identity cards (ID) without the husband’s permission. If the woman’s husband was not available at the time, then

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<sup>36</sup> Athalia Molokomme, ‘Disseminating Family Law Reform in Botswana’, *Journal of Legal Pluralism*, No. 30-31 (1990/91), p. 309.

<sup>37</sup> Rekha A. Kumar ‘Customary Law and Human Rights in Botswana’ *Human Rights & Human Welfare*, Working paper, No. 52 (2009), <http://www.du.edu/korbel/hrhw/workingpapers/2009/52-kumar-2009> [Accessed 9-April-2014].

<sup>38</sup> Datta, et al, *Beyond Inequalities: Women in Botswana*, p. 47.

a male member of the husband's family would be in charge of the household.<sup>39</sup> In pre-context indigenous social structures in Sub-Saharan Africa, men and women's rights and duties were different which therefore rendered them unequal in family and state affairs. These differences were seen from the colonial up to the post-colonial era, where they eventually promoted social and material inequalities between the two sexes.<sup>40</sup>

According to Bronwen Manby, gender discrimination is often the reason why people end up losing their country of origin and are labelled stateless. This normally affects children who cannot obtain their mother's nationality because of gender discrimination, and at the same time cannot acquire the nationality of their father.<sup>41</sup> Cheater and Gaidzanwa claim that 'the narrowing down and removal of women's rights as citizens are very deliberate post-colonial phenomenon, pushed through legislative assemblies against public female political resistance.'<sup>42</sup>

Athaliah Molokomme brings to this study the aspect of how men embrace being in power, and why women fail to stand up for themselves. She says most men have always been unreceptive to women being equal and are hostile to any such suggestion. Women, on the other hand, internalise their own subordination, even though there are human rights organisations which try to liberate them, thus assisting the government to maintain the status quo. While it might be the case that Botswana is a country with few limitations on freedom of speech and organisational activities, the government's political will to take women's rights seriously was still at the infant stage as late as 2005.<sup>43</sup> Men have been given control over property and have effectively disenfranchised women where administration, disposition,

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<sup>39</sup> Botswana: Women Still Minors' *Off Our Backs*, Vol. 23, No. 11 (1993), p. 4.

<sup>40</sup> Rhoda Howard, 'Human Rights and Personal Law: Women in Sub-Saharan Africa, *A Journal of Opinion*, Vol. 12, No. 1/2 (1982), p. 45.

<sup>41</sup> Bronwen Manby, 'Statelessness in Southern Africa' *Briefing Paper for UNHCR Regional Conference* (Mbombela: 2012), <http://www.refworld.org/docid/50c1f9562.html> [accessed-2-June-2014] p. 19.

<sup>42</sup> A.P Cheater and R.B Gaidzanwa, 'Citizenship in Neo-patrilineal States: Gender and Mobility in Southern Africa', *Journal of Southern African Studies*, Vol. 22, No. 2 (2007), p. 195.

<sup>43</sup> Molokomme 'Emang Basadi', p. 851.



enjoyment and ownership of property are concerned because patrilineal inheritance is accorded legislative status in Botswana.<sup>44</sup>

Lorato Galeage argues that the Marriage (Amendment) Act of 1967 oppresses married women, while legally entrenching men's superiority over women. In response to this legislation, Moeng Pheto, Minister of Labour and Home Affairs, presented a Bill on the Abolition of Marital Power to Parliament in 2004 in an attempt by the Botswana government to redress gender inequality in legislation.<sup>45</sup> Galeage continued to say that, upon tabling the Bill, the minister pointed out that:

in terms of existing laws men were endowed with the marital power over their wives hence subjection of women to the marital power of their husbands.<sup>46</sup>

According to Letshwiti Tutwane, Botswana was portrayed as a democratic government and the politicians enjoyed these accolades whilst in actual fact the country was lagging behind in women's empowerment. Women still lived under oppression. Kenneth Koma, the then leader of the opposition parties in parliament added that the empowerment of women could only be heard if this drive was led by men or by the poor and economically disadvantaged women, not by the already liberated women. However, if it were driven by women who had gained their freedom and who had already been empowered, the men in power would turn a blind eye to their plea. 'Even the legislation that bridges gender discrimination would be unsuccessful if it was not backed by the voices of the ordinary, non-elitist women', Koma stated.<sup>47</sup>

Educated and professional women started to challenge their husbands' authority and have since gained greater influence in family decision-making. In many cases, husbands did

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<sup>44</sup> Shelley D. Hayes, Bambi W. Gaddist and Andre W. Rawls, 'Universal Access and Human Rights For Women and Girls Too', *Human Rights*, Vol. 37, No. 2 (2010), p. 5.

<sup>45</sup> Lorato Galeage 'Pheto Presents Abolition of Marital Power Bill' *The Botswana Daily News*, 2 December 2004, p. 3.

<sup>46</sup> *Ibid.*

<sup>47</sup> Letshwiti Tutwane, 'Segokgo Calls For Women Empowerment', *Mmegi/The Reporter*, 24 February 2004, p. 3.

not believe that women should have this right and thought that those who stood up for their rights were ‘big headed’ and uncontrollable, a situation which is believed to lead to divorce.<sup>48</sup>

Doreen Gaura stated that the empowering of women would give them control over all aspects of their lives. With gender activist movements mainly comprised of middle class academic women, they found themselves in a position of opposition against the traditional moralists who felt that these women claimed to know better about what the “less empowered” women should want, and corrupting innocent women who had always believed in patriarchy in the process.<sup>49</sup>

The Botswana government has played a key role in defining the status of women. Official definitions of the status of women status came along with certain implications concerning gender-sensitive laws meant to protect the rights of women. Parliament therefore has the responsibility of passing legislation. It was comprised of forty-six members after the 1994 elections, only four of whom were women. The High Court and Court of Appeal judges were all men. The House of Chiefs, which plays an important role in the legislative process, was constituted of only male chiefs. There is a predominance of men in key positions which influence the legislation and the administration of state practice about the issue of women’s rights and their protection.<sup>50</sup>

The network between female parliamentarians and women’s civic organisations from Botswana, Namibia and South Africa has applied fairly effective and consistent pressure inside and outside parliament to translate international conventions into national laws and repeal discriminatory legislation. In Botswana in 1997, following the successful court challenge of the 1984 Citizenship Act and lobby activities preceding and surrounding it, the

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<sup>48</sup> Dominique Meekers, ‘The Noble Custom of Roora: The marriage Practices of the Shona of Zimbabwe’ *Ethnology*, Vol. 32, No. 1 (1993) p. 35.

<sup>49</sup> Doreen Gaura, ‘Sexualisation of Women in the Media: Freedom of Expression or Oppression?’, *Gender and Media Diversity Journal*, no.10 (2012), p. 29.

<sup>50</sup> Datta, et al, *Beyond Inequalities: Women in Botswana*, p. 47.

government established a commission to review all laws that discriminated against women and to make recommendations on how the national laws could be brought in line with international conventions and laws to which Botswana was a signatory. As a result, a number of laws were revised immediately, while others required further investigation.<sup>51</sup> A successful challenge to the Citizenship Act brought changes to laws that discriminated against women, demonstrating that a single challenge of the law liberated women from much oppression and from laws that silenced them for many years.

Faustin Kalabamu points out that Botswana society is highly complex and contradictory in terms of gender relations, as illustrated by the incongruity of discriminatory legislation such as the Marriage Act and Citizenship Act in relation to a non-discriminatory constitution. Ultimately, the constitution prevailed as it provided the platform for Unity Dow and *Emang Basadi* to challenge discriminatory laws in Botswana and to agitate for greater gender equality.<sup>52</sup> The achievement of substantive equality for rural women and compliance with the United Nations Convention on the Elimination of Discrimination against Women (UN CEDAW) requires special measures to be incorporated into the constitution and legislation. However, Botswana has not yet complied. Despite constitutional provision and other reforms, customary law continues to affect the personal and property rights of women. Men continue to be treated as the head of the family with guardianship rights over women and children. Botswana's international commitment to basic human rights, thus, requires recognition of the customary law.<sup>53</sup>

Article 14 of the UN CEDAW obligates state parties to institute measures to ensure the equality of rural women. Women from rural areas such as those of the Kalanga women

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<sup>51</sup> Onalenna D. Selolwane, *Gendered Spaces in Party Politics in Southern Africa: Progress and Regress since Beijing 1995* (Geneva: United Nations Research Institute for Social Development, 2006), p. 29.

<sup>52</sup> Faustin Kalabamu, 'Patriarchy and Women's Land Rights in Botswana', *Land Use Policy*, Vol. 23 (2006), pp. 241-242.

<sup>53</sup> Kumar 'Customary Law and Human Rights in Botswana' *Human Rights & Human Welfare*, Working paper, No. 52 (2009), <http://www.du.edu/korbel/hrhw/workingpapers/2009/52-kumar-2009> [Accessed 9-April-2014].

contribute significantly to the economic survival of their families. Nonetheless, these women were usually disadvantaged when it came to land ownership, education and housing, because the law favoured men. Botswana therefore needed to comply with the requirements of UN CEDAW by incorporating it into the constitution and legislation so as to achieve equality for rural women, thus including the Kalanga women.<sup>54</sup>

The critique levelled against the Marriage Act and Citizenship Act is not universally accepted in Botswana. Peter Takirambudde, for instance, argues that these acts are in line with international standards such as the UN CEDAW and the Convention on the Nationality of Married Women of 1957 (CNMW).<sup>55</sup> The UN CEDAW requires countries take all appropriate measures to modify their constitution and legislation to accord with the articles of the UN CEDAW, or abolish existing laws, customs and practices that discriminate against women.<sup>56</sup>

Takirambudde also brings a comparative law perspective to this study. He indicates that the design of citizenship laws is such that they define and prescribe the conditions which connect or disconnect an individual with a given state and its legal system. Furthermore, in most legal systems, citizenship connotes a legal status which is derived from the existence of certain conditions, such as birth, within a given country.<sup>57</sup> There has been a steady growth of women's participation in national decision-making in many countries throughout the 1990s. The women have managed to force their way into the exclusively male domain with amazing speed and determination.<sup>58</sup>

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<sup>54</sup> *Ibid.*

<sup>55</sup> Peter N. Takirambudde, 'A Note on the 1982 Botswana Citizenship Act', *PULA: Botswana Journal for African Studies*, Vol. 3 No. 2 (1983), pp. 76-81.

<sup>56</sup> Kumar 'Customary Law and Human Rights in Botswana' *Human Rights & Human Welfare*, Working paper, No. 52 (2009), <http://www.du.edu/korbel/hrhw/workingpapers/2009/52-kumar-2009> [Accessed 9-April-2014].

<sup>57</sup> Takirambudde, 'A Note on the 1982 Botswana Citizenship Act', p. 76.

<sup>58</sup> Gisela G. Geisler, *Women and the Remaking of Politics in Southern Africa: Negotiating autonomy, Incorporation and Representation* (Uppsala: Nordic Africa Institute, 2004), p. 9.

As pointed out initially by Onalenna Selolwawe, Botswana women were not the only ones faced with the challenge of discrimination. Experiences in Namibia made it clear that a gender-sensitive constitution alone was not going to change women's situation. The Namibian minister for local government, Libertine Amathila, warned her South African sisters at a 1990 conference in Johannesburg that, despite the beautiful beginning of a new constitution, a lot needed to be done to ensure that the constitution was translated into reality.<sup>59</sup> Sub-Saharan African women all realised those prescripts which had been put on paper were not being translated into practice, consequently requiring them to come together and advocate implementing the theory in the constitution.

Southern African cultures commonly place men and women in particular gender roles and create two worlds; an inferior world for women and a superior one for men. As a result, gender mainstreaming and stereotyping have been engendered and have resulted in this division between men and women.<sup>60</sup> With the coming of a wage economy, men secured better paying jobs at the expense of women. Ironically, development aggravated the oppression and subordination of women. Women were left as homemakers whilst their husbands were away making money for the family. In the end, women had to submit to their husbands as they were the providers. Furthermore:

If new forms of subordination and oppression of rural women are to be avoided, the process of 'development' needs to be better understood and the results rigorously checked against women's actual position. Technology, credit and know-how have been concentrated in the hands of men while women labour with little more than their hands to maintain the family.<sup>61</sup>

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<sup>59</sup> *Ibid*, p. 136.

<sup>60</sup> K. E Obasola, 'Gender Discrimination and Cultural Anachronisms in African Societies: Implication for Girl Child Education' *African Journal for Social Sciences and Education*, Vol.3, No. 4 (2013), p. 1028.

<sup>61</sup> Zimbabwe Women's Bureau, Helen Vukisin, Kate McCalman, Furious Chitongo 'We Carry a Heavy Load: Rural Women in Zimbabwe Speak Out': *A Report of Survey Carried Out by the Zimbabwe Women's Bureau*. In Women's International Resource Exchange, *Resistance, War and Liberation: Women of Southern Africa*, (Harare, 1981) [freedomarchives.org/Documents/Finder/DOC53\\_scans/53.Resistance.War.Liberation.Women.Southern.Africa.pdf](http://freedomarchives.org/Documents/Finder/DOC53_scans/53.Resistance.War.Liberation.Women.Southern.Africa.pdf) [accessed\_15-April-2014] , p. 34.

Molokomme states that one of the ironies of the law is that while it presumes knowledge of its provision, it is precisely here that citizens are most ignorant. Even though African societies are patriarchal, there is no doubt that many African women's organisations carefully guard their independent status and react negatively to attempts by the state to co-opt them. Outside the co-opted version of 'state feminisms', they have been able to lobby for their rights as citizens. In many African societies, a few exceptions aside, only educated, prominent and professional women in urban areas have demanded their rights. The majority of rural and urban poor women have been excluded from these advances because they lacked financial and societal autonomy and organisation.<sup>62</sup>

Despite the patriarchal nature of many African societies, women have learnt to stand up for themselves and fight for their rights. Faced with the constraints of a patriarchal society, women find themselves differentially situated in terms of their power and ability to pursue property claims.<sup>63</sup> Compared to women, men in the Kalanga communities have more control over access to resources. Women generally occupy a subordinate position when it comes to management and control over economic resources. This also applies to their sphere of authority in family life.<sup>64</sup> The call to eliminate discrimination has been addressed in key regional and human rights instruments that most Southern African countries have signed and ratified, including Botswana. The elimination of discrimination in property rights is essential as it gives power to women as citizens and affords them equal status to their husbands.<sup>65</sup>

According to Rekha Kumar:

Inequality of rights endured by women throughout the world is deeply embedded in tradition, history and religious attitude. Women have stayed in abusive marriages for many

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<sup>62</sup> Geisler, *Women and the Remaking of Politics in Southern Africa: Negotiating Autonomy, Incorporation and Representation*, p. 144.

<sup>63</sup> Anne Griffiths, 'Women's World, Siblings in Dispute over Inheritance: A View from Botswana', *Africa Today*, Vol. 49, No. 1 (2002), p. 62.

<sup>64</sup> *Ibid*, p. 63.

<sup>65</sup> Tinyade Kachika, *Women's Land Rights in Southern Africa: Consolidated Baseline Finding from Malawi, Mozambique, South Africa, Zambia and Zimbabwe*, (Denmark: Niza and Action Aid International, 2009) p. 20.

years, because of their perception of the abuse and the social factors that constrained them from leaving.<sup>66</sup>

Historically the Kalanga women were subjected not only to specific areas of disadvantage because of the negative stereotypes of women enforced by the deep-rooted Kalanga belief in patriarchy. This then led to systemic discrimination and oppression which was aggravated by reinforced social and religious attitudes.<sup>67</sup>

## **STRUCTURE OF THE STUDY**

This first chapter introduces the dissertation, that is the methods used for data collection, the ethical procedures followed by the researcher, as well as a definition of the Kalanga women under investigation. It also provides a brief background of Botswana and its governance. The introduction elaborates on the theory that informs the study and reviews the relevant literature. The justification and significance of the study are also discussed.

Chapter 2, ‘Women not yet Uhuru’ (that is ‘women not yet free’), looks at the situation in Botswana before the amendment of the citizenship and marital laws. It also focuses on the conditions that led to the formation of the Acts. It addresses the status of women before the Acts came into force as well as their socio-economic status. Interviews and archival sources form the basis of this chapter. Parliamentary debates are studied to try and trace the roots of the foundations to these Acts. It also assesses how women reacted to the new laws.

Chapter 3, ‘From Minors to Equals’, analyses the limitations of women’s socio-economic status associated with the endorsement of the marital acts, and asks how women in Botswana coped with discrimination codified by the acts. It also addresses the issues of how patriarchal society in Botswana was challenged by the ruling of the High Court on the

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<sup>66</sup> Rekha A. Kumar, ‘Customary Law and Human Rights in Botswana: Accredited Survival of Conflicts’, *City University of Hong Kong Law Review*, Vol. 2, No. 2 (2010), pp. 283-285.

<sup>67</sup> Rebecca J. Cook, ‘Enforcing Women’s Rights through Law’, *Gender and Development*, Vol. 3, No.2 (1995), p. 9.

Citizenship Act. Most importantly, it looks at the transition of women from the status of minors to equal partnership with their husbands. This chapter draws much information from the court case between Unity Dow and the state, with newspapers providing insight into the time of the tabling of the Abolition of Marital Power Act in 2004.

Chapter 4, 'The Freedom Peak For Women', looks at the changes that came with the 1992 High Court ruling on the Citizenship Act (1984), up to the Abolition of the Marital Powers Act in 2004; it considers how this affected women's daily lives in the private family sphere and in the public eye. Interviews, newspapers, books and journals inform the conclusions of this chapter.

The Conclusion, Chapter 5, gives an overview of this study's findings.



## CHAPTER 2

### WOMEN NOT YET UHURU

The title of this chapter, meaning ‘women not yet free’, examines the situation in Botswana before the amendment of the Citizenship Act (1984) and marital laws. It also focuses on the conditions that led to the formation of the Acts. It furthermore addresses the socio-economic status of women before the Acts were passed. Interviews with women of differing marital status were conducted in Botswana’s North-East District because this area is predominantly occupied by Kalanga speakers. Archival sources were consulted to form the basis of this chapter and parliamentary debates were analysed to explore the roots of the foundations to these Acts. Interviews were conducted to determine rural Kalanga women’s status in their marriages before the Acts were amended.

The formulation, interpretation and implementation of laws and rules concerning women have never been regarded as equal in Botswana. As established in Chapter 1, since independence women have been side-lined and have never occupied seats at the big tables. The laws that were formulated by men alone came to be called rights and democracy, and were accepted by the society. Very few women found a seat in any of those forums in the world, whilst in Botswana not a single woman sat at the table when the country negotiated with Britain for protection, and later on, independence.<sup>1</sup> When the three chiefs from different ethnic groups (Khama III of Bangwato, Sebele I of Bakwena, and Bathoen I of Bangwaketse) went to Britain to ask for protection, not a single woman was involved in the talks, mostly because women could not be chiefs at the time and because it was not their place to sit and negotiate critical issues with men: women were just minors led by men and they were voiceless. Even after independence and the drawing up of the constitution which came with

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<sup>1</sup> Unity Dow, ‘How the Global Informs the Local: The Botswana Citizenship case’, *Health Care for Women International*, Vol. 22, No. 4 (2001), p. 320.

the Bill of Rights, women still could not participate in political processes. The country was strictly led by men who established the rules and rights, and who determined citizenship. Men alone ordained some ethnic groups as being superior and others as minorities, for example the Kalanga.<sup>2</sup> After independence Botswana retained laws that discriminated against women and downgraded them to second class citizens. This is evidenced by the fact that, in 1994, after the Dow case, the country still had twenty-five sets of legislations<sup>3</sup> that discriminated against women in their statutes. Agnes Ngoma-Leslie, like other scholars, stressed that the countries' discriminative tendencies could not be seen from the outside since these were veiled in the open and democratic atmosphere.<sup>4</sup>

Nonetheless Charles Fombad pointed out that the Botswana constitution, when it was enacted at independence, was meant to protect all citizens from discrimination in two ways:

first against the enactment of any law which is discriminatory either expressly or in its effect, and secondly against any discrimination action by persons acting under written law, or in the performance of the functions of any public office or any authority.<sup>5</sup>

Mr Magang, a member of parliament (MP) for Kweneng East Constituency, debated the promulgation of the Citizenship Act during parliamentary proceedings in February/March 1980:

It is time the acts which are in place be reviewed and amended if needs be. The constitution has been in place since independence in 1966, and we took it as it was from the protectorate government, but after so many years of independence it's time to change it, it has passed its time and it makes certain decisions to make and even its application has become harder over the years.<sup>6</sup>

Botswana derived the greater part of its constitution from the United States constitution and from the Bill of Rights which is drawn from the constitution. In the United

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<sup>2</sup> Charles Manga Fombad, 'The Constitutional Protection against Discrimination in Botswana', *The International and Comparative Law Quarterly*, Vol. 53, No. 1 (2004), p. 147.

<sup>3</sup> See Appendix 2.

<sup>4</sup> Agnes Ngoma-Leslie, *Social Movements and Democracy in Africa: The Impact of Women's Struggle for Equal Rights in Botswana* (New York: Routledge, 2006), p. 15.

<sup>5</sup> Fombad, 'The Constitutional Protection against Discrimination in Botswana', p. 147.

<sup>6</sup> Government of Botswana, *Hansard* 67; 25<sup>th</sup> Feb - 25<sup>th</sup> March 1980 (Gaborone: Government Printers, 1980), p. 277.

States one could not become a president unless one was male and a citizen of the US.<sup>7</sup> Even though the constitution was established to protect citizens from any kind of discrimination, it was still ineffective in protecting women from discrimination because of their sex, which has been labelled as *de jure*, meaning adverse treatment or unequal treatment or a law that provides a certain kind of discrimination.<sup>8</sup> This usually happens when legislation is used to support some kind of discrimination or unfair treatment, such as when men are given better treatment than women just because of their sex and that particular treatment is written down as a law.<sup>9</sup> The 1984 Citizenship Act angered women as it was the most pronounced source of discrimination against women in Botswana. Moreover, when the United Nations held a historic conference in Africa in 1985, Botswana was one of the exceptions that did not turn up for the conference. This conference aimed to review the UN Decade for women from 1975 to 1985. Botswana's absence therefore demonstrated the country's attitude towards women's rights back home.<sup>10</sup>

### **Common law and customary law marriages as determinants of Kalanga women's socio-economic status**

As mentioned in the previous chapter, Athaliah Molokomme stated that, in the 1970s, Botswana enacted various sets of family legislation, including the Marriage Act, as well as customary and common law (Roman-Dutch law) marriages.<sup>11</sup> The common law was always regarded as foreign by citizens. On the other hand, ethnic groups in Botswana have their own customary law which is restrictive in its definition, acceptance and practice.<sup>12</sup>

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<sup>7</sup> *Ibid.*

<sup>8</sup> Fombad, 'The Constitutional Protection against Discrimination in Botswana', p. 147.

<sup>9</sup> *Ibid.*

<sup>10</sup> Ngoma-Leslie, *Social Movements and Democracy in Africa: The impact of women's struggle for equal rights in Botswana*, pp. 49 & 51.

<sup>11</sup> Athalia Molokomme, 'Disseminating family law reform in Botswana', *Journal of Legal Pluralism*, no.30-31 (1990/91), p. 308.

<sup>12</sup> Rekha A. Kumar, 'Customary law and human rights in Botswana: Accredited survival of conflicts', *City University of Hong Kong Law Review*, Vol. 2, No.2 (2010), p. 279.

After Botswana's independence, the government continued with the 1967 Marriage Act which had been formulated by the colonial government. The Botswana government then enacted a new Marriage Act in 1970. Under the Marriage Act of 1970, if a couple wished to marry under common law, their marriage would have to be registered. This also meant that any marriage that might have happened before had to be dissolved before registering the new one. This was meant to uphold the concept of monogamy marriages and overthrow polygamy. The Botswana Marriage Act of 1970 did not apply to any marriages 'contracted in accordance with any customary law of Botswana'. Therefore, this meant that even though the Marriage Act had outlawed polygamy, it was acceptable for men to have several wives under customary marriage.<sup>13</sup> Most of the Kalanga women, therefore, got married into polygamous marriages and had no right to question this since it was tradition. When interviewed, Agnes Malanga said:

I was married to a polygamist as the second wife. What my husband did was to tell his parents that he wanted to take a second wife. In most cases the parents would ask if he was capable of fending for the wives, if he is capable, then, there was no problem. The first wife would then be informed about this new development. I and my husband's first wife lived like sisters, with peace in the family.<sup>14</sup>

Both marriage laws in Botswana made no stipulation of any kind of equality between the partners. This automatically made the husband the head of the family. A married wife did not have *locus standi*,<sup>15</sup> meaning the right to legally stand before a court of law.<sup>16</sup> On the other hand, the husband had all the marital power. The wife could not engage in any court proceedings without the consent of her husband. This situation brought problems for women who wanted to take legal action against their husbands. A typical example is that of Malope v Kedisitse (MC 233/1990):

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<sup>13</sup> Anne Griffiths, 'Women's World, Siblings in Dispute over Inheritance: A View from Botswana', *Africa Today*, Vol. 49, No. 1 (2002), p. 57.

<sup>14</sup> Interview with Agnes Malanga, 10/02/14.

<sup>15</sup> Botswana National Archives and Records Services (hereafter to be referred to as BNA), M[inistry of] H[ome] A[ffairs] 18/7, Athaliah Molokomme, Onalenna Selolwane, Bojosi Otlhogile, Gloria Semolekae, Patrick Molotsi, Morulaganyi Kgasa, *Review of the Laws that affect the Status of Women in Botswana: Inception Report, Laws and Literature Review*. September 2007, p. 29.

<sup>16</sup> <http://www.duhaime.org/LegalDictionary/L/LocusStandi.aspx>[accessed\_31-July-2014].

In this case, the husband refused to assist his wife to bring an action for damages of adultery against a woman he was having an affair with and the court granted the wife permission to sue on her own without the husband's assistance and consent.<sup>17</sup>

Molokomme observed that, generally, Kalanga society was hierarchical. When looking at a family, the man was considered to be the head, followed by the wife and the unmarried children.<sup>18</sup> Changu Mannathoko further stated that Kalanga women shared common ground with other women in Botswana through living in a patriarchal culture where all laws subordinated women to the authority of men, irrespective of status or class. The Marriage Act and the Citizenship Act clearly exercised a negative impact on women's rights. Women were regarded as children under the Marriage Act. All the marital power was given to the husband for him to control everything in the household and make all decisions on behalf of the wife. Wives had no authority in the household.<sup>19</sup> Unity Dow supports Mannathoko and Molokomme by pointing out that women were not considered as equal partners. They got married in order to live under the guardianship of their husbands. Women had always been considered weak and incapable of doing anything for themselves and they were discriminated against in various ways. One of these was through the 'homemakers' concept, where women were not allowed out in the public. If they needed to voice their concerns they did so through their husbands, and if the husband was unavailable, through their fathers, uncles or sons. The public arena was not for women, whilst their husbands belonged to the public sphere.<sup>20</sup> A women's place was regarded as being at home. Men took advantage of this and used it to their advantage. While women stayed home and raised children, men went out into the world to try and fend for their families. Fedilis Nkomazana adds:

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<sup>17</sup> BNA, MHA 18/7, Molokomme et al, *Review of the Laws that Affect the Status of Women in Botswana: Inception Report, Laws and Literature Review*, p. 29.

<sup>18</sup> Molokomme, 'Disseminating Family Law Reform in Botswana', p. 304.

<sup>19</sup> Changu Mannathoko, 'What does it mean to be middle-class woman in Botswana?', in Christine Zmroczek and Pat Mahony (eds) *Women and Class: International Feminist Perspectives* (London: University College of London Press, 1999), p. 18.

<sup>20</sup> Dow, 'How the Global Informs the Local: The Botswana Citizenship Case', p. 320.

The traditional Kalanga status quo, which was governed by certain laws and norms was biased against women. The place of women is socially constructed in the same way, whether it be Bakgatla, Barolong or Bakalanga. They are socially inferior and as subject to men. Women are not only disfigured and categorised as less capable than men, but are also seen as playing a menial role in the society. The use of terms such as “the position of women” and “the place of women” refer to gendered roles and position in society.<sup>21</sup>

Furthermore, even though these women were referred to as homemakers, no prestige and status was attached to any kind of job they did. The ownership of land and valuable property was afforded to men as has already been pointed out. They were the managers of everything; women could use these with their consent. This subjected women to oppression since they did not have the freedom to use anything that could be labelled as theirs in a domain free from discrimination. Though marriage seemed to be a disadvantage in the Kalanga culture, it was a way of gaining respect. Once married, women were referred to as ‘real’ women. Unmarried women were scorned and said to be an embarrassment since they had failed to fulfil their childbearing duties. These women were often said to be immature despite their age. For instance, they were not allowed to take part in any marital negotiations which had the consequence of causing most Kalanga women to desire marriage since it rendered them a level of status and seemed a prestigious thing. Therefore the oppression and discrimination that came with marriage was often overlooked.<sup>22</sup>

Married women had many duties but few rights. Most of them worked very hard to help their husbands acquire property for the family. They did not have control over the property and were said not to own it. Husbands, on the other hand, had the right to control and use their wives’ wages. They decided on everything that was to be done in the family, the kind of education the children were to acquire, which religion to follow, and, if this was Christianity, which church to attend. They were even free to punish their wives like children if they had wronged their husbands. Married women respected their husbands as their masters

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<sup>21</sup> Fidelis Nkomazana, ‘The Experiences of women within Tswana Cultural History and Its Implications for the history of the Church in Botswana’, *Studia Historiae Ecclesiasticae*, Vol. 34, No. 2 (2008), pp. 1-2.

<sup>22</sup> *Ibid*, pp. 5-15.

and not as partners. Men's domination did not end within the household as it extended to other societal gatherings, such as the church. Even in church women were segregated from men, as, for instance, only men could be preachers.<sup>23</sup>

Nkomazana supports Gillespie by pointing out that in Kalanga society women were regarded as minors, and were thus inferior to men. This was easily seen at gatherings where they were given less respect whilst men were offered greater respect and given better reception. When there were political debates, women were not allowed to voice their opinions and could not participate in any political functions or officiate at religious ceremonies. As pointed out before, women could not own any property since it was a patrilineal affair. Historically and traditionally, according to Kalanga culture, wives, sisters and daughters were not even included in the inheritance plan, meaning that they had to depend on men for everything.<sup>24</sup>

Generally, power lies with the person who makes the final decision. This is what happened in most marriages where the husband was the person in authority and all his decisions were final.<sup>25</sup> Kalanga women knew that they were 'children' in the household; there was no negotiating and arguing about decisions made by the husband. As stated by Anurekha Chari, the 'gendering of citizenship lies in the creation of public-private divide'.<sup>26</sup> Women's rights as individuals in marriage and family were very important. This was because, in these spheres, these women's lives were greatly affected by reproductive roles. Thus, if they had limited individual rights in those areas then they could not effectively exercise or enjoy them. However, women's individual rights in these marriages could not be assured as these constituted private spheres which were complex matters to try and control. It was complex

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<sup>23</sup> Dair L. Gillespie 'Who Has the Power? The Marital Struggle', *Journal of Marriage and Family*, Vol. 33, No. 3 (1971), p. 445.

<sup>24</sup> Nkomazana, 'The Experiences of Women within Tswana Cultural History and Its Implications for the History of the Church in Botswana', p. 2.

<sup>25</sup> *Ibid.*, p. 446.

<sup>26</sup> Anurekha Chari, 'Gendered Citizenship and Women's Movement', *Economic and Political Weekly*, Vol. 44, No. 17 (2009), p. 48.

because African societies respect and value the preservation of family, including how women are controlled and what rights they are accorded in their private family home.<sup>27</sup> Rhoda Howard stressed that:

Customs are neither immutable in time nor neutral in their impact. Women have a right to physical integrity and to individual choice in how they will live even if, highly influenced in cultures.<sup>28</sup>

Women are the ones who have endured an inequality in rights throughout the world, and this is deeply embedded in culture, tradition, history, and even religious attitudes.<sup>29</sup> Some cultures like that of the Kalanga allowed men to discipline their wives with corporal punishment; this being practiced mostly in rural areas. Many women stayed in abusive marriages for years because they perceived this abuse as their cultural tradition. The way women were socialised hindered them from just walking out of their matrimonial homes.<sup>30</sup> This inferior position that women found themselves in caused them suffering at the hands of the men who were thought to be their protectors yet had the right to beat them.

When women got married under customary law the husband paid *lobola* (bride price). Uncles from both the bride and the groom's family were the ones who led when it came to *lobola* negotiations. Excellent Chireshe and Regis Chireshe point out that women drew no benefit in matters concerning *lobola*. The bride price only benefited the men in her family because those who charged and received *lobola* could use it as they wished. After these women were married, husbands would feel they had paid for them like commodities, implying that they had control over their 'possessions'. Some men had the audacity to tell their wives that they had paid for them and reminded them of this time and again. *Lobola* gave men the right to control women and stripped what little freedom and rights women had

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<sup>27</sup> Rhoda Howard, 'Human Rights and Personal Law: Women in Sub-Saharan Africa, *A Journal of Opinion*, Vol. 12, No. 1/2 (1982), p. 46.

<sup>28</sup> *Ibid*, pp. 46 & 51.

<sup>29</sup> Kumar, 'Customary Law and Human Rights in Botswana: Accredited Survival of Conflicts', p. 283.

<sup>30</sup> *Ibid*, pp. 284-285.



before marriage. This brought inequality between spouses and opened up a gap between men and women in Kalanga society.<sup>31</sup>

Husbands were favoured by the law and had a clear legal advantage which their wives did not enjoy. Dair Gillespie noted that ‘the wife does not gain legal protection against capricious action by the male but in exchange, she becomes his vassal.’<sup>32</sup> It is a universal practice that when a woman gets married she takes the husband’s name, and this is also a common practice amongst the Kalanga, where she also falls under his social class. He then becomes the economic head of the family.

Kalanga culture viewed women as minors, that is even as adults they had few rights compared to men. In practice, single women above marriageable age (that is around the age of 30) were more independent than married women of their age. Ideally they were considered to be under the guardianship of their fathers, and were often allocated their own property which they used and disposed of as they wished. For married women on the other hand, socio-economic status, legal-, marriage- and property rights are interrelated.<sup>33</sup> This is supported in an interview with Kudzani Tagana:

Being married is what I wanted but after so many years of marriage I had to start life afresh and I am too old to achieve some of my dreams. I look at women whom I grew up with and never got married. They have achieved their dreams; most of them have everything they wished for. I am grateful for the children I had in that marriage but my life would have been so much better if I had not gotten married. I taught myself to drive without my husband’s knowledge. People on the outside used to look at me and think I have the most perfect marriage and my husband does everything for me. I sometimes imagine the things I could have done for myself if I had not gotten married and ask for permission to do anything.<sup>34</sup>

Married women did not have any independence in their lives and had to seek permission for anything they wished to do, whether it was spending money, visiting their parents or friends, or to go shopping. Thus, even after the Abolition of the Marital Powers

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<sup>31</sup> Excellent Chireshe and Regis Chireshe, ‘Lobola: The Perceptions of Great Zimbabwe University Students’, *The Journal of Pan African Studies*, Vol. 3, No. 9 (2010), p. 217.

<sup>32</sup> Gillespie ‘Who Has the Power? The Marital Struggle’, p. 450.

<sup>33</sup> Mary P. Van Hook and Barbara N. Ngwenya, ‘The Majority Legal Status of Women in Southern Africa: Implications for Women and Families’, *Journal of Family and Economic Issues*, Vol. 17, No. 2 (1996), p. 177.

<sup>34</sup> Interview with Kudzani Tagana, 05/02/14.

Act (AMPA) of 2004, most Kalanga men wanted to hold on to that tradition as they believed this made marriages last forever.<sup>35</sup> Molokomme and colleagues also stated that by getting married, women were signing away power to the husband, as they would lose the capacity to acquire a residence of their own and choosing the matrimonial residence would rest with the husband. This usually constituted a disadvantage to women in the sense that the legal consequences of the marriage were mostly determined by the law of the husband's domicile.<sup>36</sup> There was no guarantee that equality between men and women was more important than customs. If there was discrimination against women, it was considered lawful in some circumstances.<sup>37</sup> Eckenia Sekai did not see this treatment as discrimination, and argued that:

What you call oppression and abuse is what we called respect for our husbands. We reported everything to our husbands and every decision was made with his consent. When my neighbour came to borrow or ask for anything, even salt, I would let my husband know. I would do that with utmost [*sic*] respect, go to him, kneel down and ask for his permission to give the neighbour whatever they are asking for. The husband was the owner of the house. A married woman would not come home after sunset; otherwise you would have to answer for that. On the other hand, my husband could come home at any time or after days and I was not supposed to ask any questions. That was respect and that is why our marriages lasted forever. Nowadays, because of these new laws, our children cannot control their wives, when husbands try to discipline their wives they leave because the laws have given them all the power.<sup>38</sup>

Elizabeth Mbotho also shared Sekai's view, in saying that:

During our times men were in power as compared to today where everyone is equal. We took directives from our husbands and there was always peace in the household. The husband could go away for days and we would not interrogate him about where he was. Because of these equal women do not allow men their space, and they also want to act like they are men. This has caused chaos in many families, leading to high rates of divorce. This cannot be stopped because of all these new laws that allow women to do as they wish. Getting married lately since the enactment of the AMPA (2004) is like a waste of time, because very few marriages are successful. We respected our husbands to a point where someone came to deliver news that needed to be responded to, and the husband was not

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<sup>35</sup> Scott T. Yabiku, Victor Agadjanian and Arusyak Sevoyan, 'Husbands' Labour Migration and Wives' Autonomy, Mozambique 2006-2006, *Population Studies: A Journal of Demography*, Vol. 64, No. 3 (2010), p. 296.

<sup>36</sup> BNA, MHA 18/7, Molokomme et al, *Review of the Laws that Affect the Status of Women in Botswana*, p. 29, See also, Gisela G. Geisler, *Women and the Remaking of Politics in Southern Africa: Negotiating autonomy, Incorporation and Representation* (Uppsala: Nordic Africa Institute, 2004), p. 167.

<sup>37</sup> Kumar, 'Customary Law and Human Rights in Botswana: Accredited Survival of Conflicts', p. 277.

<sup>38</sup> Interview with Eckenia Sekai, 10/02/14.

around, we would wait for him. Then later the response would be sent to the concerned person, as the wife would not talk on her husband's behalf [*sic*].<sup>39</sup>

Rekha Kumar stated that men in the Kalanga culture were likened to a bull that could leave his kraal for the neighbour's kraal. In other words, it was normal for men to have concubines. Many women have lived with this kind of behaviour from their husbands since time immemorial and it has survived the test of time.<sup>40</sup> Men could be unfaithful to their wives and get away with it because no one could question their actions. Women were just taught to know their place in marriage and not ask men about their whereabouts or where they were from. That was considered a sign of disrespect to the husband.

Women were discriminated against to the extent that, under the law, even their own children were not considered theirs. Children were said to belong to their father and he was considered the sole legal guardian. If it happened that the couple got divorced, the father retained the legal guardianship. Unlike mothers, fathers had the final say in matters that concerned their children. The mother could not protest against the father's decision. In Botswana, males are subject to guardianship only until marriage or until they break ties with their family home, but women must always fall under someone's guardianship.<sup>41</sup>

With the introduction of migrant labour, a huge number of men left their homes for work, meaning that wives remained to head the household. Therefore, their work in the household was increased and they were forced to take up some of the roles that were previously performed by their husbands.<sup>42</sup> Even though Kalanga women acted as the heads of their families in the absence of husbands, there was always a male relative with *de jure*

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<sup>39</sup> Interview with Elizabeth Mbotho, 10/02/14.

<sup>40</sup> Kumar, 'Customary Law and Human Rights in Botswana: Accredited Survival of Conflicts', p. 286.

<sup>41</sup> Fombad, 'The Constitutional Protection against Discrimination in Botswana', p. 157.

<sup>42</sup> Anne M.O Griffiths, *In the Shadow of Marriage: Gender and Justice in an African Community* (London: The University Chicago Press, 1997), pp. 45-46.

jurisdiction to represent the family when it came to legal and political matters in the public sphere.<sup>43</sup>

Scott Yabiku, Vicot Agadjanian and Arusyak Sevoyan supported Anne Griffith's argument by stating that married women were never in control and would always have to answer to in-law family members. When husbands left for work the women would not be independent, but had to answer to the father-in-law, brother-in-law or the uncle of the husband.<sup>44</sup> James Denbow and Phenyio Thebe have thus stated that men had more power in everything compared to women. Even in situations where wives were left to be heads of their families, they did not receive the same recognition as men because they were not thought to be qualified for such positions.<sup>45</sup>

The women were either left behind at home to raise children if the husband was a migrant labourer, or she would accompany him to where he worked around the country. Thus, the husband determined her place of residence after marriage.<sup>46</sup> Kesentseng Matebu shared that:

I worked for the government under the Central Transport Organisation between late 1970s to the early 1980s. My husband did not have a problem with me working. Eventually I had to quit my job because the kind of work that my husband did took him from one place to another, he was being transferred a lot as a pastor. I had to leave my job and accompany him around the country.<sup>47</sup>

Molokomme adds that with the introduction of the wage economy, there were significant social changes. For instance, some men left their homes for work and this largely contributed to the instability of marriage and families. It also led to an increase in the number of 'female-headed households'.<sup>48</sup> Men could go away to work for months, even years, and

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<sup>43</sup> *Ibid*, pp. 47-48.

<sup>44</sup> Yabiku et al, 'Husbands' Labour Migration and Wives' Autonomy, Mozambique 2006-2006, p. 296.

<sup>45</sup> James Denbow and Phenyio Thebe, *Cultures and Customs of Botswana* (Westport: Greenwood Press), 2006, p. 135.

<sup>46</sup> *Ibid*.

<sup>47</sup> Interview with Kesentseng Matebu, 03/02/14.

<sup>48</sup> Molokomme, 'Disseminating Family Law Reform in Botswana', p. 307.

wives would be left to fend for the children but they never assumed the position of their husbands at home or in the society. Women could be left to build a house and take care of the livestock and fields. These things, however, remained that of her husband and she was merely a caretaker.

Kalanga women always had guardians. Before marriage they remained under the guardianship of their fathers and after marriage the guardianship was transferred to the husband. In case of divorce or the death of the husband, the woman returned to the guardianship of her father. A woman could not inherit any properties left by the husband. According to law, she had no legal rights of inheritance, but was entitled to remain in her matrimonial home until she remarried. Before then she would be maintained by her eldest son, or the husband's brothers who were the natural heirs of a deceased man's estate.<sup>49</sup>

Property ownership in marriage was made more complicated by marriage legislation.<sup>50</sup> All marriages are assumed to be in community of property, unless the parties execute an ante-nuptial contract excluding community under common law. If the marriage was in community of property, this meant that the property of the spouses was owned jointly, but in practice the wife was considered to be the junior partner. Her husband alone had powers of administration. The wife had to obtain spousal assistance from her husband before she could deal with family property, unless she was buying household necessities or was a public trader. On the other hand, where there was no community, the spouses owned and controlled their property separately.<sup>51</sup> Chabo Nleya testified that:

I got married in 1987 to a South African husband but we lived in Botswana and the United States because he was a political activist. We then later got divorced because I could not bear children for him. My husband believed so much in marital power and he made it clear to me that he was the man of the house. He had the guts to embarrass me in whatever way

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<sup>49</sup>Fombad, 'The Constitutional Protection Against Discrimination in Botswana', p. 158, See also BNA, MHA 18/7, Molokomme et al, *Review of the Laws that affect the Status of Women in Botswana*, p. 22.

<sup>50</sup>Molokomme, 'Disseminating Family Law Reform in Botswana', p. 310.

<sup>51</sup>*Ibid.*

in front of my friends. We had one bank account which he controlled. We shared the credit card and at times he would refuse to give me money for basic needs like food and even refuse to pay rent. The thing is I also have siblings who still live under such marital power abuse. It is not even easy for them to leave their husbands because they threaten them. They also stay in such marriages because of the kids.<sup>52</sup>

The condition of women married in community of property was unfavourable as it reduced them to minors. This unfair position of women married in community of property was apparently the reason why parliament enacted the Married Persons Property Act in 1971, so as to place women in the same position as men. Women still continued to be regarded as minors even after the enactment of the act as it did not improve women's status in marriage. It merely reversed the common law presumption in favour of community to one in favour of marriage without community. Customary law applied to the property of Africans marrying by the statute unless they completed a special form indicating a choice in favour of the common law.<sup>53</sup> The Abolition of Marital Power Act (2004) was necessary because the previous attempt by the state to bring equality between spouses and to upgrade women's status in marriage by means of the Married Persons Property Act in 1971 had failed.

Kudzani Tagana married her Kalanga husband in 1985 and divorced him in 2009. For her, the husband was in control:

My husband could just go buy a car without discussing anything with me. My husband could not even fend for me. I had to open a tuck-shop in order to take care of myself and the children. I even taught myself how to drive. That man treated me badly like I did not matter in his life; he was even violent at times. When I tried to go to my parents' house my father told me to persevere since I got the marriage that I had always wanted and referred me to the in-laws. There was a time I had to take up the matter with the District Commissioner since we were married both under the common and customary law. The District Commissioner called my in-laws but they did not come, but then tried to solve the matter between me and my husband. He only changed for a week and went back to his old deeds. I stayed in that marriage for the sake of my children because I wanted to protect them. As soon as the younger ones finished Form five I decided to get a divorce which was after a long loveless marriage.<sup>54</sup>

Sipho Showa, a columnist in the *Sunday Standard*, stated that,:

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<sup>52</sup> Interview with Chabo Nleya, 04/02/14.

<sup>53</sup> Molokomme, 'Disseminating Family Law Reform in Botswana', p. 310.

<sup>54</sup> Interview with Kudzani Tagana, 05/02/14.

The very patriarchal institution of heterosexuality is central in men's domination over women. For example most women would not renew the lease of a house to a tenant without consulting their husbands even if the fellow is out of the country for a long spell. This would be in spite of the fact that the renewal needs to be done urgently as the house being rented out probably generated income for the family. Interestingly, this behaviour of women seeking needless permission goes beyond married women. Single women do end up letting boyfriends control their property simply because women have been socialised to know that the men rule.<sup>55</sup>

### **The Citizenship Act (1984) and the status of women**

According to Gisela Geisler, the legitimacy of the patriarchal nature of Botswana came under scrutiny when the Citizenship Act (1984) was challenged by women in Botswana, who questioned the rights of husbands to be heads of families and to singularly pass on their citizenship to children.<sup>56</sup> Mr David Magang member of parliament (MP) for Kweneng East Constituency, suggested to the MPs in February/March 1980 that:

The Botswana constitution has loopholes that can be used against us, the constitution is too liberal and the Citizenship Act is too open for anyone to take advantage of this is to be proved by relevant sections in the constitution. The Law Reform Committee should also look at the Citizenship Act and the constitution, as the committee encompasses people who are dedicated and can thoroughly look at these laws.<sup>57</sup>

Magang felt it was time to upgrade women's position in the society since they had been kept behind the scenes and made inferior by the laws. The legal system was discriminating to women in many respects. Magang stressed that:

often it is the actual content of the law which affects them particularly laws on marriage, divorce and custody of children. At times it is the administration of the law which obstructs their access to the country and the opportunity to discover what their rights are under the law.<sup>58</sup>

There is a contradiction between culture and equality. Traditionalists believe that giving women full citizenship and treating them as equals would alter the balance of power for women and give them a foundation from which the fight for equality can be continued.<sup>59</sup>

Women in many societies have been rated as second class citizens because they are not

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<sup>55</sup> Sipho Showa, 'More needs to be done to protect women than just changing the law', *Sunday Standard*, 19-25 December 2004, p. 8.

<sup>56</sup> Gisela Geisler, 'A Second Liberation: Lobbying for Women's Political Representation in Zambia, Botswana and Namibia' *Journal of Southern African Studies*, Vol. 32 (2006), pp. 76-77.

<sup>57</sup> Government of Botswana, *Hansard* 67, pp. 278 & 283.

<sup>58</sup> Sharita Samuel, 'Women Married in Customary Law: No longer Permanent Minors', *Empowering Women for Gender Equality*, Vol. 15, No. 40 (1999), p. 23.

<sup>59</sup> *ibid.*

treated as equal citizens compared to men. They had limited rights to the extent that in Botswana they could not pass their citizenship on to their children under the 1984 Citizenship Act. In some cases, if women got married to husbands of foreign nationality they would lose their Botswana citizenship. They were told to transfer from their original countries to that of the husband. This clearly shows that women had never acquired full citizenship because of their sex.<sup>60</sup>

It is clear that citizenship is a gendered aspect in many societies. Women are usually referred to as citizen-mothers; they are considered citizens as far as their duties and obligations are concerned which include producing and educating the future citizens. They then subordinate themselves in respect to men who become heads of the family, making the woman's citizenship dependent and directly linked to his.<sup>61</sup>

As previously mentioned by Onalenna Selolwane in Chapter 1, K.F. Augustine-Adams stated that the Law Reform Committee travelled around Botswana to receive oral and written views of Botswana on certain laws that included the Marriage and Citizenship Act. Most Botswana agreed and supported the patrilineal citizenship rule for children born in marriages. In response to the committee, Chingabe, a respondent during the Law Reform Committee survey, believed that a married man determined the citizenship of the children, not the mother. Determining children's citizenship through the mother would be denying many deserving children of their rightful citizenship.<sup>62</sup> Tshwanetse, a Kalanga woman from Masunga village, also pointed out that if a Motswana woman got married to a foreigner, she was expected to be prepared to move and live with her in-laws wherever they may be.

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<sup>60</sup> Unity Dow, 'National Implementation of International Law: The Dow Case', In United Nations, Division for the Advancement of Women, *Bringing International Human Rights Law Home: Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child* (New York: United Nations, 2000), p. 112.

<sup>61</sup> Joyce P. Kaufman and Kristen P. Williams, 'Who belongs? Women, Marriage and Citizenship' *International Feminist Journal of Politics*, Vol. 6, No. 3 (2004), pp. 421-422.

<sup>62</sup> K.F Augustine-Adams, 'Gendered States: A comparative Construction of Citizenship and Nations', *Virginia Journal of International Law*, Vol. 41, No. 93 (2000) p. 127.



Women were not supposed to get married to foreign men with the plan of bringing them into the country and expecting the children to be called Batswana, because they would not be.<sup>63</sup> Therefore, Athaliah Molokomme pointed out that many people were hostile whenever a suggestion was made pertaining to the equality of men and women. Even women themselves embraced the idea and practice of being subordinate to their husbands. This helped the government to retain the *status quo*.<sup>64</sup> Rampholo Molefhe argued that the Dow case showed there was more to the fight than what was viewed by the general public; it was a fight of women trying to liberate themselves from the legislated oppression by the government. Educated, professional and business women were having meetings at residences to find a solution through briefings and debriefings.<sup>65</sup>

In an interview with Segametsi Mosadiotsile from *Emang Basadi*, she pointed out that when Dow took the government to court in 1990, this was the right thing to do, and it was time for the Act to be amended. Laws need to be amended time and again in the best interests of the general population. Modisaotsile continued to stress that:

You can imagine a situation when a child is denied citizenship in Botswana because his/her father is of foreign citizenship and back in the father's country the same thing happens the child being denied citizenship because his/her mother is foreigner too in that country or because they were born outside the country. Then what would happen to that child. He/she will have no country of origin? Laws should be made to protect every citizen not strip them of their rights. The law was discriminatory in the sense that children belonging to Batswana men were protected not the same with women. The government had to understand that we live in a global village, people mix from all parts of the world. This Act made it seem like [*sic*] children born to Batswana mothers were not welcome in their motherland just because their mothers had not been married to fellow Batswana men, it was like punishment. Some people thought educated women were misleading the uneducated when the government was taken to court. Children to these women could not even be admitted in good schools because they were not considered citizens, or even get government sponsorship for tertiary education. Most women would not turn up for educational meetings, we used to tour the country to teach women about their rights but just a few women would come. They are not aware of the changes in the law. Most people hide behind culture because of the weaknesses they have and cannot handle. We try to have workshops to sensitize people about changes in the laws and about new acts in place.<sup>66</sup>

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<sup>63</sup> *Ibid*, p. 127.

<sup>64</sup> Molokomme, 'Emang Basadi (Botswana)', p. 851.

<sup>65</sup> Rampholo Molefhe, 'More in Fight Than Meets The Eye-Women's Fight Much More Complex', *The Midweek Sun*, 28 November 1990, pp. 3 & 5.

<sup>66</sup> Interview with Segametsi Modisaotsile, 29/04/2014. See also Appendix 3, an interview with Tiny Pholi.

Clara Ohlsen was a member of the Botswana Democratic Party (BDP) and was married to a foreign citizen. She was aware of the difficulties women had of having children with spouses of foreign citizenship when living in Botswana. That was before the passing of the new Citizenship Act (1984). Realising these difficulties, she advocated against them amongst the MPs and the executive of the BDP, although the issue was ignored by the leaders. She described the responses she got as ‘stony silences and blank faces’.<sup>67</sup> There were a few women activists who requested a meeting with the MPs to find a way of getting justice and equal recognition of women’s rights with regard to citizenship, but only a few agreed and they were all drunk, according to Ohlsen:

They especially went and got alcohol and got drunk to make it into a derisory meeting. That was a week before the law was passed. These men were drunk, they just laughed at us, and some of their remarks were very derisory. The law was passed by parliament, almost unanimously. There was absolutely no opposition to it.<sup>68</sup>

Ohlsen was later elected as an MP in 1984 and advocated for fresh consultations over the law as her most important immediate task. Her party (the BDP) did not agree with her plans. She also had difficulties getting the project off of the ground. Ohlsen resorted to tabling a motion in parliament with the object of reviewing the law and her motion went through. A Law Reform Committee consisting of seven select committees of the national assembly, the Attorney General and seven MPs was selected. The committee consulted people around the country through *Kgotla*<sup>69</sup> meetings, over the laws.<sup>70</sup> People were asked what they thought about the patriarchal nature of the country when it came to the Marriage and Citizenship Acts. However, because people in rural areas, especially women, were

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<sup>67</sup> *Ibid* p. 166.

<sup>68</sup> *Ibid*.

<sup>69</sup> The *Kgotla* is a forum in which state matters and disputes are debated and settled. It is the scene of power and important decision making.” Every village in Botswana has a *Kgotla* which is led by a *Kgosi*. Women were supposed to attend *Kgotla* meetings but they were excluded from debates and deliberations, all they had to do was listen to the men. There is a basic principle which says “there is freedom of opinion and fundamental right of participation” in spite of this principle women could not participate. It only favoured and worked for men. At the end all the decisions, traditional laws and policies that were discussed and agreed on were just imposed on women, and they could not agree or disagree with them. But with this laws that were in place and discriminated against women were agreed on by men which means in these discussions the views and opinions of men are usually biased and their favour them over women. See Nkomazana, ‘The experiences of women within Tswana cultural history and its implications for the history of the church in Botswana’, p. 21.

<sup>70</sup> *Ibid*, p. 167.

socialised to accept men as leaders, they agreed with the old or existing law. They thought it would be disrespectful to men to be considered equal with women.

Most people made it clear to the Law Reform Committee that it was central to the traditions and customs of Botswana that a man married a woman into his family and not the other way round. This simply meant that children born into that marriage should take the father's descent and totem, especially in the Kalanga culture, where totems are very important. Most people supported the discriminatory provision of the Citizenship Act. A few urban working class women opposed the Act.<sup>71</sup> Rebecca Cook stated that traditional, social and religious practices were used to reinforce women's subordinate status, which made liberation of the law to provide equal rights for women slowest in countries such as Botswana. The constitutions of these countries often have sex-equality provision but they still accept customary practices which limit the application of the equality provision included in the constitution.<sup>72</sup>

Tapson Jackalas adds:

In the Kalanga culture, the woman has to move to where she has been married. For example, if a Kalanga woman from this village (Jackalas No.1) gets married in another ethnic group; she has to move to her in-laws. This is the case with the Citizenship Act of 1984. It was the right law, women married to foreigners were supposed to move to the countries in which they were married. If a Kalanga woman from Botswana gets married to a Zimbabwean man, she has to go there, hence changing her citizenship even that of her children. I do not agree with the new law in place.<sup>73</sup>

It is worth noting that the fact that mothers and fathers faced different regulations in the transmission of their citizenship to children had an enormous effect on people as citizens belonging to particular nations.<sup>74</sup>

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<sup>71</sup> Augustine-Adams, 'Gendered States: A Comparative Construction of Citizenship and Nations', p. 127.

<sup>72</sup> Rebecca J. Cook, 'Enforcing Women's Rights through Law', *Gender and Development*, Vol. 3, No. 2 (1995), pp. 10-11.

<sup>73</sup> Interview with Tapson Jackalas, 03/02/14. For details see Appendix 4.

<sup>74</sup> Augustine-Adams, 'Gendered States: A Comparative Construction of Citizenship and Nations', p. 94.

Sharita Samuel argued that in many international norms, like the 1957 Convention on the Nationality of Married Women, it was stated that married couples enjoyed equality and status during marriage, but in actual fact women continued to be treated as the insignificant partner in marriage and in exercising their human rights, mostly due to their sex or marital status. Many states did not safeguard against such discrimination. Married women were denied their rights just because they were women. Just as Kumar and Takirambudde have pointed out, Samuel says national and international bodies like the United Nations played a significant role in trying to make states aware of the importance of treating women as equals, thus they impose conventions such as the UN CEDAW to be ratified by states. Most African women are married under the customary law, and have never enjoyed the rights enjoyed by other citizens. Customary marriage entrenched the forfeiture of their rights to citizenship.<sup>75</sup>

The Botswana Citizenship Act (1984) did not compel Botswana women to give up their citizenship upon marriage to a foreign husband, but it limited their capacity in two ways; first, these women could not pass Botswana citizenship onto their legitimate children since they were supposed to acquire their father's foreign citizenship by descent. Children born in Botswana were no exception. Secondly, she had limited capacity to influence her husband's attainment of Botswana citizenship by naturalisation. This situation was different with Botswana male citizens since they could pass their citizenship on to their legitimate children and foreign citizen wives could also obtain a certificate of naturalisation.<sup>76</sup>

When applying for registration as a citizen of Botswana, the applicant had to state his or her name in full and their age, state the father's name in full and whether he was (if deceased) a citizen of Botswana in accordance with the constitution. The applicant also had to

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<sup>75</sup> Samuel, 'Women Married in Customary Law: No Longer Permanent Minors', p. 24.

<sup>76</sup> Athaliah Molokomme, 'Marriage: What Every Woman Wants or a Declaration of 'civil death'? Some Legal Aspects of the Status of Married Women in Botswana', *Pula: Botswana Journal for African Studies*, Vol. 4, No. 1 (1984), p. 75.

produce evidence of the father's Botswana citizenship, such as his birth certificate or a sworn affidavit, with the father's place of birth included.<sup>77</sup> The application for citizenship, therefore, was not concerned with the mother's information and it clearly showed that the father determined one's citizenship. All questions for a citizenship applicant probed the father's details.

Vincent Segwai was born in the United Kingdom but his father was a Motswana. He wished to regain his citizenship as a Motswana. He therefore wrote a letter of enquiry on the procedure to the Minister of Home Affairs. Permanent Secretary A.H Donal for the ministry replied to Segwai's enquiry in 1967, and pointed out that:

It is correct that there was no Botswana citizenship before independence, and therefore it was not possible for you to naturalise or register as a Bechuanaland citizen in 1963, 1964 or 1965. If you will let me know the replies to the following questions, I will endeavour to advise you regarding your present position in relation to applying to become a citizen of Botswana. QUESTIONS - what were the place and date of your birth? Where was your father born? Have you or your father at any time changed the citizenship with which you were born, either by own act or otherwise? Without this information I could only quote the law to you at length, and you could as easily look it up in full in the High Commissioner's office.<sup>78</sup>

As stated by Bronwen Manby, most African countries have two basic concepts that define the laws governing citizenship. These concepts include:

*jus soli*, meaning, literally law or right of the soil, where by an individual obtains citizenship because he or she was born in a particular country. The other concept is *jus sanguinis*, meaning law or right of blood, where citizenship is based on descent from parents who themselves are or were citizens.<sup>79</sup>

Putting things in writing is easier than putting them into practice. An example can be cited from Namibia where women activists and politicians had an enormous influence in the process of writing the constitution. As a result, the Namibian constitution was hailed as a major victory for women's rights and non-sexist politics. Critics have pointed out that even if

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<sup>77</sup> BNA, MHA 5/20, Application for Registration as a Citizen of Botswana.

<sup>78</sup> BNA, MHA 5/20, Letter from A.H Donal, Permanent Secretary, Ministry of Home Affairs, to Vincent Segwai, 1<sup>st</sup> March 1967, Gaborone.

<sup>79</sup> Bronwen Manby, *Citizenship Law in Africa: A Comparative Study 2<sup>nd</sup> edition* (New York: Open Society Foundation, 2010), p. 2.

the constitution was addressing women's rights, it did not make discrimination against women a criminal offence and only recommended affirmative action.<sup>80</sup> This can be related to the Botswana constitution which also promised equality amongst all citizens, but this did not happen which was largely due to the Marriage and Citizenship Acts.

Chari pointed out that women mostly face oppression when it comes to citizenship rights, that is they are not afforded the same level of citizen status than men. Countries that respect and uphold women's rights may grant equal citizenship rights to all citizens, but patriarchal societies would automatically segregate women from men as the latter determine who enjoys the rights, while societal discrimination and social exclusion undermine the benefits of citizenship.<sup>81</sup> In a society that is built on the belief that women are subordinate to men, laying down equal rights for citizens will not work unless people themselves change their attitudes regarding the relationship between women and men.

## **Conclusion**

Women become extremely vulnerable when laws are put in place by the government to prevent them from obtaining valuable property. These laws also fail to recognise and give credit to the different economic contributions they make towards the development of the country. This makes it seem like men are the only important citizens in the country. As a result, women are put in a position where they feel that they have no alternative but to accept mistreatment in the marriage.<sup>82</sup>

In the absence of a guarantee that equality between men and women takes precedence over custom, traditional practices that discriminate against women may be lawful in some

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<sup>80</sup> Geisler, *Women and the Remaking of Politics in Southern Africa: Negotiating Autonomy, Incorporation and Representation*, p. 130.

<sup>81</sup> Chari, 'Gendered Citizenship and Women's Movement', pp. 47-48.

<sup>82</sup> Van Hook and Ngwenya, 'The Majority Legal Status of Women in Southern Africa: Implications for Women and Families', p. 183.

circumstances.<sup>83</sup> The Constitution specifies that the government has assumed an obligation to ensure that at all levels of administration and the basic rights of the people will be respected and protected.<sup>84</sup> When women like Unity Dow stepped up to liberate women from the position they were put in by the patriarchal nature of the country, this was a breakthrough for women. The Dow case also led to the review of laws which discriminated against women, especially in marriage. The Abolition of Marital Power Act (2004) also put the Kalanga women in a much better position of being equals in families. As a result the Dow case and the AMPA (2004) led to the transition of Kalanga women's position from that of being minors to that of being the partners of their husbands.

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<sup>83</sup> Rekha A. Kumar 'Customary law and human rights in Botswana' *Human Rights & Human Welfare*, Working paper, no.52 (2009), <http://www.du.edu/korbel/hrhw/workingpapers/2009/52-kumar-2009> [accessed 9-April-2014].

<sup>84</sup> *Ibid.*

## CHAPTER 3

### FROM MINORS TO EQUALS: TRANSFORMING KALANGA WOMEN

This chapter analyses the transition of women from the status of being minors to being equal partners with their husbands. It also addresses the issues of how patriarchal society in Botswana was challenged by the ruling of the High Court on the Citizenship Act (1984) and the enactment of the Abolition of Marital Power Act (AMPA) of 2004. It examines how the Kalanga women benefited from the ruling of the High Court and the AMPA (2004). The chapter draws extensively on evidence from the court case between Unity Dow versus the State, with newspapers giving insight into what transpired when the Abolition of Marital Power was enacted in 2004.

Intense changes in the roles, status and socio-economic wellbeing of women around the world have come as a result of modernisation, development and globalisation in recent decades.<sup>1</sup> The world has always been male-dominated and women have always had to work hard to be recognised. Since men usually occupied high positions in the society they ensured that the laws that were formulated favoured them. Examples can be cited in the Botswana Citizenship Act (1984), the Marriage (Amendment) Act (1967), or even the fact that men were allowed to marry more than one wife.<sup>2</sup> Jeff Ramsay stated that many women believed that men were meant to be household heads, despite the fact that women suffered from being treated as minors for a very long time. They seemed to believe the norm that husbands should be in control. They believed that these were traditions which ought to be respected, as Changu Mannathoko indicated in the previous chapter.<sup>3</sup>

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<sup>1</sup> Robert Hitchcock, Meloin Johnson and Christine E. Haney, 'Indigenous Women in Botswana: Changing Gender Roles in the Face of Dispossession and Modernisation', in Robert Hitchcock and Diana Vincling (eds), *Indigenous People's Rights in Southern Africa* (New Jersey: New Transaction Publishers, 2004), p. 166.

<sup>2</sup> The Editor, 'Woman's Plight', *The Botswana Guardian*, 11 October 1991, p. 6.

<sup>3</sup> Jeff Ramsay, 'In Defence of Matriarchy', *Mmegi/The Reporter*, 20 February 1992, p. 14.



Policy makers and politicians tend to ignore women's needs and do not consider them when it comes to their participation in running the affairs of their countries. This general observation was made by African women expressing dissatisfaction with their respective country's governments. These women's rights activists, including Sara Hluphekile Longwe from Zambia, Rose Chege from Kenya and Puseletso Kidd from Botswana, aired their views at the UNICEF conference on Women Empowerment in Eastern and Southern Africa held in Gaborone in 1992. According to Pamela Dube, reporter for *Mmegi (The Reporter)*, most African women do not understand anything about the political and economic systems of their countries because they lack education in those spheres. This could also be because most African women were taught that they were always second to the boys in the family. Sara Hluphekile Longwe, a women's rights activist from Zambia, advocated for the eradication of the oppressive and discriminative laws of the African countries. She argued that:

Women are often discriminated against in their access to factors of production especially in access to credit, land and skills training. There is a structure of gender inequality which is sometimes founded in discriminatory laws but which in most countries is more often due to administrative and customary practice which is not sanctioned by discriminatory law.<sup>4</sup>

Shadrack Rathapo noted the emergence of women's non-governmental organisations in Botswana, because they wanted to address the plight of women in the country. Organisations like *Emang Basadi* which was formed in 1986, wanted to empower women through educating them about the laws that affected them and counselling them to build better lives. Women were to be encouraged to stand up for themselves, and also to take part in the development of the country.<sup>5</sup> When *Emang Basadi* was started, women around the world had started demanding equality with men on all fronts. Women who were at the forefront of the formation of *Emang Basadi*, that is Athaliah Molokomme, Onalenna Selolwane and others, mobilised other women in Botswana to demand the government to change legislation so as to bring equality between men and women. *Emang Basadi* really

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<sup>4</sup> Pamela Dube, 'Women Must Believe in Themselves', *Mmegi/The Reporter*, 3-9 July 1992, p. 2.

<sup>5</sup> Shadrack Rathapo, 'The State of Gender Information in Botswana', *Libri*, Vol. 50, No. 14 (2007), p. 304.

challenged the politics of Botswana, and many viewed it as disruptive because Botswana politics had always been very calm and had never been faced with confrontation. The organisation helped women to challenge the status quo. The stable patriarchal environment of Botswana was greatly challenged, when *Emang Basadi* together with Unity Dow stood up for women's rights.<sup>6</sup>

Ernest Moloi added that, by 1991, it had been 25 years since Botswana's independence and women had worked very hard to make sure that their voices were heard in their pursuit of equal rights. They had started doing jobs that were previously reserved for men, including road construction, building, and digging trenches. Botswana were now aware of these developments. It was no longer against tradition to see women doing such work. Botswana is a society which upholds African norms and traditions, one of which is that women are a weaker sex and should be consigned to the background. These women were made to believe that their place was in the kitchen and in raising kids. Even though women were confined to the background, it is interesting to note that the society changed its beliefs on the positions of women. A woman who worked for the Roads Department was quoted as saying:

Government must realise that us women can also do jobs reserved for males. They should let performance and capability be the instruments by which to define who to employ for a certain job. There must be equality in the salaries for men and women doing the same jobs.

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Kebasaletse, who also worked for the Roads Department, said that men who found women doing the same jobs as them used to discourage them by telling them that they were too weak to be doing the kind of job. These men were not interested in leaving behind the old beliefs that a woman's place was at home. Every time women talked about issues that

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<sup>6</sup> Agnes Ngoma-Leslie, *Social Movements and Democracy in Africa: The Impact of Women's Struggle for Equal Rights in Botswana* (New York: Routledge, 2006), p. 58.

<sup>7</sup> Ernest Moloi, 'Women in Society - Botswana Women Victims of Sexual Prejudice', *The Midweek Sun*, 25 September 1991, p. 11.

affected them they seldom used ‘discrimination’ as the definition of the situation. By 1991, women had made significant progress in terms of doing the same jobs as men; they held the same positions as men even though men still dominated. Mrs Gupta, whose husband was a teacher at Naledi Senior Secondary School in Gaborone, said:

Much as it is apparent, to a large extent men’s attitudes towards women are still as they were thousands of years ago. However, all these advancements in women’s lives are not without opposers [*sic*].<sup>8</sup>

According to Chris Machokoto, since women were now considered equal to men, it was time they also performed heavy-duty jobs such as the digging of trenches. If they wanted to be paid the same salary as men, this meant they had to tackle the same jobs as men and are not to be given lighter duties because of their gender, as those times were now in the past. Machokoto insisted that the westernisation of African culture had destroyed the good relations that husband and wife had previously enjoyed. Decades earlier, men were in control of everything. There were fewer divorces because of the respect wives had for their husbands, but the Acts had escalated the divorce rate because women wanted to be treated like men.<sup>9</sup>

It was hard for women who live in rural areas and who are used to a traditional way of life to suddenly adapt to a different lifestyle.<sup>10</sup> At the Fourth World Conference in Beijing in 1995, governments were urged to:

Enact and enforce laws and introduce implanting measures of redress and access to justice in case of non-compliance, to prohibit direct and indirect discrimination on grounds of sex, including by reference to marital or family status.<sup>11</sup>

This was a challenge to patriarchal countries like Botswana who had to change the people’s mind-set concerning norms and beliefs. They were facing a huge universal change where women were now being brought to the forefront in an attempt to foster equality.

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<sup>8</sup> *Ibid.*

<sup>9</sup> Chris Machokoto, ‘Women Have Strived for Justifiable Cause’, *The Botswana Guardian*, 4 October 1991, p. 6.

<sup>10</sup> Moloi, ‘Women in Society: Botswana Women Victims of Sexual Prejudice’, p. 11.

<sup>11</sup> United Nations, *Report of the Fourth World Conference on Women: Beijing 4-15 September 1995* (New York, United Nations, 1996), p. 76.

It is worth noting that patriarchal states like Botswana and Kenya had their reservations when it came to criminalising sex discrimination. They feared that women would file suits in courts of law. As a result, women in most of these countries were affected by such provisions and denied constitutional protection on the basis of their gender.<sup>12</sup>

### **The citizenship case 1990 - An aid for the transition of women's status**

Unity Dow is a citizen of Botswana who was born to Botswana parents. She got married to Peter Nathan Dow who was a citizen of the US. He had lived in Botswana for about fourteen years by the year 1990. Before Peter and Unity got married in March 1984, they had a child, Cheshe Dow, born in 1979. After they got married they had two other children, Tumisang Dow (1985) and Natasha Dow (1987).<sup>13</sup> These two children were born after their parents got married and after the 1984 Citizenship Act was enacted. This meant that they were considered citizens of the US.

Dow took the government of Botswana to court in a civil case as she alleged that the 1984 Citizenship Act had discriminatory clauses against women. She challenged sections 4, 5 and 13 of the Citizenship Act (1984),<sup>14</sup> and pointed out that they went against the Botswana Constitution.<sup>15</sup> The Government of Botswana as the defendant was represented by deputy Attorney General Ian Kirby, who admitted that there were laws that discriminated against

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<sup>12</sup> Vicky W. Mucai-Kattambo, Janet Kabeberi-Macharia and Patricia Kameri-Mbote, *Laws and the Status of Women in Kenya* (Nairobi: Women and Laws in East Africa-Laying the Foundation, 1995), p. 2.

<sup>13</sup> Unity Dow (ed.), *The Citizenship Case: The Attorney General of the Republic of Botswana vs Unity Dow – Court Documents, Judgements, Cases and Materials* (Gaborone: Lentswe La Lesedi, 1995), p. 108, See also High Court of Botswana, 'In the High Court of Botswana Held at Lobatse', *Human Rights*, Vol. 13, No. 4 (1991), p. 614.

<sup>14</sup> Citizenship Act of 1984, Section (4) (1), A person born in Botswana shall become a citizen by birth and descent if, (a) his father is a citizen of Botswana, (b) in the case of a person born out of wedlock to a Botswana mother. Section (5), (1), a person born outside Botswana shall become a citizen of Botswana by descent if, (a) his father is a citizen of Botswana, (b) in the case of a person born out of wedlock to a Botswana mother. A person born before the commencement of this Act shall not be a citizen by virtue of these sections unless he was a citizen at the time of such commencement. Section (13) makes special provision for application for naturalisation by a woman married to Botswana citizen man and no such special provision exists for foreign husbands of Botswana citizen citizenship, See, Unity Dow (ed), *The Citizenship Case: The Attorney General of the Republic of Botswana vs Unity Dow – Court Documents, Judgements, Cases and Materials*, pp. 6-7.

<sup>15</sup> Desmond Montshiwa, 'Citizenship Amendment Act Case Set for November', *Botswana Daily News*, 17 September 1990, p. 4.

women but added that there were other laws that discriminated against both men and women. He continued to point out that with law at least one person's liberty would be limited one way or the other at some point in life. Kirby also said that the law reflected 'the morals of the Botswana society.' Parliament with the power vested in it could determine the pace at which society changed its morals.<sup>16</sup>

After Dow took the government to court, there was a lot of media coverage on the case. She and Linda Pfotenhauer, a freelance journalist, sat down in an interview to analyse the main argument of the case. To start, Dow explained what the Citizenship Act was, and how the 1982 Act differed from the 1984 Act. She pointed out that the Citizenship Act was a piece of legislation that determined who would be a citizen of a particular country. Dow also explained that before 1982, one would become a citizen of Botswana if one was born in Botswana or if born to a Motswana, even if they were out of the country.<sup>17</sup> There was no discrimination then, as long as one of the parents was a Botswana citizen, and nor did their marital status matter.

When Dow launched the case, many women who were affected by the Act stepped forward. They now had hope that their children would also be considered citizens.<sup>18</sup> As a result, the Law Reform Committee then went out again to get the views of the public. The Act was read out clause by clause in all committees. Although the Batswana agreed with the stated intention of the Act, a small group of educated women, vocal and articulate, begged to differ. Most of them were married to foreigners and expressed their views about the Act. They pointed out that it was discriminatory and denied children born in wedlock to Batswana mothers their rights. These women wanted children born to Batswana mothers married to

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<sup>16</sup> Kebareng Solomon, 'Citizenship Act challenged in the High Court', *Botswana Daily News*, 7 November 1990, p. 3.

<sup>17</sup> Linda Pfotenhauer and Unity Dow, 'An Interview with Unity Dow', *Botswana Notes and Records*, Vol. 23 (1991), p. 101.

<sup>18</sup> Keto Segwai, 'More Women Challenge the Citizenship Act', *Mmegi/The Reporter*, 17-23 August 1990, pp. 1 & 3.

foreign fathers to have the option of becoming Botswana citizens by descent from their mothers. These women argued that:

these discriminatory aspects of the law undermine both commitment and loyalty and may compel these victims to lose their enthusiasm to the extent of deciding to leave the country of their adoption.<sup>19</sup>

The Law Reform Committee submitted a report after a country-wide enquiry into the citizenship laws to the Ministry of Home Affairs in 1980. That was when the ministry decided to implement the recommendation through enacting the 1982 Citizenship Act.<sup>20</sup> Dow pointed out that in the 1982 Citizenship Act one acquired citizenship if the father was a citizen of Botswana or if the person was not entitled to any other citizenship. It was this Act which was amended, became the 1984 Citizenship Act, and was challenged in court. The new Act stipulated that fathers could only pass citizenship on to their children. If a Motswana woman was married to a foreign husband she could not pass citizenship to her children, yet, if a Motswana man was married to a foreign woman, he could indeed pass his citizenship on to the children. Women could only pass citizenship to their children if the children were born out of wedlock to a foreign father.<sup>21</sup> This was deemed discrimination since women were deprived of the opportunity to pass citizenship on to their children while their male counterparts could.

Elsie Alexander, the coordinator of the Citizenship Case Fund, asserted that when Botswana gained its independence in 1966, any child born to any citizen of Botswana became a citizen of Botswana. The 1984 Citizenship Act removed the right of Botswana women married to foreign husbands to pass their citizenship on to their children. The Act violated the constitutional and human rights of women and children.<sup>22</sup> Not a single woman sat on the

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<sup>19</sup> Government of Botswana, *Report of the Law Reform Committee, on: (i) Marriage Act, (ii) Law of Inheritance, (iii) Electoral Law and (iv) Citizenship Law* (Government Printers: Gaborone, 1986), pp. 11-12.

<sup>20</sup> *Ibid*, p. 11.

<sup>21</sup> Pfothenhauer and Dow, 'An Interview with Unity Dow', p. 101.

<sup>22</sup> Elsie Alexander, 'Citizenship Case Support Fund', *Mmegi/The Reporter*, 7-8 September 1990, pp. 12-13.

committee which carried out the country-wide enquiry that led to the enactment of the 1982 Citizenship Act. Yet, as noted above, this Committee brought back what the majority of the people in the country had suggested about the Act.<sup>23</sup>

A consequence of the 1984 Botswana Citizenship Act's discrimination against women was that it was incompatible with Article 3 and 18 of the African Charter on Human and People's Rights which was adopted in June 1981 and entered into force in October 1986. Article 3 of the Charter stated that each individual is equal before the law, and that the law should protect everyone. Article 18 of the Charter on the other hand, obliges that all signatory states:

...shall ensure the elimination of all discrimination against women and shall ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>24</sup>

Botswana had many laws that subordinated women and put them in a position of inferiority, but the laws have since been revised in order to improve their position and conditions. The Citizenship Act of 1984 not only caused emotional and psychological pain through its effects on mothers and children. It also put women in a vulnerable position since it conflicted with their fundamental freedoms<sup>25</sup> and gave them limited rights compared to men.

Dow appeared before Judge Justice Martin Horwitz to prove that the Citizenship Act (1984) denied the rights guaranteed to her by the Botswana Constitution. She was represented by her attorney, Jules Browde, who declared that sections 4, 5 and 13 of the Citizenship Act contradicted the Constitution as they 'encroached on her liberty and were discriminatory'.

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<sup>23</sup> Keto Segwai, 'Citizenship Act on the Balance: Judgement Reserved Indefinitely', *Mmegi/The Reporter*, 9-15 November 1990, p. 2.

<sup>24</sup> Dow (ed.), *The Citizenship Case: The Attorney General of the Republic of Botswana vs Unity Dow – Court Documents, Judgements, Cases and Materials*, p. 118. See also African (Banjul) Charter on Human and Peoples' Rights.

<sup>25</sup> Human Rights Watch, 'Botswana Second Class Citizens: Discrimination against Women under Botswana's Citizenship Act', *Human Rights Watch: Africa*, Vol. 6, No. 7 (1994), pp. 4 & 15.

Mrs Dow's three children were all born in Botswana and lived in Botswana their whole lives. The last two were regarded as citizens of the US because of their father's citizenship and since they were born in wedlock. This meant they were not considered citizens of Botswana. Browde argued that the Act restricted who women could marry and favoured men. Men could get married to whoever they wished since the marriage would not bring any complications to their lives compared to women who had to think about what marriage to a foreigner would mean to their children. As a consequence, 'marrying a foreign national becomes a dangerous choice', Browde said. The Act discriminated against women and subjected them to degrading treatment, Browde continued, and he argued that they should be freed from this legislation which downgraded them to an inferior position. He also pointed out that the Act was outdated and was no longer relevant:

It goes against both United Nations Charter and the African Charter on Human and People's Rights which construe the Constitution. He added that Botswana was committed to both charters.<sup>26</sup>

The deputy Attorney General countered by arguing that it cannot be said that the 1984 Citizenship Act discriminates against women since it was amended to cater for children born out of wedlock to foreign fathers so that they could take their mother's citizenship. It was argued that this should be sufficient proof that the Botswana Constitution was never meant to discriminate against women.<sup>27</sup> Judge Justice Martin Horwitz said that since he was dealing with a human rights case he would take a more generous approach in coming to a judgement. He furthermore stated that the purpose of the Constitution was to guarantee all citizens that there would be no discrimination on any basis and that it would protect them. The judge pointed out that people were now living in an era where women could no longer be treated as minors, being used to 'satisfy males' whims and wishes'. It was unheard of for a country like Botswana to be a signatory on conventions that were against women's discrimination and still

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<sup>26</sup> Solomon, 'Citizenship Act Challenged in the High Court', p. 3.

<sup>27</sup> Sun Reporter, 'Dow Has no Right to Litigate on Behalf of Her Kids and Hubby-Ian Kirby' *The Midweek Sun*, 12 February, p. 1.



upheld laws that did exactly that.<sup>28</sup> That did not prove anything because children born to foreign fathers married to their mothers could not live in Botswana with their mothers.

In the opinion of Sibusisiwe Boy, a middle-aged Kalanga woman, Unity Dow had no case:

I agree with the 1984 Citizenship Act, this is because children belong to the husband not the wife. If people get married, the wife should be prepared to move to the husband's country of origin. Children can never be considered the wife's. Isn't it that when a woman gets married she takes the husband's family name? Then this means the children should be given their father's citizenship not their mother's. If a Motswana woman marries a foreigner she should be ready to move, being in Botswana should be on temporary basis. If I get married I will move out of my parent's house to my husband's family and my children would be considered my husband's.<sup>29</sup>

Furthermore, Mesh Moeti quoted Athaliah Molokomme in asking:

Why should tradition be selectively and negatively used; why is it considered to be static when it is convenient, but dynamic when we wish to discard our skins for three piece suits and ties, or take away constitutional power from chiefs, or sell tribal land?<sup>30</sup>

Molokomme also questioned assumptions made by the Law Reform Committee that most women who were against the Citizenship Act were women married to foreign husbands. The Committee did not make a survey of who attended their meeting; neither did they check their marital status and the nationality of their spouses. Molokomme says she attended some of the meetings and she could not recall any such poll. She said most of the people who argued against the law were not married to foreign husbands, and even if they were, it was not relevant to the report because the Committee was supposed to be objective.<sup>31</sup>

Browde said: 'A Constitution is a living document which must cater for the aspirations of future generations; therefore it must be interpreted liberally or in a more generous approach'.<sup>32</sup> Kirby tried to convince the court that Unity Dow had no right to litigate on behalf of her children because Botswana followed a patrilineal system, which

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<sup>28</sup> Ernest Moloi, 'Historic Verdict for Dow', *The Botswana Guardian*, 14 June 1991, p. 1.

<sup>29</sup> Interview with Sibusisiwe Boy, 13/02/14.

<sup>30</sup> Mesh Moeti, 'A Law Comes Before the Courts', *Mmegi/The Reporter*, 13-19 July 1990, p. 7.

<sup>31</sup> *Ibid.*

<sup>32</sup> Ernest Moloi, 'The Word "sex" Deliberately Left Out to Allow Discrimination-Kirby', *The Botswana Guardian*, 14 February 1992, p. 9.

means her husband was the legal guardian of the children, not her. Kirby continued to insist that if the Citizenship Act did indeed discriminate against women and was contradictory to the constitution, then it affected men in the same way. He asked Browde:

Putting aside the meaning of 'discrimination' for a while, take a situation where a Motswana man marries a non-citizen who is liable to deportation, would this not be discriminating against the man?<sup>33</sup>

Section 15 of the Botswana Constitution<sup>34</sup> deals with discrimination but it does not highlight anything about discrimination on the basis of sex; in fact it seems the word 'sex' was deliberately omitted. Kirby said the word 'sex' had deliberately been omitted since Botswana is a patriarchal nation which adheres to the common law, so lineage and guardianship would continue to follow the male domicile. Browde thought that the only reason why the word 'sex' was not included in section 15 of the constitution was to allow discrimination on that basis. Judge Akinole Ayanda found it hard to believe that Botswana, as a signatory of the international treaties and conventions on abolition of discrimination, actually passed an act which discriminated against women.<sup>35</sup> The threat was not against her, it was against her husband and children, and so Dow had no right to bring the case before a court of law.<sup>36</sup>

The law can be challenged by any one at any given time, which means that laws are made to be changed, said Advocate Browde. He continued to say that the country's Bill of Rights was supposed to be supported by such acts rather than be contradicted by them. Browde also said it was misleading for Kirby to say that parliament was sovereign and that this was used as an excuse by those who did not want to follow what the Bill of Rights had

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<sup>33</sup> *Ibid.*

<sup>34</sup> See Appendix 5.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Sun Reporter*, 'Dow Has no Right to Litigate on Behalf of Her Kids and Hubby-Ian Kirby', p. 1.

established. Concluding his submission, Browde pointed out: 'it is a remarkable decision to make in 1990 in a country with a Bill of Rights to discriminate against women.'<sup>37</sup>

According to Pfothenhauer and Dow, the latter had pursued the case because the citizenship law in Botswana had been unjust since the time it was passed. It was a serious manifestation of gender discrimination in Botswana. She explained that women were being oppressed and so she felt it was a good time to pursue this case. Dow then gave an example of women who suffered because of this law. She said there was one particular case where a Motswana woman was married to a Nigerian citizen. This woman had complications with her pregnancy so was sent to South Africa to see specialists and also gave birth there. On her return to Botswana with the baby, she was denied entry by the immigration officers because she did not have residence papers for the baby. They insisted that they would not allow the baby into the country without the papers since the baby was Nigerian. Pfothenhauer asked Dow if there was a gap between the way rural and urban women viewed the Citizenship Act. In her response Dow pointed out that women saw this issue the same way. The difference lay in the way they dealt with it. Women in rural areas felt helpless, like there was nothing they could do about it, whilst those in urban areas knew of their rights and the means they could use to advocate for their rights. Most, if not all women felt the Act was discriminatory.<sup>38</sup>

Sydney Pilane, an attorney in Gaborone, argued that when the Constitution of Botswana was enacted in 1966, it was meant for everyone. It was also intended to differentiate between the conduct and relationship of Botswana society. Joshua Sibonge, reporter for *The Midweek Sun*, argued that, surprisingly, people want to forget that the same Constitution they lived by for so many years had glued them to one thing and they lived in harmony. They have become westernised to the extent that they talk about discrimination and

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<sup>37</sup> Segwai, 'Citizenship Act on the Balance: Judgement Reserved Indefinitely', pp. 1-2.

<sup>38</sup> Pfothenhauer and Dow, 'An Interview with Unity Dow', pp. 103-104.

unfair treatment. Athaliah Molokomme, who was a law lecturer at the University of Botswana, argued that ‘the government cannot enact a law which discriminates on the basis of gender.’<sup>39</sup> Omphemetse Motumise, also a lecturer in law at the University of Botswana, pointed out that, besides the fact that Pilane was saying that although Botswana was a patrilineal society this does not mean there should be discrimination on the basis of sex, it was also time the government took initiatives to close the gap between men and women through laws that were in place. Another lawyer, Themba Joina, advised women to stand up and be active in politics so that they can make their way to parliament. This would give them a better chance of changing the laws themselves and make non-discriminatory laws. Moupo, also a practicing lawyer, compared Pilane to ‘African dictators whom he said idealized African societies so that they could continue to repress them’.<sup>40</sup> These lawyers opposed Pilane because they knew what patriarchy did to women’s rights.

According to Dow, in the recent past it was not the norm for a woman to live with children in a place different from where the father resided. This was even supported by the Citizenship Act of 1984, but it was no longer applicable to modern-day society. This is the reason why the United Nations General Assembly made the Declaration on the Elimination of Discrimination against Women in November 1967. Included was the provision that ‘discrimination against women, denying or limiting as it does their equality of rights with men is fundamentally unjust and constitutes an offence against human dignity’.<sup>41</sup>

### **Marital power abolished**

Kalanga men had long been considered the guardians of minor children, heads of families and even heads of villages. They also had the liberty to discipline their wives. These

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<sup>39</sup> Joshua Sibonge, ‘Lawyers Differ with Pilane on Dow Verdict’, *The Midweek Sun*, 28 October 1992, pp. 1-2.

<sup>40</sup> *Ibid.*

<sup>41</sup> Dow (ed), *The Citizenship Case: The Attorney General of the Republic of Botswana vs Unity Dow – Court Documents, Judgements, Cases and Materials*, pp. 117-118.

are some of the practices that had been considered as unchangeable and unchallengeable truths.<sup>42</sup> Most elders, especially in rural areas, did not agree with an act that brought about equality between men and women. They believed the Act tarnished the natural way of things.<sup>43</sup> Rhoda Howard, though she feels that women needed freedom, she did not agree with the use of legislation in the abolition of cultural norms. She pointed out that Kalanga women, like other women in Botswana and the rest of the world, ought to be guaranteed individual rights. They should be given rights as individuals as to whether they want to follow their culture, live under patriarchy so as to fulfil their cultural norms, or opt out of some of their traditional customs. Even if it was the right thing to do to accord women the freedom to go along with traditional customs, this does not mean that the abolition of deeply rooted and valued customs through legislation like the AMPA (2004) was not appropriate.<sup>44</sup>

On the contrary Margret Nasha pointed out that:

I believe some aspects of our culture have outlived their usefulness. During traditional pre-marital counselling by elderly women, a young bride-to-be was encouraged to be subservient and submissive to her husband. Marriage after all is supposed to be a union of equals, bound together by reciprocal love and mutual respect.<sup>45</sup>

Sipho Showa wrote about an old Scottish proverb which says ‘it’s a sad house where the hen crows louder than the cock’, which means women should be seen but not heard. Showa said that was no longer the case and that women had come out to advocate for their rights and plead for the change of laws that discriminated against them. The Marital Power Bill was one of the steps that the government took to ensure equality. Not all men were happy about this. Things changed and women started to speak up for themselves since it was time they were given a platform to raise their concerns. Democracy and culture gave everyone the

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<sup>42</sup> Unity Dow and Puseletso Kidd, *Women, Marriage and Inheritance* (Gaborone: Women and Law in Southern Africa Trust, 1994), p. 1.

<sup>43</sup> Machokoto, ‘Women have strived for Justifiable Cause’, p. 6.

<sup>44</sup> Rhoda Howard, ‘Human Rights and Personal Law: Women in Sub-Saharan Africa, *A Journal of Opinion*, Vol. 12, No. 1/2 (1982), p. 45.

<sup>45</sup> Margaret Nasha, *Madam Speaker Sir! Breaking the Glass Ceiling: One Woman’s Struggle* (Gaborone: Diamond Educational Publishers, 2014), pp. 36-49.

right to voice their opinions. The main question though, was whether the abolition of marital power would change men's attitude towards the position of women in the family and the society.<sup>46</sup> Showa quoted feminist Simone de Beauvoir, who wrote that:

a woman within marriage does not enjoy the dignity of being a person; she herself forms part of the patrimony of men. Perhaps the changing of the marital power status will bring the much-needed respite for women. The concern; however is that there are other much deep rooted issues which would continue making it difficult for women to find autonomy through the rejection of conventional gender role arrangements under patriarchy.<sup>47</sup>

Moeng Pheto, the then Minister of Labour and Home Affairs, presented the Abolition of Marital Power Bill to parliament towards the end of 2004, as indicated in Chapter 1. It was a way of showing the efforts made by the government to clean the statute books and common laws of provisions that discriminated against women and were gender insensitive. The minister highlighted that:

the main thrust lies in the introduction of a fair marital property regime, to provide for domicile of choice for married women as well as to provide for equal capacity between spouses in all matters concerning the conduct of their marital affairs.<sup>48</sup>

Pheto said that the current law placed women in a legally subordinate position, and that this Bill was meant to abolish the powers that husbands had over their wives through the common law.<sup>49</sup> Botswana shares a common law tradition with South Africa, but South Africa abolished marital power in all marriages in 1997. The enactment of the Abolition of Marital Power Act in 2004 showed that Botswana was on the right path of bringing matrimonial property law in line with what was happening in Southern Africa and the rest of the world.<sup>50</sup> The Abolition of Marital Act (2004) is crucial for this dissertation, but it is mostly

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<sup>46</sup> Sipho Showa, 'Women's Emancipation Calls for More Than a Change in Law', *Mmegi/The Reporter*, 15 December 2004, pp. 8 & 10.

<sup>47</sup> *Ibid.*

<sup>48</sup> Lorato Galeage 'Pheto Presents Abolition of Marital Power Bill' *The Botswana Daily News*, 2 December 2004, p. 3.

<sup>49</sup> *Ibid.*

<sup>50</sup> E.K. Quanash, 'Abolition of Marital Power in Botswana: A New Dimension in Marital Relationship?', *University of Botswana Law Journal*, Vol. 1 (2005), p. 8.

concentrated on Sections 4, 5, 16, 17 and 18.<sup>51</sup> This is because these sections address issues that totally affected women in families.

The law intended to eliminate all restrictions on women due to marital power and the title that men had as head of their families. Pheto said that after the abolition of marital power, spouses would be considered equal in dealing with joint estates and the disposal of assets and their administration. From now on, both the husband and the wife would have to seek approval or consent from the other when dealing with property or joint estate. He explained that the amendment would provide for spouses married in community of property and legal action would be taken against spouses who made decision without the consent of the other. This new act would mean that spouses would have to share the costs generated by any debts incurred by the other in purchasing assets that were jointly theirs. The minister also said that women would be able to choose their domicile and could obtain the guardianship of the minor children. They have the same requirements as men in matters concerning minor children.<sup>52</sup> Nevertheless, Lot Moroka, *The Botswana Guardian* columnist, pointed out that many married women did not understand the difference between getting married in community of property and out of community of property. Most of these, because of the excitement of the upcoming marriage, did not study their options and what each of the options meant. They therefore got married in community of property or out of community of property and signed everything in the name of the husband which ultimately worked to their disadvantage.<sup>53</sup>

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<sup>51</sup> This act would not apply to the customary and religious marriages. Abolition of Marital Power, Section (4) Husband's marital power, abolished, section (5), abolished Common law position of the husband as the head of family. Section (16), the domicile of the wife was not by virtue of marriage considered to be the same as the husband's, section (17) the domicile of a minor child shall be the place which the child is closely connected and Section (18) parents have equal guardianship over minor children. For more see, Government of Botswana, *The Abolition of Marital Power Act, 2004* (Gaborone: Botswana National Assembly, 2004).

<sup>52</sup> Galeage, 'Pheto Presents Abolition of Marital Power Bill', p. 3.

<sup>53</sup> Lot Moroka, 'What Animal is Marital Power: Part 1', *The Botswana Guardian*, 11 February 2005, p. 10.

Botswana is a patriarchal society and so the enactment of the Abolition of Marital Power Act (2004) was a way of empowering women. It is not surprising that many men, including some parliamentarians, opposed the Bill. Traditionalists thought the Bill was disrespectful to men who hold unquestionable positions as heads of families. They viewed the Bill as an insult to their tradition.<sup>54</sup> Maatla Ramahobo, a columnist for *The Botswana Guardian*, pointed out that, contrary to what the traditionalists wanted to believe:

Gone are the days when a man's status was elevated within marriage so that his behaviour was considered above reproach and as a result wives tolerated infinity within marriage because they were expected to be submissive. This was the culture towards marriage. Traditional black culture prevented women from being able to control their husbands' behaviour.<sup>55</sup>

The MP for Tonota South, Pono Moatlhodi, was against the tabling of the Abolition of Marital Power Bill because he was not in favour of abolishing men's position as heads of their families. According to Moatlhodi this was uncalled for and against the Bible, from which he quoted: 'as Christ was head of the church, the husband would always remain head of the family'.<sup>56</sup> As Moatlhodi used the Bible to support his argument, Pelonomi Venson, the then Minister of Communications, Science and Technology, begged to differ with him by counter-quoting from the Bible, where 'it is stated in Genesis that God created male and female' and shows that men and women were created equally. Moatlhodi continued to point out that, besides the new law being against the Bible, it was also against the tradition and culture that has always held people tightly together.<sup>57</sup> Moatlhodi believed that the new law would destroy families since it was against the Bible, tradition and culture, everything which glued families together.

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<sup>54</sup> The Editor, 'Educate the Masses on Marital Power', *Mmegi/The Reporter*, 8 December 2004, p. 8.

<sup>55</sup> Maatla Ramahobo, 'Women Should Stand tall and Fight', *The Botswana Guardian*, 11 March 2005, p. 9.

<sup>56</sup> Thomas Nkhoma, 'Moatlhodi against Abolition of Husband as Family Head', *Botswana Daily News*, 2 December 2004, p. 3. See also Moabi Phia, 'Moatlhodi Angers Women MPs', *The Botswana Guardian*, 3 December 2004, p. 6.

<sup>57</sup> *Ibid.*



Richard Richard, a columnist for *The Botswana Gazette*, asserted that marital power was contrary to what other ministers had said. To him there was no link between marital power and biblical creation. Richard said marital power was just a form of common law, stressing that:

Christianity is a faith that emphasises justice, righteousness and the highest standard of mutual appreciation between spouses. It is inconceivable that righteousness or justice exists in the arbitrariness that is intrinsic to marital power. The abuse that our mothers and sisters endured under marital power is the main reason it has to be abolished.<sup>58</sup>

Some men claim superiority over women whilst they can barely take care of them.<sup>59</sup> This was common amongst the Kalanga women who cited during interviews how their husbands neglected their responsibilities but insisted on being the heads of their families. As pointed out by Kudzani Tagana in an interview:

I took care of myself and the kids when I was still married. I opened a tuck-shop, to sell fresh produce. When I walked around the village, many women envied and said my husband took very good care of me. I did all that myself because I did not want to embarrass him. I also had to pay for the children's school fees.

Residents in Borolong, a village predominantly populated by Kalanga speakers, were interviewed by *Mmegi* newspaper about the Bill. The villagers had different reactions about it. Torontle Ketswenyegile felt the purpose of the Act was just to formalise the reality of what was happening in most families, as women are and have always been the backbone of families:

any woman walks over her husband would not been influenced by the law. This would be because her personality, and even before the Bill, there were wives who disrespected their husbands. The Bill is not at fault, but we as human beings.<sup>60</sup>

Manaana Kgopo said the Act was long overdue as women had lived under oppression for a long time and it was time all that was put to an end. It was time women were also financially empowered.<sup>61</sup>

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<sup>58</sup> Richard Richard, 'Marital Power Unchristian?', *The Botswana Gazette*, 15 December 2004, p. 25.

<sup>59</sup> *Ibid.*

<sup>60</sup> Tduetso Setsiba, 'Villagers React to Abolition of Marital Power Bill', *Mmegi/The Reporter*, 11 January 2005, p. 5.

The MP for Boteti South, Thanda Lebonaamang Mokalake, said that it was time for the Abolition of Marital Power Act to be put in place, and this should have been done a long time ago. Mokalake pointed out how women had suffered because of the marital power state of marriages: some were treated like children whilst others lost everything when their husbands died, since the relatives would take everything with the belief that it belonged to the men. Margaret Nasha, who was Minister for Local Government, reminded the honourable house that Botswana was a signatory to the UN CEDAW and therefore they should not use culture as a way of subjecting women to unfair treatment.<sup>62</sup> According to her, Botswana was beyond the point of using culture as an excuse to oppress women.

Showa argued that doing away with oppressive laws was not instantly going to change the attitude of men towards women, because patriarchy is more complicated than writing down a few laws of what should and should not be done. 'The very patriarchal institution of heterosexuality is central to men's domination over women'. Kalanga women respected and worshipped their husbands. They were raised to know that the men are the heads and are made to believe that men were always in control and they were subordinates. It was not surprising that married women were not the only ones affected by this dependence on men. Even single woman had been cultured into letting boyfriends control their lives and property. It was necessary for the government to enact the AMPA (2004), so men would understand the torture that some women go through under patriarchy and that a lot has to be done for men to see beyond women as minors.<sup>63</sup>

Ponatshego Kedikilwe, MP for Madinare, welcomed the Bill as it concentrated on liberating women from the oppression they faced in marriages. Like Shaw Kgathi who was

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<sup>61</sup> *Ibid.*

<sup>62</sup> Nkhoma, 'Moatlhodi against Abolition of Husband as Family Head', p. 3. See also, Phia, 'Moatlhodi Angers Women MPs', p. 6.

<sup>63</sup> Showa, 'Women's Emancipation Calls for More Than a Thange in Law', pp. 8 & 10.

the MP for Bobirwa, Kedikilwe was concerned with the way of women married under customary and religious marriage lived when the Bill was enacted.<sup>64</sup> Having a single law on marriage was considered to be ideal, but there were other factors that needed to be considered, such as the fact that the Marriage Act was monogamous, and, being merged with polygamous customary law, would distort the entire arrangement. Another point was that if polygamy was to be introduced into the current marriage act because of terminal diseases and infertility, that would then undermine the existing monogamous marriages.<sup>65</sup>

Marital power did not exist only in common law marriages, and the elimination of marital power should be done across the board, including customary law. The Bill ought to be used as a basic standard of marital decency. Every woman had the right to enjoy its protection; it was not supposed to be used as a further measure of discrimination against women. The injustices that women married under the common law experienced were not any different from those that women married under customary marriages faced.<sup>66</sup> Richard pointed out that:

Maybe someone knows of a religion that gives us men autocratic powers over the family institution. It's increasingly funny how the government smarting under narrow populist political interests steers clear of making definitive reforms when they are most necessary. Maybe we need to establish from the government what form of protection it has arranged or intends to arrange for excluded groups of women now that those married under common law will have their backs covered.<sup>67</sup>

Shaw Kgathi, the MP for Bobirwa, felt that the government was slow in reviewing laws that discriminated against women, especially women wed in customary and religious marriages. He pointed this fact out in parliament during the debate after the tabling of the Abolition of Marital Power Bill. He was happy with the new Bill but his only problem with it

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<sup>64</sup> Lorato Galeage, 'PHK Welcomes Clauses Abolishing Common Law', *The Botswana Daily News*, 3 December 2004, p. 3.

<sup>65</sup> Government of Botswana, *Report of the Law Reform Committee*, p. 3.

<sup>66</sup> Richard, 'Marital Power Unchristian?', p.25.

<sup>67</sup> *Ibid.*

was that it excluded the majority of women since most women in Botswana were married under the customary law. He argued that the review could have encompassed all marriages.<sup>68</sup>

As stated by Thomas Nkhuma, Kgathi reminded fellow MPs that culture was dynamic and that they should not misinterpret the Bible as it preaches equality just like the Constitution. The MP for Kweneng South, Gladys Kokorwe, brought to the attention of the honourable house the taskforce led by Athaliah Molokomme, a former law lecturer at the University of Botswana and Botswana Attorney General, that embarked on a journey around the country consulting the Batswana on all laws that were discriminatory against women. MP for Molepolole North, Gaotlhaetse Matlhabaphiri, had a problem with the clause that wanted to abolish the position of men as head of the family, but approved the rest of the Bill. The Bill was supported by other MPs, amongst them the MP for Gaborone West South, Robert Molefhabangwe, and MP for Mahalapye East, Botlogile Tshireletso, who pointed out that this should have been done a long time ago. Molefhabangwe nevertheless complained that not enough was done when it came to consultation on the Bill. He urged fellow MPs not to use culture and tradition as excuses for oppressing women.<sup>69</sup>

Richard also said that the government ought to explain why women married under the common law were the only ones who were supposed to enjoy protection while others were left out. 'They need to tell us why they left out other women who are faced with patriarchal oppression', Richard said.<sup>70</sup> It was totally hypocritical that the same female MPs who scolded MP Pono Moatlhodi for his unfortunate remarks never raised their voices in defence of these excluded groups.<sup>71</sup> Kalanga women were mostly married under customary law.

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<sup>68</sup> Thomas Nkhoma, 'Slow Review of laws that discriminate against Women Worries Kgathi', *The Botswana Daily News*, 3 December 2004, p. 2.

<sup>69</sup> *Ibid.*

<sup>70</sup> Richard, 'Marital Power Unchristian?', p. 25.

<sup>71</sup> *Ibid.*

Generally, customary law in Botswana is based on patrilineal society, with no reference to any ethnic group. Customary law is gender-discriminatory by its nature.<sup>72</sup> Mary van Hook and Barbara Ngwenya have claimed that customary law is commonly used by the indigenous people in their private lives. Kalanga women who live in rural areas are more knowledgeable about it and find it more relevant than the common law.<sup>73</sup>

Daniel Kwelagobe, MP for Molepolole South, shared his concern over how the Abolition of Marital Power Bill affected the general public, and noted that Parliamentarians had not bothered to discuss the upcoming law with the people. He said that it was very important to obtain views on the matter from the people before passing the Bill.<sup>74</sup> The views of the public should be important when deciding whether to include customary and religious marriages in the Act or not.

Lesedi Gabonowe also interviewed by *Mmegi* in Borolong village, follows her traditions, and did not agree with the Bill. She was angered by the government passing such a law. According to her, husbands were meant to be family heads and that is a reality that can never be changed. Listening to the radio and news about the Act made her unhappy as she believed the country was drifting away from its traditions. Gabonowe firmly believed in patriarchy and even added that women were not meant to be leaders: ‘Why would we try to challenge nature?’<sup>75</sup> For her a woman is not meant for the public sphere, the husband is the one who should be out there trying to fend for the family. Furthermore, the Act, according to her, was going to contribute to the already escalating divorce rates.<sup>76</sup>

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<sup>72</sup> Unity Dow (ed), *The Citizenship Case: The Attorney General of the Republic of Botswana vs Unity Dow – Court Documents, Judgements, Cases and Materials*, p. 20.

<sup>73</sup> Mary P. Van Hook and Barbara N. Ngwenya, ‘The Majority Legal Status of Women in Southern Africa: Implications for Women and Families’, *Journal of Family and Economic Issues*, Vol. 17, No. 2 (1996), p. 176.

<sup>74</sup> Rebaone Tswii, ‘MPs Never Had Time to Discuss Bill with Constituencies-DK’, *Botswana Daily News*, 6 December 2004, p. 2.

<sup>75</sup> Setsiba, ‘Villagers React to Abolition of Marital Power Bill’, *Mmegi/The Reporter*, 11 January 2005, p. 5.

<sup>76</sup> *Ibid.*

Tlholego Atamelang, resident of Borolong, agreed with Gabonowe. She said that young people wanted to destroy the country and forget about the culture. According to her, the government of the day was too weak to lead the country on the right paths. 'I pity the young people of this country because they will not enjoy the peace of marriage', she alleged. Atamelang said that in her experience, in every institution there is a leader and there are followers, and this also applies to marriage.<sup>77</sup>

Mmakgang Lerole, when interviewed by *Mmegi*, felt there were both advantages and disadvantages to the new act. Lerole said that the Act was necessary because things had changed. Men of today could not take care of their responsibilities and as a result the Act allows women to take matters into their own hands when husbands fail. Even if that was the case, some women would go to extremes and use this opportunity to disobey their husbands.<sup>78</sup>

Kebaeditse Podile told *Mmegi* that both men and women were capable of providing for families; why then should one have more powers than the other? She said women were oppressed in the past as a result of these laws, and it was time all those laws were rectified to accommodate both men and women. Podile pointed out that the laws had perhaps changed, but if women, especially those in rural areas, are not taught about these laws they will continue to be oppressed since they will not be aware of new laws that benefit them. Another woman who was a housewife, Motlalepula Ramaijane, did not agree with informants who said that the Bill would give women the platform to abuse their husbands. She said it was time that people learnt to communicate in marriages. If that was done then there was no way the Bill could affect marriages. She urged organisations to concentrate their services in rural areas when teaching women about their rights, rather than focusing on Gaborone only. Maria

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

Kajane said the Bill was a way of showing men that women were equally capable and strong. She was married for fourteen years and her husband always treated her like a child in the family. With the new Bill she could now stand up for herself and also be an adult in the house.<sup>79</sup>

The then Minister of Labour and Home Affairs, Moeng Pheto, was pleased with the response he got during the debate of the Bill on Abolition of Marital Power, saying that it was a ‘resolut[ion] of balance, justice and equality’ and would restore cultural practices. As consultation was still going on regarding marital affairs in the country, Pheto informed the honourable house that there would be another Bill in the near future when consultations were complete. Some MPs were not happy with the idea of reviewing the law again, but the Minister of Labour and Home Affairs informed them that it was necessary to do so, as it was in accordance with the Abolition of Marital Power. He pointed out that ‘as part of this, we have to abolish the position of the husband as the head of family a position which has never arisen as a consequence of marital power’. Pheto suggested to MPs that by abolishing the position of the husband as the head of the household, husband and wife could consult each other when making decisions.<sup>80</sup>

According to Alec Campbell, the Kalanga customary marriage law is based on the patriarchal system whereby the husband was ordained the head of the family and has all the decision-making powers. He asserted that:

The Act has been the subject of controversial debate between the government, which insists that it is in keeping with tradition, and women groups which press for its amendment to remove the discriminating provision.<sup>81</sup>

Women, first of all, need to be economically empowered; attaining economic independence will help them deal with any challenges confidently. Moggie Mbaakanyi, a

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<sup>79</sup> *Ibid.*

<sup>80</sup> Lorato Galeage, ‘Minister Happy with MPs Support’, *The Botswana Daily News*, 6 December 2004, p. 2.

<sup>81</sup> Eva Procek, *Changing Roles of Women in Botswana* (Gaborone: The Botswana Society, 1993), pp. 10 & 30.

specially elected MP, pleaded with fellow MPs to fight the ‘males’ superiority complex. Mbaakanyi pointed out with an example that the Bill should tally with everything relevant for it to work:

if one wants to sell a vehicle the Bill says she/he has to provide written consent but if the Ministry of Works and Transport does not require such, the whole process would be futile.<sup>82</sup>

Shoshong MP, Duke Lefhoko, welcomed the Bill but said it was nature that the husband was the head of the house; even the Bill could not change that. He added that the Bill would be a chance for both spouses to control and have access to assets that they jointly owned. Lefhoko said for a progressive change the nation ought to be taught about the new law.<sup>83</sup> Contrary to the MPs Mbaakanyi and Lefhoko, Keleke Kgang, a Borolong village resident who was also an elder in the village, totally disagreed with the new Bill. Kgang stated that the husband is the provider of the family, and so it is unreasonable to try and give women financial powers in the family. Young people in the village did not share the same sentiments as the village elders. They thought the Bill was a good step towards liberating women.<sup>84</sup> In an interview, Taboka Pheko from Jackalas No.1 said:

I got married at a very young age. I went to school up to Form 2 (which is middle school). When I met my husband he was a very loving man and even suggested that I stop working as he could provide me with everything. I got married under both the common law and customary law. After our marriage we moved to Gaborone because he owned businesses there. He later retired and we moved to the village. You have to understand that I am married to a traditionalist who is over thirty years older than me. Even after the Abolition of Marital Power Act under the common law, my husband is still favoured by customary law. He does not believe in a wife being an equal partner. I have tried to tell him that things have changed, but he told me that things [*sic*] in our home are going to work the same way as in his father’s house. He does not allow me to own a bank account or find a job because he is the sole provider and the head of the house. I am a minor in this house; there is no difference between me and my children with the treatment I get from this man. I have asked for assistance from professionals but he does not listen. He does not care about the common law and even women’s rights. He says there can only be one head and that is him.<sup>85</sup>

The Law Reform Committee toured the country enquiring into the changes of the law, and this resulted in the general public agreeing to merge customary and common law

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<sup>82</sup> Tswiio, ‘MPs Never Had Time to Discuss Bill with Constituents-DK’, p. 2.

<sup>83</sup> *Ibid.*

<sup>84</sup> Setsiba, ‘Villagers React to Abolition of Marital Power Bill’, p. 5.

<sup>85</sup> Interview with Taboka Pheko, 03/02/14. For details on the interview see Appendix 6.



marriages into one act, comprising the best elements of both. Among the suggestions brought forward were that if the first wife had a terminal disease or was infertile, then the husband could marry a second wife, which was never a condition under the customary law.<sup>86</sup> The Minister of Labour and Home Affairs did not agree with the suggestion made by the public, to the extent that when the Abolition of Marital Power Act was enacted, it excluded customary law marriages.

## Conclusion

The High Court ruled in favour of Dow, but the state did not agree with the ruling and took the matter to the Court of Appeal.<sup>87</sup> The government wanted to use customary law as an excuse for discrimination against women in legislation, and argued that the constitution and Bill of Rights recognised the father as the one who determines where the child belonged; that is the children born to a married couple belonged to the father.<sup>88</sup> But when giving a ruling on the case, the Court of Appeal cited that even tradition and customs were supposed to be in line with the Constitution; they cannot be used as an excuse to bridge it. International bodies also influenced the High Court decision. The Dow case was beyond Botswana borders and it probably set an example for other countries that still had laws that discriminated against women.<sup>89</sup>

It was victory for women, also Kalanga women, since most of them are from border villages perhaps most affected by citizenship laws and they celebrated Dow's victory. But since the state did not agree with the ruling, the next chapter will concentrate on the events

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<sup>86</sup> Government of Botswana, *Report of the Law Reform Committee*, p. 3.

<sup>87</sup> Unity Dow, Sheryl Stumbras and Sue Tatten, 'Looking at Women's Empowerment initiatives from a Grassroots level' In George J. Andreopoulos and Richard Pierre Claude (eds), *Human Rights Education For The Twenty-First Century* (Pennsylvania: University of Pennsylvania Press, 1997), pp. 460 & 467.

<sup>88</sup> Judith van Allen, 'Women's Rights Movements as a Measure of African Democracy', In Stephen N. Ndegwa, *A Decade of Democracy in Africa* (Leiden: Brill Publishers, 2001), p. 45.

<sup>89</sup> Gisela Geisler, 'A Second Liberation: Lobbying for Women's Political Representation in Zambia, Botswana and Namibia' *Journal of Southern African Studies*, Vol. 32 (2006), p. 77.

after the High Court ruling, and how long the victory celebration lasted. ‘The Dow judgement sent the government reeling and nudged it out of its complacent attitude that Batswana women have no reason of inequitable treatment in one of the Africa’s most highly regarded democracies’,<sup>90</sup> Dow pointed out with colleagues.

This decision is a landmark one not only for Botswana but for evolving nations in Africa and other parts of the world because it recognises that contemporary society dictates that women assume their rightful place in partnership with their male counterparts in the development of societies. In 1995 Botswana’s parliament was forced to comply with the Court of Appeal ruling to grant women the right to pass citizenship on to their children, regardless of whom they are married to. This also paved the way to neutralise all other laws that discriminated against women in the statute books of Botswana.<sup>91</sup>

The victory of the Dow case was very significant not only to Botswana but to all African countries, where women were still viewed as minors and denied some of the basic human rights. This decision would force customary laws that usually undermine women’s rights to comply with the constitution in respecting women as equal to men. Customary law in the Kalanga society was developed so that it covered marriage and the status of women in the community. Marriage was not regarded as a matter between only the members of a couple but it concerned the whole society; it was not a union between two individuals but the two families entirely as such women would be put under pressure to prove their worth to everyone and respect their husbands, thus subordinating themselves to the control of their husbands.<sup>92</sup>

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<sup>90</sup> Dow, et al, ‘Looking at Women’s Empowerment initiatives from a Grassroots level’, pp. 460 & 467.

<sup>91</sup> *Ibid.*

<sup>92</sup> Michael P. Seng, ‘In a Conflict Between Equal Rights for Women and Customary Law, The Botswana Court of Appeal Chooses Equality’, *University of Toledo Law Review*, Vol. 24 (1993), pp. 563 & 566.

After marital power was abolished in 2004, this came as a shock mostly to traditionalists who never believed that a husband and wife could be equal partners in marriage and would have to consult each other when making decisions. This was evident even when some Kalanga women were interviewed about what they thought of the AMPA (2004). Some pointed out that they still wanted to hold on to their culture as this is what kept them in happy marriages for a very long time, and pointed out that the new Act would bring chaos to marriages. Chapter 4 will therefore concentrate on what happened when the Act was in place, and how the Kalanga women and their husbands reacted to it.

## CHAPTER 4

### THE EMERGENCE OF WOMEN'S FREEDOM IN BOTSWANA

The emergence of women's freedom in Botswana was shaped by the changes that came with the 1992 High Court ruling on the Citizenship Act (1984) up to the Abolition of the Marital Powers Act (AMPA) in 2004. This affected women's daily lives both in the private family sphere and in the public eye, with the Dow Court Case and the AMPA (2004) helping to improve the status of women. Interviews, newspapers and secondary literature inform this chapter to gauge people's reactions to the High Court ruling and the enactment of AMPA (2004).

Botswana adopted the UN CEDAW formally on 18 December 1979. It was ratified by twenty countries in 1981, which led to it being put into force as an international treaty. Botswana only acceded to the convention on 13 August 1996. This obliged Botswana to review all laws that were not in line with the UN CEDAW.<sup>1</sup> Falencia Mogege, coordinator for the Women's Affairs Division in the Ministry of Home Affairs, pointed out that after Botswana ratified the UN CEDAW, plans were made to review all laws that discriminated against women and affected their status, and a committee was set up to do the job. She noted that, 'Botswana was striving towards gender neutrality'. Additionally, a number of women's rights organisations had long complained about the laws that oppressed women in Botswana.<sup>2</sup>

Lot Moroka, a columnist for *The Botswana Guardian*, reported that:

Discriminatory practices against any segment of our population be they women, children, minority groups is detrimental to national development. Therefore it is critical that all laws which facilitate discrimination against any segment of our nation be reviewed.<sup>3</sup>

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<sup>1</sup> United Nations, 'Botswana Report on the Implementation of the CEDAW: Combined Initial, Second and Third Reports', *United Nations* (2008), p. 7.

<sup>2</sup> Lekopanye Mooketsi, 'Government Yields to Gender Activists', *Mmegi/The Reporter*, 6-12 December 1996, p. 21.

<sup>3</sup> Lot Moroka, 'What Animal is Marital Power: Part 3', *The Botswana Guardian*, 4 March 2005, pp. 6-7.

By acceding to the UN CEDAW, Botswana was committing itself to protect women against any form of discrimination. This did not mean that the government wanted to undermine the nation's culture. Keto Segwai argues that Botswana was compelled to sign the UN CEDAW after the High Court ruled in favour of Unity Dow in 1992. As mentioned before, Botswana had voted in favour of the convention but did not sign it until 1996. The Attorney General's office alerted the government that it was time policy makers assigned to the convention. This advice came when Dow decided to challenge the government on her rights as a Motswana woman. The Office of the President was alerted that Botswana had not signed the UN CEDAW since its conception in 1979. After the court ruling it was time to amend all the outdated laws that discriminated against women. Botswana was made an example of by the World Bank on the account that women who married in community of property lacked contractual capacity.<sup>4</sup>

### **After the high court ruling - The Dow case**

Having rights to something means that you are entitled to some specific goods and services. Therefore rights are claims that should be fulfilled. As every citizen was entitled to rights in the Constitution, and basic human rights, it was therefore apparent that there be an institution or authority that people can appeal to if their rights are violated. This is why Unity Dow saw it fit to take her government to the High Court when her rights as a woman and a mother were violated by the state. That was also the reason why the High Court ruled in her favour because it was their duty to enforce what she was rightfully entitled to as a Motswana and the rest of the other affected women in Botswana, like the rural Kalanga women whom did not have the necessary power and knowledge of what to do in that situation.<sup>5</sup> The protection of women's rights through the application of the national constitution and

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<sup>4</sup> Keto Segwai and Mesh Moeti, 'After Dow: State Likely to Ratify UN Convention protecting Women's Rights', *Mmegi/The Reporter*, 21-27/June/1991, p. 2.

<sup>5</sup> George Kent, 'The Human Rights to Food and Dignity', *Human Rights*, Vol. 37, No. 1 (2010), p. 2.

domestic laws is the first line in the defence of women's rights. This though was not the case in Botswana, where parliament did not want to address issues of discrimination against women. It was only after the Dow case that Botswana attempted to reform and change laws.<sup>6</sup>

In 1993, the High Court and Court of Appeals ruled in Dow's favour that the Citizenship Act of 1984 discriminated against women and was unconstitutional, as it denied women married to foreigners the right to pass citizenship of Botswana on to their children.<sup>7</sup> The court was made up of five judges, and when making the ruling during the Dow case it was affirmed by a majority of three to two. The judges gave their different judgements which were lengthy and comprised up to seventy-five pages of text. A wide variety of sources was used by the court when making the decision, some of which included the African Charter on Human and People's Rights of 1981, the United Nations Declaration of Human Rights of 1948 and the UN CEDAW of 1967. Therefore, Botswana like all other African state signatories of the African Charter on Human Rights and People's Rights of 1981, had an obligation to ensure that all discrimination against their womenfolk would be eliminated.<sup>8</sup>

After being alerted to the discriminatory value of the laws, the government still contested the High Court ruling in the Citizenship Act (1984) case. It became clear that while the Act would be amended because the government was instructed by the courts to do so, most parliamentarians disagreed with the court's ruling. Some MPs, however, insisted that it was time to realise that times had changed. 'This Stone Age mentality, primitivity and barbarism should be condemned',<sup>9</sup> MP for Gaborone West North, Paul Rantao, pointed out

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<sup>6</sup> Rebecca J. Cook, 'Enforcing Women's Rights through Law', *Gender and Development*, Vol. 3, No. 2 (1995), p. 10.

<sup>7</sup> Outsa Mokone, 'Minister Fumbles Over Dow Case?', *The Botswana Gazette*, 10 November 1993, pp. 1 & 11.

<sup>8</sup> M.D.A Freeman, 'Botswana: Bucking the Backlash', *Journal of Family Law*, Vol. 33 (1995), pp. 295-296.

<sup>9</sup> Government of Botswana, *Hansard 118; 7<sup>th</sup> – 11<sup>th</sup> August 1995* (Gaborone: Government Printers, 1995), p. 14.

that, discrimination against women should never be allowed.<sup>10</sup> The Human Rights Watch argued that:

Respect for traditions and customs should not be allowed to override the constitutional guarantees and international obligations into which Botswana has freely entered. Given such a matter of both law and practice, the limited decision in the Unity Dow case is deeply troubling. Instead of seeking to rationalise its failure to uphold the rule of law and to respect and protect human rights norms, the government of Botswana contested and challenged the view that tradition and custom justify discrimination against women. Tradition and custom are not only constantly evolving and changing in any society, but they are also open to different interpretations at any given point in time. By their very nature and function, traditional and customary norms and institutions should protect and respect the rights and interests of all members of the community in the specific historical context. In a modern democratic nation state like Botswana, tradition and custom should serve to uphold the rule of law and equality for women, rather than to justify the violation of these fundamental and universally valid norms.<sup>11</sup>

Neighbouring countries like Namibia already had Constitutions that were gender neutral and it was time for Botswana to follow suit. The Unity Dow case attracted a lot of attention from human rights organisation, something that the Attorney General had warned against. This raised eyebrows over Botswana's stance when it came to women's rights. The government's legal branch made it clear that Botswana still had a number of laws that discriminated against women.<sup>12</sup>

The government appealed the Dow case after the High Court ruling because they believed the court was mistaken in not believing that the word 'gender' was intentionally left out in the Constitution. MPs believed the word was left out so that the patriarchal nature of Botswana could never be questioned.<sup>13</sup> Bojosi Otlhogile said:

the Unity Dow Judgement is certainly a landmark decision on constitutional law, it cannot simply be wished away. However I do not see it as triggering a constitutional crisis. Of course the former Attorney General believed the judgement would lead to confusion in the law. The judgement is clear. What the case decided is that sex discrimination is unconstitutional and that section 4 of the Citizenship Act is unsupported because it

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<sup>10</sup> *Ibid*, p. 15.

<sup>11</sup> Human Rights Watch, 'Botswana Second Class Citizens: Discrimination against Women under Botswana's Citizenship Act', *Human Rights Watch: Africa*, Vol. 6, No. 7 (1994), pp. 3 & 7.

<sup>12</sup> Segwai and Moeti, 'After Dow: State Likely to Ratify UN Convention Protecting Women's Rights', p. 2.

<sup>13</sup> Mesh Moeti, 'Gov't Challenges Dow Decision', *Mmegi/The Reporter*, 26 July – 1 August 1991, p. 1.

discriminates between men and women. What led the majority to the view that the word 'gender' was omitted in the constitution?<sup>14</sup>

The court of Appeal left the government of Botswana with two basic choices. These included amending the Citizenship Act of 1984, so as to comply with the Constitution or to amend the Constitution to permit gender discrimination; the latter an impossibility for Botswana as the Dow case had brought the world's attention to the country's women's rights issues.<sup>15</sup>

The Minister of Labour and Home Affairs, Patrick Balopi, considered a referendum to change the constitution of Botswana after the Court of Appeal's decision on the Dow case. This was because some MPs wanted gender discrimination to be permanently embedded in the Botswana Laws. In the end nothing was done in that regard. Instead, the Constitution was amended to include the word 'gender'. Human Rights Watch wrote that:

The discriminatory effects of the Citizenship Act cross many boundaries. Women from rural and urban communities are affected. Female citizens who established residence in or out of Botswana are affected. Their children and foreign spouses are affected.<sup>16</sup>

Otlhogile added that the conclusion on the word 'gender' was itself a contradiction within sections 3 and 15 of the constitution. A frequent question which arose was: if the word appeared in one section, then why was it missing in another? They were looking for reasons why this had happened. It was concluded that people who framed the constitution intended to exclude women from all spheres of the public domain, with the idea that women could not hold any high public positions. Excluding them from the constitution was viewed as easier to control than having a society led by women. On the other hand, the constitution was handed down to Botswana by the British colonial government in 1966, and by 1990 the British themselves had abolished gender discrimination. Otlhogile quoted Justice Bizos one of the

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<sup>14</sup> *Mmegi Reporter*, 'The Unity Dow Judgement: A Constitutional Crisis for Botswana', *Mmegi/ The Reporter*, 17-23 July 1992, pp. 4-5.

<sup>15</sup> Michael P. Seng, 'In a Conflict Between Equal Rights for Women and Customary Law, The Botswana Court of Appeal Chooses Equality', *University of Toledo Law Review*, Vol. 24 (1993), pp. 578-579.

<sup>16</sup> Human Rights Watch, 'Botswana Second Class Citizens: Discrimination against Women Under Botswana's Citizenship Act', p. 15.



judges of Dow Citizenship Case, who said that ‘in relation to the protection of personal and political rights the primary instrument to determine the heartbeat of Botswana is its Constitution’.<sup>17</sup> Botswana’s Constitution is the heartbeat lived in the people, and it was the people who would determine its rhythm:

The Constitution is made for the people and not the people for the Constitution. It is true that gender-based discrimination can no longer be supported in this time and age. International laws, treaties and conventions are against it.<sup>18</sup>

M.D.A. Freeman also added that:

the very nature of the Constitution requires “a broad and generous approach be adopted in the interpretation of its provisions”, nor could the Constitution be allowed to be “a lifeless museum piece.”<sup>19</sup>

Bahiti Temane, who was the Minister of Labour and Home Affairs in 1995 during the debate of the Citizenship Amendment Bill of 1995, told parliament that there were complaints that laws in Botswana discriminated against women. Most of the affected women were those who were married. He pointed out that while the Marriage Act had been amended sometime back, it still granted men marital power: men were still favoured by the Citizenship Act.<sup>20</sup>

Temane reminded parliament that the Citizenship Act would need to be amended after the successful challenge of the Act by Unity Dow. The Act had been rendered discriminatory against women married to foreign husbands. This was unconstitutional and he went on to say:

The Court of Appeal declared section 4 and 5 of the 1984 Citizenship Act null and void on the grounds that the said sections were ultra vires the provision of the section 3 and 15 of the constitution of Botswana.<sup>21</sup>

MP Paul Rantao supported the High Court and Court of Appeal upholding Dow’s argument. He applauded the fact that the judgement drew the attention of the nation and the

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<sup>17</sup> *Mmegi Reporter*, ‘The Unity Dow Judgement: A Constitutional Crisis for Botswana’, pp. 4-5.

<sup>18</sup> *Ibid.*

<sup>19</sup> Freeman, ‘Botswana: Bucking the Backlash’, p. 295.

<sup>20</sup> Government of Botswana, *Hansard 115; 12<sup>th</sup> Feb - 16<sup>th</sup> December 1994* (Gaborone: Government Printers, 1994), p. 70.

<sup>21</sup> Government of Botswana, *Hansard 118; 7<sup>th</sup> – 11<sup>th</sup> August 1995*, p. 5.

international community to the fact that some laws derived from Botswana's customs and traditions were outdated. He also said:

Our laws and actions must conform to the standard as adopted by the international human rights charter which is very clear. I hope this is just one of the first of all the laws that are discriminatory against women and many more will follow as we continue to sharpen on thought patterns in the right direction of the international law and human right.<sup>22</sup>

The Botswana government carried out a survey through *Kgotla* meetings after the Dow case's judgement, in order to determine which pieces of legislation were discriminatory. Customs and traditions were considered during the survey. In order to implement the decision of the court after the Dow case, sections of the Citizenship Act that were discriminatory were to be amended so that it was gender neutral. There was nowhere that the Constitution could be amended to allow for discrimination on the basis of gender as had been considered by the former Minister of Labour and Home Affairs, Patrick Balopi, in 1994.<sup>23</sup> This was because, by that time, Botswana could not take such a retrogressive step in its development. People were living in the age where women could make meaningful and crucial contributions to the development of their states and Botswana, known as a democratic country, could not be left behind. Section 4 was to be amended which would lead to the consequential amendment of Sections 5, 6, 7, 8, 12 and 13 of the Citizenship Act.<sup>24</sup>

Temane toured the country, briefing citizens on the proposed amendments and obtaining their views. According to the Minister, people welcomed the amendments. The Minister stressed that there was a need for the amendment of the Act to be effected speedily because the judgement had long been passed by the court.<sup>25</sup> The Minister of Mineral Resources and Water Affairs, David Magang, added that it was important for Botswana to change its laws as the wider society had also changed. Magang observed that new laws

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<sup>22</sup> *Ibid.*, p. 13.

<sup>23</sup> Government of Botswana, *Hansard* 118; 7<sup>th</sup> – 11<sup>th</sup> August 1995, p. 5.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* p. 7.

should reflect people's changing attitudes and customs when necessary. He further stated that people should not treat former laws as mistakes. It was important to understand that culture was dynamic and people's attitudes changed over time, which meant that even laws could change in that regard.<sup>26</sup> South Africa is a typical example of a country where women have been empowered without undermining the cultural values of the different ethnic groups. Culture is dynamic and it evolves with time. While societies differ from one another, they still have the liberty to change those practices that degrade the status of women.<sup>27</sup>

MP for Gaborone Central, Michael Dingake, told parliament that as 51% of the population were women, it was therefore time that MPs took cognisance of the fact. He added that as modern developments were carried out by both men and women, women needed to feel empowered and to be treated as equals. They would put more effort into helping with development when they knew that they were appropriately recognised. The Citizenship Amendment Act would encourage full participation by women in all spheres because they would be assured that the society now recognised their strengths.<sup>28</sup>

The government subsequently established the National Council on Women and adopted the Policy on Women, both of which were inspired by the Unity Dow judgement. Furthermore it brought harmony between Non-Governmental Women's Organisations and the Department of Women's Affairs as they realised they were fighting the same war. Unity Dow was then appointed as the only female High Court judge, eight years after she launched the case and five years after the victory. The Citizenship Amendment Act (1995) allowed women married to foreign husbands to pass their Botswana citizenship on to their children.<sup>29</sup>

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<sup>26</sup> *Ibid*, p. 13.

<sup>27</sup> Lot Moroka, 'What Animal is Marital Power: Part 2', *The Botswana Guardian*, 11 February 2005, p. 10.

<sup>28</sup> Government of Botswana, *Hansard 118*; 7<sup>th</sup> – 11<sup>th</sup> August 1995, p. 19.

<sup>29</sup> Unity Dow, 'How the global informs the local: The Botswana citizenship case', *Health Care For Women International*, Vol. 22, No. 4 (2001), pp. 330-331.

## **The aftermath of the Abolition of Marital Power Act 2004**

At the end of 2004 there was heated debate about the Abolition of Marital Power Bill which had been passed in parliament. MPs gave their opinions either for or against the Bill. In the midst of those debates, two things became clear. First, the Bill offended Botswana's patriarchal system. Secondly, it was clear that humanity was indeed divided into equal parts: male and female. Mostly men were strongly opposed to the Bill. Mompoti Lebani noted that the parliamentarians who were supposed to be representing their people and advocating equality for all citizens were the same ones opposing the Bill. In doing so they were directly or indirectly promoting the exploitation and oppression of women. It was not fair to talk about freedom and equality whilst some people were not enjoying these rights. It was unfair for people to live under lawful oppression simply because they were women.<sup>30</sup>

Kalanga women had different reactions to the passing of the Act. Generally the younger female generation lived the Western lifestyle and in the process rejected the traditional way of life which the older women expected them to lead. This therefore seemed like competition between the older generation and the younger generation. The older women believed so strongly in patriarchy which was deeply rejected by the younger women. This behaviour was said to be leading to moral decay.<sup>31</sup> Many elderly women accepted patriarchy, and with that they helped to socialise young women into their beliefs, thus acquiring strength to control the young. They were assisting patriarchy in the oppression of women and stripping them of their freedoms.<sup>32</sup> Ester Maweni was one of the elderly women who totally disagreed with the much celebrated women's freedom:

I don't see why people are celebrating this abolition of marital power, some of us now seem like we never gave birth. Our sons are being controlled by their wives and they have forgotten all about us. These young women now abuse this freedom and we have no chance

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<sup>30</sup> Mompoti Lebani, 'Marital Power is a Mere Social Construct', *The Botswana Gazette*, 9 February 2005, p. 10.

<sup>31</sup> Gisela Geisler, 'A Second Liberation: Lobbying for Women's Political Representation in Zambia, Botswana and Namibia' *Journal of Southern African Studies*, Vol.32 (2006), p. 72.

<sup>32</sup> *Ibid.*

with our own children anymore. Husbands can no longer discipline their wives, because they would leave them as the law has given them all the power.<sup>33</sup>

However, other elderly women like Kudzani Tagana and Lebogang Lopang had a different reaction to the abolition of marital power. Tagana was very happy with the initiative that the government had taken. She said:

I was married to a very good man, but over time he changed into someone I did not recognise. For that reason, I am happy that the government realised that women can do well and need to be treated as equals, there are a lot of women out there that I know that never depended on men like us and have done well for themselves. They raised their kids alone, worked hard in a world dominated by them and now they are driving expensive cars. Some of us are only starting life now and we are already old. I would really encourage women to appreciate this Abolition of Marital Power Act to empower themselves and stop men from walking all over them.<sup>34</sup>

Sharing her thoughts on the Abolition of Marital Power Act enacted in 2004, Lebogang Lopang pointed out:

The abolition of marital power has brought positive change to a lot of us Kalanga women. I got divorced from my husband after so many years of marriage because he was too controlling. He would even stop me from going to church; I could not take it anymore. Right now I am remarrying my ex-husband because the Act made him realise that as a woman I am capable. We are going to build back our family. We will be partners in this new marriage not one being the head and the other a minor.<sup>35</sup>

Chabo Nleya said that she was one of the women who suffered at the hands of abusive marital power, but felt that the government opposing the law was a good initiative. At least some women would not have to go through what she had when she was married. Nleya also said:

My husband believed he was the man of the house to a point that he would even embarrass me in the presence of my friends. We had one bank account which he controlled and even controlled our credit card. He would refuse to give me money to buy basic needs like food or refuse to pay rent because he had the power. Women now do not have to suffer the way we did. If I am ever going to re-marry I will not let a man abuse me again, because now I will be having the law on my side.<sup>36</sup>

Sibongile Matopote, a middle-aged woman from Ramokgwebana, said she was not really aware of the abolition of marital power because she grew up in a society where she had been

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<sup>33</sup> Interview with Ester Maweni, 10/02/14.

<sup>34</sup> Interview with Kudzani Tagana 05/02/14.

<sup>35</sup> Interview with Lebogang Lopang, 06/02/14.

<sup>36</sup> Interview with Chabo Nleya, 04/02/14.

socialised to accept that men are in control of everything. However, she agreed with other women who supported the Act, saying that the position of men always being in control sometimes endangered women's lives because certain men took their power to extreme levels.

Matopote also said:

The AMPA of 2004 was the best thing that ever happened to women. Having to wait for your husband for months to come home and make decisions for you was something else, because it's not like women are incapable of thinking. I still prefer being single than married because, there we might have all this laws in place to protect women but what still stands is that men will never stop being in control. A lot of women still live under oppression. It's only that most women living under such conditions are not aware of their rights and they also persevere because women are known to be survivors, strong and can handle any situation that they find themselves in. Women should never agree to be housewives because that on its own increases the level of oppression and exploitation because you will be depending on your husband for everything. They should get rid of the mentality of being strong and survivors because that has killed a lot of women. If a women is being oppressed she should know she has the right to leave that marriage and be happy somewhere else.<sup>37</sup>

The leader of the House of Chiefs, Kgosi Seepapitso VI, argued that initially the issue of equality was confined to advocating for the equal treatment and payment of men and women at their workplaces, but that the debate had been broadened to seek equality between men and women in every aspect of society. Moreover, men were still subjected to harsh conditions in their places of work, while women worked in more conducive environments so that they were in fact treated better than their male counterparts. Women were not subjected to corporal punishment and were seemingly receiving special treatment.<sup>38</sup>

It is worth noting that the AMPA (2004) was meant to protect women against abuses by their husbands. Husbands could no longer control their wives' freedoms, nor make major decisions without their wives' consent. Women were protected from fraudulent business deals in which husbands used family resources. Wives could now take husbands to court if they felt that their husbands had used and abused their family assets. Husbands could no longer dispose of or sell family assets without the woman's knowledge. If the wife needed

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<sup>37</sup> Interview with Sibongile Matopote, 09/02/14.

<sup>38</sup> Bame Piet, 'Seepapitso Condemns Abolition of Marital Power Bill', *Monitor*, 13 December 2004, p. 5.

consent from the husband to do anything that benefited the family and he refused for no good reason, she could take the matter to court. Lot Moroka stressed that:

Marital power therefore has checks and balances against abuse. The wife has numerous avenues of protection against the machinations of a foolish, prodigal spendthrift of a husband.<sup>39</sup>

According to Log Raditlhokwa, because Botswana had agreed to the UN CEDAW in 1996, the AMPA (2004) was a natural consequence. It drew most of its support from the review of all laws affecting the status of women in Botswana, which was carried out in 1998. The law review reports recommended that marital power be amended to accommodate joint decision-making. The question that still lingered was whether the government could change existing attitudes between husbands and wives through legislation. Public opinion was crucial.<sup>40</sup> A commission of enquiry was needed to obtain public opinion, during which people could learn more about the law. It was hoped that this would prevent the law from being merely a piece of paper with no practical consequences.

Moroka asserted that when married people live in harmony and respect for one another, then the issue of hierarchy and power in that relationship would not pose a problem. Each partner knew what was expected of him or her; they understood the role they played in the relationship. He went on to say that the dynamics of life have the ability to change people, by ‘turning good people into monsters and shatter[ing] dreams.’<sup>41</sup> There is a critical need for protection when this happens. It was important, therefore, that the government put laws in place to prevent awful circumstances.<sup>42</sup> Raditlhokwa stressed that:

Gender transformation is a social political imperative. We should all work hard for it. But the intentions, practice modes, sugar coated declarations and impact of all those who pose as change agents should be scrutinised carefully. Even though the AMPA (2004) could continue to contribute to gender empowerment it will not achieve the envisaged results. It is a function of middle-class opportunism and political expediency. Because of the prevailing

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<sup>39</sup> Moroka, ‘What Animal is Marital Power: Part 2’, p. 10

<sup>40</sup> Log Raditlhokwa, ‘Marital Power Cannot be Abolished’, *The Midweek Sun*, 19 January 2005, p. 12.

<sup>41</sup> Lot Moroka, ‘What Animal is Marital Power: Part 1’, *The Botswana Guardian*, 11 February 2005, p. 10.

<sup>42</sup> *Ibid.*

attitudinal sets and the lack of appropriate social and legal infrastructure, it is apt to engender contradictions that will create problems that they are not economically, socially and organisationally equipped to deal with.<sup>43</sup>

Even after the Act was enacted, men still felt they deserved to be the heads of their families since they were the ones paying *lobola* (bride price). Married women were not only oppressed by their husbands, but also by the entire family of in-laws. The only setback was that the Kalanga women in the rural areas were left out of the human rights awareness programmes, thus many of them did not learn about their rights.<sup>44</sup> The public needed to be informed that the main purpose of the act was to motivate the nation to guard against social stagnation and retrogression.<sup>45</sup>

Maatla Ramahobo argued that there were times when women worshipped their husbands, that is they were supposed to be submissive whilst the husband's status was elevated within the marriage and women tolerated any treatment they received from them. Women were not allowed to control their husband's behaviour in traditional culture. Men had been ordained as the head of their families since the beginning of life, but since culture is dynamic, it is not surprising that changes came about. Ramahobo also asked the following:

Why did initiation and finding of spouses by parents for their children stop hence it is culture? Doesn't that mean culture is dynamic? Another unrecognised issue behind the marital power is *lobola*. But *lobola* is the bride's price [*sic*] not bride's gift. Women should therefore stand tall and fight this prejudice. They are human beings enough to demand and deserve the right to conquer and be equal to their mates thus men.<sup>46</sup>

The abolition of the men as the head of the family clause in the Act was one of the positive effects that came with the introduction of new Act. This meant that not only one parent would have the upper hand in family affairs, but instead both parents would have equal responsibilities. This was to enhance effective communication and consultation within the family structure. Ditshwanelo, a human rights organisation in Botswana, stressed that if

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<sup>43</sup> Raditlhokwa, 'Marital Power Cannot be Abolished', p. 12.

<sup>44</sup> *Ibid.*

<sup>45</sup> Michael Dingake, 'Abolition of Marital Power?', *Mmegi/The Reporter*, 11 January 2005, p. 6.

<sup>46</sup> Maatla Ramahobo, 'Women should stand tall and fight', *The Botswana Guardian*, 11 March 2005, p. 9.



people could accept the Act and change their attitudes, this would build strong marital relations. It would help the Batswana to strive for equality, hence promoting human rights and a secure future for all.<sup>47</sup>

According to Shadrack Majwabe, the AMPA (2004) had not worked out the way it was supposed to. Ironically, women's organisations were pleased with the Act but in fact it still discriminated against women and to a great extent excluded and separated them, as asserted by Majwabe:

The Act was a snobbish [*sic*] and elitist act, it based on monocracy than democracy. It was liberating the already liberated, resourced, informed and advantaged women who are married under the common law at the exclusion of the highly disadvantaged, less economic, semiliterate and mostly peasants who are married under traditional or religious law.<sup>48</sup>

Majwabe also argued that:

Surely a teacher who is married under common law is better positioned and resourced to fight for her rights against her abusive husband than a subsistence farmer who failed standard seven and married under customary law.<sup>49</sup>

In this situation, the subsistence farmer needs greater protection than the teacher. The act did not facilitate equality as it was supposed to do and actually discriminated against some women.<sup>50</sup> Women who already had the necessary resources to fight for their rights were the ones that the government had helped, while the economically disadvantaged were left out. Dingake indicated that:

If the lawmakers believe marriage is marriage and marital power of one sex distorts gender equality wherever marriage is contracted then they had a duty as legislators to determine that they did not enact a flawed legislation as they had done. It is therefore difficult to guess why the Minister, Cabinet colleagues including women ministers conjured up such imprecise laws under the pretext of putting things right? The abolition of marital power has not enhanced prospects of equality – it is a misnomer.<sup>51</sup>

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<sup>47</sup> Ditshwanelo, 'Welcome Steps Towards Gender Equality', *Mmegi/The Reporter*, 09 March 2005, p. 8.

<sup>48</sup> Shadrack Zola Majwabe, 'Abolition of Marital Power Bill Liberates the Already Liberated Women', *The Botswana Gazette*, 16 February 2005, p. 16.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Dingake, 'Abolition of Marital Power?', p. 6.

Dingake's opinion in *Mmegi* stated that one would have thought the passing of the Abolition of Marital Power Act would bring great celebration amongst women. Surprisingly, there was a deafening silence, as if nothing had happened. The Minister of Labour and Home Affairs, Moeng Pheto, deserved to be thanked by women for standing up to liberate them from the oppression they had lived under for so many years. One wonders why this news was met with silence. If women were not expecting this, it would have come as a shock. They may have been intimidated by the reaction they expected from men, who were mostly holding on to their patriarchal lifestyles. Perhaps the silence can be attributed to the fact that old habits die hard. Marital power may have been abolished but the reality of the matter was that a year later it was just a law written on paper, like many others. Marital power still lingered on in most marriages. Dingake believed it was going to be very hard to change people's attitudes having lived under such conditions for so long.<sup>52</sup>

There are many female headed families. Furthermore, most of the people imprisoned in Botswana are men but still society insisted that men were better than women at heading families. Moreover, the Bible was not supposed to be used to advance patriarchal interests, because it can be used and interpreted differently by each individual to suit their argument. Majwabe stressed that instead of relying on the Bible, the Constitution should have been used together with human ethics principles, as both benefit everyone, that is rich or poor, religious or not. 'A law is a law when it caters not only for everybody but when it advantages everybody'.<sup>53</sup>

Lebani, *The Botswana Gazette* columnist, argued that on the issue of men's position and the Bible:

Men unfortunately ignore the fact that their so-called power is just mere social construct that can and needs to be deconstructed. It is not a God given position, as they would like it

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<sup>52</sup> *Ibid.*

<sup>53</sup> Majwabe, 'Abolition of Marital Power Bill Liberates the Already Liberated Women', p. 16.

to be perceived. It must be noted that all human beings are born equal before the eyes of the Lord including women. Men or males must swallow their pride and make their much-needed contribution in making the planet earth a true place of peace and equality, regardless of one's biological make-up. They should appreciate women as their equal partners.<sup>54</sup>

By 2004 the Batswana had become much more diverse in their views, complexities and experiences, than decades earlier. In the past, elected MPs could make decisions for the rest of the citizens without consultation. This was so because citizens then held the belief that the MPs were their voice. By 2004, MPs still represented the voices of the people that elected them but it was no longer permissible for them to take decisions without consulting the larger population. People could now raise their concerns about what they wanted and believed in, all of which had to be considered when decisions were made in court. Public participation in the decision-making process was believed to be a noble practice and an important element of a democratic nation. Legislators could never know the wishes of the citizens if they did not consult with them.<sup>55</sup> This was the fundamental reason why the public was consulted prior to the promulgation of the AMPA (2004).

Most people were unhappy with the issue of the AMPA (2004). Those who quoted the Bible said that God had created both men and women but men were bestowed as the heads of their families, and in that they were supposed to love their wives. In return, wives were required to respect their husbands. It furthermore mentions that when two people get married, they become one thing, implying equality. The government was therefore helping to put into practice what marriage was really thought to be. The government's main role is to institute policies, strategies and rules. It also governs the laws of the country to enable equality amongst all the citizens, regardless of gender.<sup>56</sup> The act did not pose a problem to married people who believed that they were now one entity. This oneness could be described as unity,

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<sup>54</sup> Lebani, 'Marital Power is a Mere Social Construct', p. 10.

<sup>55</sup> Moroka, 'What Animal is Marital Power: Part 3', p. 6.

<sup>56</sup> Karabo, 'The Bill is for Fairness', *The Midweek Sun*, 2 February 2005, p. 12.

synergy, and a single mind; not confusion and disrespect between spouses.<sup>57</sup> As mentioned by Karabo, Men and women are different but equal. The act was instituted to uphold Christian values and was meant to lay a foundation for successful marriages, and thus was fair for everyone.<sup>58</sup> Some men felt threatened by the act since it laid some rules that many married couples failed to put into place when they got married. Karabo says that many men believed that the agenda behind the promulgation of the AMPA (2004) was for women to mistreat them.<sup>59</sup>

Nehemiah Mugoni stated that since the Act excluded religious marriages, one would have expected religious organisation to fight for their rights. Perhaps this was because they did not fully understand it. There were Christian MPs at the time of the tabling of the bill that contributed to the debates, while some went to the extent of opening the Bible in parliament for reference. Mugoni believes that some MPs did not understand the Bill at all. For instance, it came to light that they did not understand what ‘head of family’ meant under the common law, and that confusion of this nature had never been resolved. MPs Nonfo Molefhi and Lefhoko advised that people should be taught that the Bill did not mean that the husband could not use his powers as head of family, but that rather it was meant to promote equality and women’s status in the family. This clearly showed the extent to which MPs did not understand what was meant by abolition of the husband’s status as head of the family. To them the Bill did not take away all the marital power that the husband held in the family. Clause 5 of the Bill ‘abolishes the position of the husband as the head of family’, meaning

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

that husbands could no longer be referred to as the heads of their families since their power had been taken away.<sup>60</sup>

MP for Selebi Phikwe East, Nonfo Molefhi, said he would consult with the cultural and Christian organisations so that they could help him advocate for the amendment of the Abolition of Marital Power Act. Molefhi believed that the position of men as heads of families could not be abolished, as this went against Christian values. Nevertheless, those values do not encourage the subjugation of wives in marriage. Molefhi also stated that ‘the position of the husband is a socio-cultural, hierarchical and institution arrangement which requires the husband to be responsible and accountable for all matters of the family’.<sup>61</sup> The position of the husband could never be separated from his authority as the head of the family. Marriage in Botswana is a cultural event which cannot be separated from the common law. People may get married under the common law but the entire procedure ends as a cultural arrangement.<sup>62</sup> Mugoni points out that in trying to bring equality within families; the uniqueness of the marriage institution has been destroyed. In any institution there must be a hierarchy of power because there is no peaceful social life without it. This law could have dealt with joint property and regulated it instead of interfering with other marital affairs.<sup>63</sup>

With the government trying to empower women, women themselves were urged to stand up and help in the fight for gender equality and to show enthusiasm in liberating themselves from the shackles of patriarchy. In 2005, at a women’s day celebration, Chief Justice Nganunu pointed out that women should be at the forefront of effecting change, that is they should change their attitudes on patriarchy and should stop undermining themselves.

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<sup>60</sup> Nehemiah Obed Mugoni, ‘There is no peace without hierarchy of power’, *The Botswana Guardian*, 7 January 2005, p. 6.

<sup>61</sup> Viola Maripe, ‘MP to Seek Amendment of Marital Bill’, *Mmegi/The Reporter*, 11 Jan 2005, p. 4.

<sup>62</sup> *Ibid.*

<sup>63</sup> Mugoni, ‘There is no Peace without Hierarchy of Power’, p. 6.

Most women would prefer to be led by men, and even in the workplace they do not see themselves as being capable of handling positions of power.<sup>64</sup>

## **Conclusion**

In conclusion, it is clear that most people who were firm believers in patriarchy were offended by the AMPA (2004), including most of the Kalanga people. The question was asked of how the Batswana could talk proudly of freedom when most of the female population lived under oppression because of their gender. To understand or appreciate why many men were against the Act, one first needed to understand the marriage institution. This institution has been used by patriarchy as a way of exploiting women even though it has the potential to be a positive and sensible enterprise.<sup>65</sup>

Before the abolition of marital power, when husbands were still ordained as heads of their families, they had the liberty to choose where the family should reside, which church to go to and the kind of life the family was to have, that is they were the final decision makers. With the AMPA (2004) in place, the husband was no longer the decision maker. All he could do was suggest ideas to the wife and if she did not agree with them, then whatever the man had proposed could not be pursued. If he forced matters, the woman could take him to court and he could be charged with unreasonable behaviour, which could also be considered grounds for divorce.<sup>66</sup>

Some husbands continued to treat their spouses like minors even with the AMPA (2004) in place. In families where spouses did not respect each other, it gave stubborn women the opportunity to exploit the new law. Some went to the extent of taking decisions to spite their husbands. Mostly it was women who were stuck in loveless marriages and who were

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<sup>64</sup> Guardian Reporter, 'Women Own Enemies', *The Botswana Guardian*, 11 March 2005, p. 1.

<sup>65</sup> Mompoti Lebani, 'May the Marriage Bill bring Patriarchy to an End', *Sunday Standard*, 6-12 February 2005, p. 8.

<sup>66</sup> Mugoni, 'There is no Peace Without Hierarchy of Power', p. 6.

primarily there for the sake of the children, who welcomed the Bill with both hands, as the hostage situation they found themselves in had been reversed; they could now also call the shots. The law freed them from the shackles of abuse and deprivation in that they could save resources independently. On the other hand, there were women with ulterior motives, who used this to engage in secretive transactions. It was important for people to understand that marriage was for two independent, equal people who chose to live together. As a result, these individuals had to understand and appreciate each other as equals and know their roles in the partnership. The law, therefore, was meant to help in upholding an understanding between the two.<sup>67</sup> Women finally got their much-needed empowerment and equality status, but if they lost self-respect in the process of enjoying their newly found status they would in fact be disempowering themselves. These women were faced with a challenge of how they were to use this personal empowerment without sacrificing their self-respect and respect for other people, especially their spouses. Men were also faced with the challenge of how they were going to accept the empowered wives without feeling inferior and threatened.<sup>68</sup> After acquiring the much needed freedom, the Kalanga women had to realise that the AMPA (2004) was meant to protect them from oppression and not to destroy relations within families. Therefore, they had to continue to respect their husbands who were also obliged to return the respect. Husbands had to understand that the law was not meant to degrade them but rather to help bring harmony in families and empower women so that they can start to make a significant contribution to the development of the country, starting at family level and with no constraints.

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<sup>67</sup> Lebani, 'Marital Power is a Mere Social Construct', p. 10.

<sup>68</sup> Moroka, 'What Animal is Marital Power: Part 3', pp. 6-7.

## CHAPTER 5

### CONCLUSION

It is without a doubt that all the women in Botswana were affected by the Citizenship Act (1984) as it discriminated against them and also benefited from the AMPA (2004). In this study, however, the emphasis fell on the rural Kalanga women - how they were affected by the Acts and how they dealt with the consequent challenges. One finding which emerged clearly concerned language, as pointed out in Chapter 1. The language used by these people is iKalanga; a language which is not recognised in the country as all the laws are written in either English or Setswana. Consequently, by the time the Kalanga people received the message it would be distorted, or it would have been delivered to them in Tswana which was difficult to understand. This study also traced the Kalanga women's voices with regards to their position in families. This was done in an effort to support them and document their reality as only a handful of studies have been conducted about women in Botswana, most of which are concentrated on the urban and Tswana-speaking women.

Kalanga women had been socialised to depend on men and as such they were ignorant about what was happening in the country as most of them did not read newspapers or listen to the news. Some men took this to their advantage and kept information such as the abolition of marital power to themselves. Hence, women were not aware of the AMPA (2004) and continued to live under patriarchy in their families because they felt they did not have any other choice. Some pointed out in interviews that they were not even aware of the Citizenship Act. Divorce was another way to escape terrible marriages that were caused by abuses of marital power. During interviews women who had divorced their husbands explained that they had done this because it was the only way they could live independent and happy lives. It also became clear that Kalanga patriarchal society fuelled the oppression of women in that



it had already been allowed by the legislation put in place by the state. Women had been thought to worship their husbands from very young and thus it was not easy for a newly instituted law to change their perceptions about life and their long-held beliefs.

This study also revisited claims of how Botswana was a peaceful country to the rest of the world while in reality it was not. It sought to show how the rule of law in the country conflicted with women's rights. It took into consideration arguments for and against the picture painted of Botswana as an African success story. It examined the position occupied by Kalanga women in the North East District who were marginalised and had their voice silenced by citizenship and marital legislation, so that through this study they can speak up and realise that they are equal to men, and that despite the patriarchal nature of their culture they deserve to be treated as equals in the family structure. This study contributed to the documentation of Kalanga women's voices and provides a framework for understanding the concept of citizenship in relation to marriage and its historical complexities within the cultural context of Kalanga society. Furthermore, the research is significant because it provides a more nuanced lens for viewing Botswana's post-colonial democratic society by incorporating the life experiences of marginalised Kalanga women. The main question addressed by this study concerned the historical factors that led to the promulgation of the Marriage (Amendment) Act of 1967, the Marriage Act of 1970, the Citizenship Act of 1984 and its amendment in 1995, as well as the Abolition of Marital Power Act of 2004 and the consequences of these acts for Kalanga women's daily lived experiences up until 2005. The history of these acts and how they encouraged the restriction of women's citizenship and marital authority in Botswana constituted the central focus of this research.

The fact of Botswana being labelled a success story because of its democratic politics and its flourishing diamond economy was problematic. This is because women's rights then seemed unimportant, whilst they made up half of the population of the country. Cook and

Sarkin pointed out that labels such as ‘Africa’s success story’ or ‘Africa’s miracle’, based simply on national economic performance and political stability, are problematic in descriptions of Botswana. Labelling countries and praising them because of their economic status and free and fair elections is misleading when in fact those countries are simultaneously neglecting certain of their citizens’ human rights. Discrimination against women should be the one reason why such labels should not be given to countries that do not live up to that standard. If Botswana negates some basic human rights then it should not be regarded as Africa’s ‘miracle’ because such definitions of ‘miracle’ set the standard too low. The African situation is not so worthless that the protection of human rights should not be taken seriously; Africa’s ‘miracle’ should be a country working towards addressing pitfalls and not shying away from them, for instance by empowering women and not discriminating against them just because of their sex.<sup>1</sup>

This study has shown that not all of Botswana’s people benefited from the fronts of the country’s successes, and it is therefore problematic that labels such as ‘Africa’s success story’ or ‘Africa’s miracle,’ based simply on national economic performance and political stability, are so flippantly used to describe Botswana.<sup>2</sup> Even though scholars like Bugalo Maripe and colleagues have continued to praise Botswana as a miracle (unlike other scholars who have damned this label), they believe that the country’s democratic politics are characterised by its unqualified respect for human rights, and in particular, women’s rights.<sup>3</sup>

As this study has revealed, educated and prominent women were the only ones who really had a choice to avoid marriage. These women preferred unmarried cohabitation or have lovers who do not live with them because this allows them to maintain their liberty, rather

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<sup>1</sup> Amelia Cook and Jeremy Sarkin, ‘Is Botswana the miracle of Africa? Democracy, the rule of law, and human rights versus economic development’, p. 460.

<sup>2</sup> *Ibid.*, p. 458.

<sup>3</sup> Bugalo Maripe, David Sebudubudu and Mokganedi Zara Botlhomilwe, ‘Limited Freedom and Intolerance in Botswana’, *Journal of Contemporary African Studies*, Vol. 29, No.3, (2011), p. 338.

than contracting a formal marriage. Less educated and poorer women, such as the Kalanga, chose to get married because they perceived this a way to gain respect and lead a better life.<sup>4</sup> Molokomme also pointed out that it is ironic how women in the country were considered to be the backbone of the nation, because their needs were not taken seriously and pieces of legislation which were in place were not helping since they silenced them and with little concrete action taken on the women's side. Such actions could be legal reform, rendering women equal citizens with men in both public and private law, and, more importantly, making women a specific target group in the formulation and implementation of government economic programmes.<sup>5</sup>

Education can be used as a tool for socio-economic development in a country, but its impact on people can vary. For instance, an educated woman can behave differently to an uneducated woman. An illiterate woman can go along with the traditions and customs that are imposed on her through marriage, but the same cannot be said about some educated women. Western ideas such as individualism, introduced to them through education, can make such women view customs and traditions differently. Some people who support Western influence believe that it can bring a positive influence in changing the marriage institute, for example, by eradicating inequality in marriage.<sup>6</sup> As indicated in Chapter 4, educated women can stand up for and liberate themselves from marital oppression since they are more aware of the resources available to use, unlike uneducated women and especially those living in rural areas. As this study has pointed out, most Kalanga women affected by these acts reside in rural areas and are not well-informed about the alternatives in dealing with the oppression they face.

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<sup>4</sup> Dominique Meekers, 'The Noble Custom of Roora: The Marriage Practices of the Shona of Zimbabwe' *Ethnology*, Vol. 32, No. 1 (1993) p. 36.

<sup>5</sup> Athaliah Molokomme, 'Emang Basadi (Botswana)', *Signs*, Vol. 16, No. 4 (1991), p. 851.

<sup>6</sup> Georgia L. Kaufmann and Dominique Meekers, 'The Impact of Women's Socio-economic Position on Marriage Patterns in Sub-Saharan Africa', *Journal of Comparative Family Studies*, Vol. 29, No. 1, (1998), p. 102.

In the absence of a guarantee that equality between men and women takes precedence over custom, traditional practices that discriminate against women may be lawful in some circumstances.<sup>7</sup> The constitution specifies that the government has assumed an obligation to ensure that at all levels of administration the basic rights of the people will be respected and protected.<sup>8</sup> As mentioned in Chapter 1, members of such societies are socialised into occupying clearly defined roles. that is there were different roles for men and women, and their rights and obligations were ingrained at an early stage of their lives. The enforcement of these rights and obligations depended upon certain patterns of living and modes of production, as well as certain attitudes towards one's relatives and the community at large. This study reveals that when new laws attempt to change these deep-rooted trends in society, people like the Kalanga women do not oblige or are so ignorant that they do not notice the redress taking place.<sup>9</sup> It was men who developed concepts of who could be considered 'a citizen, an enemy, legitimate force to repel an enemy, legitimate solicitation of public views, work worthy of remuneration, equality and law'.<sup>10</sup> Existing politico-legal power structures consciously excluded women; it is not like the women chose to be silent. Men were the only ones who could assume roles as head of their families, headmen, chiefs, advisors to the chiefs and other high positions in the society.<sup>11</sup>

Similar to countries such as Zimbabwe, this study shows how women in Botswana have fought issues of citizenship by conceptualising the problem of discrimination against

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<sup>7</sup> Rekha A. Kumar 'Customary law and human rights in Botswana' *Human Rights & Human Welfare*, Working Paper, No. 52 (2009), <http://www.du.edu/korbel/hrhw/workingpapers/2009/52-kumar-2009> [Accessed 9-April-2014].

<sup>8</sup> *Ibid.*

<sup>9</sup> Athalia Molokomme, 'Disseminating family law reform in Botswana', *Journal of Legal Pluralism*, No.30-31 (1990/91), p. 303.

<sup>10</sup> Unity Dow, 'How the global informs the local: The Botswana citizenship case', *Health Care For Women International*, Vol. 22, No. 4 (2001), p. 320.

<sup>11</sup> *Ibid*, p. 3.

them as being one that can be addressed through changing the laws.<sup>12</sup> It would strengthen their case to broaden the critique by pointing out what the whole Southern African region has experienced, considering physical mobility owing to war, wage labour and travel for education.<sup>13</sup> Women in Southern Africa started fighting the battle against citizenship discrimination, which had been fought and won a generation ago by Western women, but their chances of success were much smaller as most political leaders supported the African tradition that supports the male as occupying a superior position in society.<sup>14</sup>

Men and women were both deprived of certain citizenship rights during colonial rule. Rights that not all citizens could enjoy included, for example, the right to vote or stand for political office. They also had limited if no rights to land, education and employment. This was also the time when divisions between classes and ethnic groups were encouraged. In Botswana there are superior ethnic groups, such as the Bangwato, and minorities like the Kalanga.<sup>15</sup> These historical developments exercised great influence in the acquisition of rights. Women had fewer rights in regard to education and employment when compared to their male counterparts under colonial rule. They also had limited rights to land and other resources. Throughout the post-colonial period these patterns never changed, with males continuing to be dominant. Women were not included in high positions of government and this discrimination against them was perpetuated by the fact that they were not permitted in political platforms where they could speak for themselves and get better recognition. The political, social and even civil rights between men and women had never been equal.<sup>16</sup>

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<sup>12</sup> Rudo Gaidzanwa, 'Citizenship, Nationality, Gender and Class in Southern Africa' *Alternatives: Global, Local, Political*, Vol. 18, No. 1 (1993), p. 47.

<sup>13</sup> *Ibid.*

<sup>14</sup> A.P Cheater and R.B Gaidzanwa, 'Citizenship in Neo-patrilineal States: Gender and Mobility in Southern Africa', *Journal of Southern African Studies*, Vol. 22, No. 2 (2007), p. 197.

<sup>15</sup> Kathleen M. Fallon, 'Transforming Women's Citizenship Rights Within an Emerging Democratic State: The Case of Ghana', *Gender and Society*, Vol. 17, No. 4 (2003), p. 527.

<sup>16</sup> *Ibid.*, p. 528

As stated in Chapter 1, when Botswana won its independence, women were under-represented in parliament, which led to a lack of female representation in all levels crucial to decision-making in the country. This might be because Botswana had a peaceful transition to independence from Britain; there was no struggle to draw them into politics and decision-making positions. For a number of years this situation was not questioned until women realised that the patriarchal situation in Botswana only worked to their disadvantage; to such an extent that they could not pass citizenship on to their children.<sup>17</sup>

Since independence, women worked hard for recognition and eventually had to come together to form organisations that could fight the battle. Eventually, international bodies like the UN CEDAW were formed to address the specific needs of women, especially their need to be recognised by their states as full citizens. African women, as in the Kalanga culture, were confined to the background; they were not supposed to complain about their subordinate position. Women like Unity Dow were called names and said to be un-African because of their behaviour, as they showed the ability to stand up for their rights. They were usually seen as ‘anti-African, imperialists, and supporters of western generated philosophy of feminism’.<sup>18</sup>

Therefore, Kalanga women believed that only men had the rights and power over them. Botswana legislation did not make the situation any easier for these women, an example being the 1984 Citizenship Act.<sup>19</sup> What is more important for this study to note is that the Act dishonoured Botswana’s Bill of Rights instead of complementing it.<sup>20</sup> By 2004, women married under common law had been backed by the law to be equal partners with

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<sup>17</sup> Gisela Geisler, ‘A second liberation: Lobbying for women’s political representation in Zambia, Botswana and Namibia’ *Journal of Southern African Studies*, Vol. 32 (2006), p. 76.

<sup>18</sup> Ann Stewart, ‘Should Women Give Up on the State? - The African Experience’, In Shirin M. Rai and Geraldine Lievesley (eds), *Women and the State: International Perspectives*, (London: Taylour and Francis, 1996), pp. 26 & 38.

<sup>19</sup> Nadia Steinzor, *Women’s Property and Inheritance Rights: Improving Lives in a Changing Time*, (Washington: Women in Development Technical Assistance, 2003), pp. 13 & 17.

<sup>20</sup> Keto Segwai, ‘Citizenship Act on the Balance: Judgement Reserved Indefinitely’, *Mmegi/The Reporter*, 9-15 November 1990, p. 2.

their husbands, while women wed in customary and religious marriages were legally still minors.<sup>21</sup> In most cases, women who stood up for themselves and sought their rights were feared and well-respected in society. Unity Dow stood up for herself and in the process liberated a lot of women. For women to enjoy their new-found status, different groups such as the parliamentarians, the media, women's organisations and the Attorney General had to work together to ensure that changes arising from the abolished and amended discriminatory laws were implemented.<sup>22</sup> They had to make sure women enjoyed their new-found freedom and equal status.

Botswana had to demonstrate that it found itself in the era where women's rights were important in the country's development. People welcomed the amendments that were to be made by the state after losing the Dow case. Magang, then minister of Mineral and Water Affairs, added that it was crucial for Botswana to upgrade women's status.<sup>23</sup>

The political, economic and social empowerment of women was aided by the enactment of such laws as the AMPA (2004). There had formerly been no balance in power relations and equity in decision-making. Prior to the amendments, Botswana was a nation shaped largely by customs and traditions, but time had come to realise that some of those traditional practice only served to perpetuate the oppression of women through role stereotyping.<sup>24</sup> These traditional practices and norms degraded women's status to that of being minors.

As indicated in Chapter 4, change is a very difficult thing to achieve. Kalanga women had lived under marital power for centuries and it was not going to be easy for them to

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<sup>21</sup> Robert Hitchcock, Meloin Johnson and Christine E. Haney, 'Indigenous Women in Botswana: Changing Gender Roles in the Face of Dispossession and Modernisation', In Robert Hitchcock and Diana Vincling (eds), *Indigenous People's Rights in Southern Africa* (New Jersey: New Transaction Publishers, 2004), p. 167.

<sup>22</sup> Steinzor, *Women's Property and Inheritance Rights: Improving lives in a changing time*, pp. 13 & 17.

<sup>23</sup> Government of Botswana, *Hansard 118; 7<sup>th</sup> – 11<sup>th</sup> August 1995*, pp. 7 & 13.

<sup>24</sup> United Nations, 'Botswana Report on the Implementation of the CEDAW: Combined Initial, Second and Third Reports', *United Nations* (2008), p10.

embrace change. Even the most educated, intelligent and politically-minded women dismissed the Act, saying that gender equality could never be attained, or not at least in their life time. Both men and women had to be willing to change their attitudes so that they could deal with the 'stubborn social problems' that hindered many development goals from being reached. During the debate on the Bill in parliament, women put forward redundant and tepid arguments. They concentrated too much on the MP for Tonota South, Pono Moatlhodi, whose biblical argument was meant to divert everything and turn it into an ineffectual game.<sup>25</sup>

The one thing that this Act did was to bring more discrimination than gender equality. In discriminating against women, it contradicted its main agenda. Marital power is marital power, whether under common law, customary law or religious rites, and provided more reason why female MPs were supposed to stand up and advocate for the abolition of marital power in all marriages, without fear or favour.<sup>26</sup>

The law should not have divided women in two camps, that is the informed and the less informed (for example the Kalanga). Educated women who lived under better socio-economic conditions were mostly married under common law, and these were the same women who were liberated by the Act. Yet the Act excluded other types of marriage in which Kalanga women were already disadvantaged. The Act reminded one of the apartheid era in South Africa, whereby the citizens were divided into two with each group having its laws, one for blacks and another for whites. The question may be asked if customary and religious marriages were recognised by the state as legal, and why it was that women married under these arrangements were left out. If the Act could not protect these unfortunate women, who and what was to protect them from the abuses of marital power? Most Kalanga women reside

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<sup>25</sup> *Ibid.*

<sup>26</sup> Michael Dingake, 'Abolition of marital power?', *Mmegi/The Reporter*, 11 January 2005, p. 6.



in rural areas and they happen to be the main voters for the people who were in power and who should have been advocating for them.<sup>27</sup>

The belief that the oppression of women is due to *lobola* is a far-fetched misconception. The paying of the bride price does not stop the oppression of women. Patriarchy is a social construct and is thus cultural. As a result, an immediate enacting of the Act would not easily change the attitude of the people. As stated by Raditlhokwa, the AMPA (2004) was supposed to have been enacted a long time ago; it is long overdue. Equality and human rights have never been promoted in Botswana society.<sup>28</sup>

The unfortunate thing about the Bill is that there was no nationwide tour to try and teach people about the new changes that the Bill would bring. The main people targeted by this new Bill would not get the news; they would continue living under oppression, unaware of the existence of a law to protect them against it. Women, especially in rural areas, were supposed to be taught about the new law and this should have been done in their own language for easy understanding and because it is usually the illiterate who are unaware of their rights. Most Kalanga women, especially those in deep rural areas, suffer such marital violations. *Kgotla* meetings would have been an appropriate way to inform them about the changed law.<sup>29</sup>

Women do not live in isolation and thus the pursuit of equality should not exclusively be focused on women: men also need to be considered in this process. Gender identities are intertwined and affect one another. It is thus important to determine how women's rights affect those of men.<sup>30</sup> Women in Botswana fought very hard for gender equality and their

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<sup>27</sup> *Ibid.*

<sup>28</sup> Log Raditlhokwa, 'Abolition of Lobola won't Guarantee Marital Equality', *The Botswana Gazette*, 16 March 2005, p. 10.

<sup>29</sup> The Editor, 'Educate the Masses on Marital Power', *Mmegi/The Reporter*, 8 December 2004, p. 8.

<sup>30</sup> Radijeng, 'Customary law and gender equality: The legal status of women in Botswana', p. 46.

struggle has started to produce results. After the AMPA (2004), married women regained their dignity and acquired their right to be treated as responsible adults, not minors.<sup>31</sup>

Property has always been a big issue in marriage and with the AMPA (2004), women gained greater control of property in their family. This constituted huge progress in Botswana concerning women's rights. All the laws that discriminated against women in the workplace were also amended so that women were granted equal access to employment benefits and gender equality in the work environment was promoted.<sup>32</sup>

The socioeconomic conditions of the present day are no longer examined for it is assumed that women have won their rights in all social arenas. In places where this has not occurred it is accepted that ideology takes a while to filter down to the masses. Who has the power in the family can only be determined by the family itself, and wives can no longer be regarded as minors. After 2004 a lot of things had to be considered when it came to who had the final say in a family on matters such as the level of education and status. The resourcefulness and competence of the two partners determined who would be the decision maker.<sup>33</sup>

With the AMPA (2004) in place, married couples could make joint decisions and it was no longer necessary for the husband to make decisions for his wife or vice versa. But if the husband was to continue to be treated as the head of the family it would be up to them, what remained was that the wife now had the liberty to question the husband's decisions. For

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<sup>31</sup> The Editor, 'Not Yet Uhuru for Women', *Mmegi/The Reporter*, 09 March 2005, p. 6.

<sup>32</sup> United Nations, 'Botswana report on the implementation of the CEDAW', pp. 10 & 20.

<sup>33</sup> Dair L. Gillespie 'Who has the power? The marital struggle', *Journal of Marriage and Family*, Vol. 33, No. 3 (1971), pp. 445 & 448.

more guidance the couple could still rely on religion and tradition. The husband is no longer the only one exercising power; all this has been reversed by the Act.<sup>34</sup>

The Dow case contributed a great deal to amending the law so as to favour women; a situation which also affected the Kalanga. Given the patriarchal nature of Kalanga society, the male-biased law concerning the passing on of citizenship to the children did not help matters, but instead exacerbated the subordination of women. In view of the Kalanga women's experiences, the Citizenship Act (1984) had to be changed since most of these women were married to men of foreign nationalities. The AMPA (2004) brought relief in terms of the marginalisation and subordination these women faced. However, some felt that the AMPA (2004) would destroy marriages since women would become too controlling, which went against Kalanga culture, where women are supposed to be seen and not heard. The APMA (2004) had to be instituted so as to end the discrimination and abuse that women were confronting. For the reason that men were recognised as the heads of their families, women had to respect whatever decision they made whether wrong or right. The Kalanga women displayed different reactions to the Act. Most elderly women thought the Act was simply a bad idea, with the majority of them predicting that post-2004 marriages would not last when compared with marriages that took place before the Act was instituted. On the other hand, younger women were happy with the Act since it gave husbands and wives an opportunity to sit down and discuss family issues and come to an agreement that would benefit everyone in the household.

The Citizenship Act (1984) and AMPA (2004) constitute two distinct pieces of legislation, with one discriminating against women and having to be amended in order to

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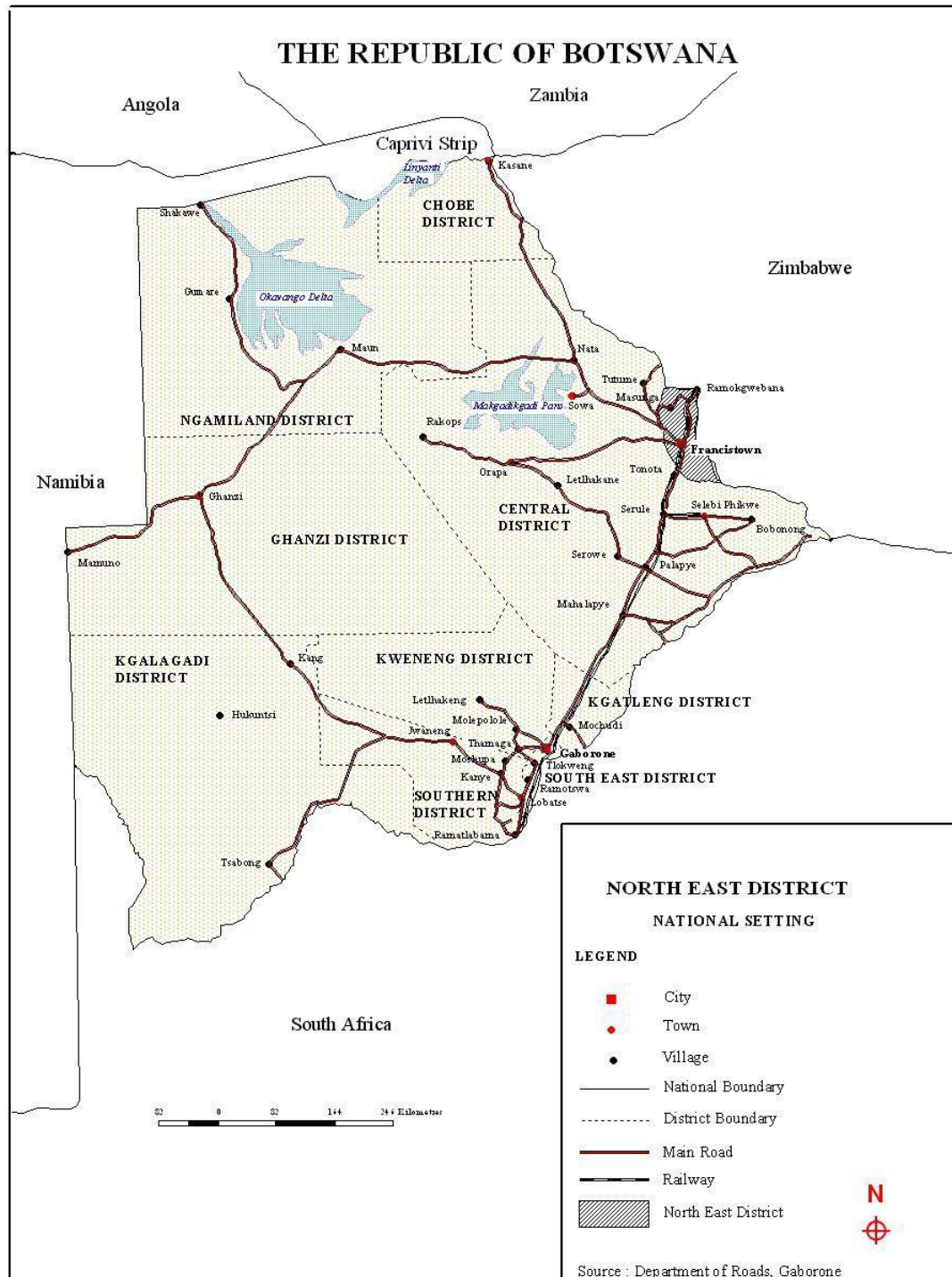
<sup>34</sup> Dianne Hubbard, *Guide to the Married Persons Equality Act*, (Windhoek: Legal Assistance Centre, 2009), p. 8.

eliminate the discrimination. The AMPA (2004) was solely intended to liberate women from the shackles that bound them in their marital households.

There are intellectual and practical justifications for a study of Kalanga women in North East Botswana in relation to the legislation of citizenship and marriage. First, as pointed out in Chapter 1, in spite of an equitable Constitution and a perceived successful transition from a British protectorate to a lauded democratic society, women's rights as citizens and wives were deliberately restricted. Equal rights were thus not extended to women in post-colonial democratic Botswana, with married women particularly affected and women's voices silenced in general. The prevailing narrative of Botswana's post-colonial democracy as an unqualified success story and an ideal for the rest of the continent is contested. This research was therefore crucial in the creation of a more nuanced and representative understanding of Botswana's post-colonial democratic transition and a society that includes women's experiences and voices.

## APPENDICES

### Appendix 1



**Figure 1: Geographic location of the North-East District of Botswana**

(Source: Government of Botswana, North-East Development Plan 2003-2009.)

## Appendix 2

### **Laws Deemed by Botswana's High Court as Discriminatory against Women**

1. Citizenship Amendment Act CAP. 01:01
2. Customary Courts Act CAP. 04:05
3. Penal Code CAP. 08:02
4. Criminal Procedure Act and Evidence Act CAP. 08:02
5. Change of Name Act CAP. 15:02
6. Prisons Act CAP. 21:03
7. Immigration Act CAP. 25:02
8. Pensions Act CAP. 27:01
9. Military Pensions Special Fund Act CAP. 27:02
10. Adoption of Children Act CAP. 28:01
11. Affiliation Act CAP. 28:02
12. Deserted Wives & Children's Protection Act CAP. 28:03
13. Marriage Act CAP. 29:01
14. Married Person's Property Act CAP. 29:03
15. Matrimonial Causes Act CAP. 29:06
16. Administration of Estates Act CAP. 31:01
17. Deeds Registry Act CAP. 33:02
18. Companies Act CAP. 42:01
19. Mines, Quarries Works and Machinery Act CAP. 44:02
20. Bills of Exchange Act CAP. 46:02
21. Employment Act CAP. 46:02
22. Education (Corporal Punishment) Regs. CAP. 58:35
23. Education (Primary Schools) Regs. CAP. 58:83
24. Unified Teaching Service Act CAP. 62:01
25. Mental Disorders Act CAP. 63:02

(Source: Agnes Ngoma-Leslie, *Social Movements and Democracy in Africa: The Impact of Women's Struggle for Equal Rights in Botswana*, (New York: Routledge, 2006). See also Unity Dow (ed.), *The Citizenship Case: The Attorney General of the Republic of Botswana vs Unity Dow – Court Documents, Judgements, Cases and Materials* (Gaborone: Lentswe La Lesedi, 1995).

### Appendix 3

#### INTERVIEW WITH TINY PHOLI.

My name is Tiny Pholi and I am customary court clerk in Mulambakwena village. I was happy when the Abolition of Marital Power Act was enacted. This gave us women all the independence. Women can now work, get promotions to top positions in organisations and even own property. I also believe that this act brought peace in many families, even though yes there would be some exceptions where families were broken because of it. This equality meant men and women living in harmony, not that the wife would take over the husband's position in the family. Even though marital power was abolished there are still some traces of it in some families.

As for the Citizenship Act, the way you explained it, I also believe Unity Dow did justice to many women by standing up to the government and forcing the law to be changed. I really did not know anything of the sort when it came to the Citizenship Act. Most of us Kalanga women are not ignorant when it comes to such things even though they affect us directly. The decision to amend the Citizenship Act in 1995 was a good thing not just to the Kalanga women but to the children as well.

## Appendix 4

### INTERVIEW WITH TAPSON JACKALAS

I am Tapson Jackalas, the village chief in Jackalas No.1. Marriage is a cultural norm in the Kalanga society. We are a patriarchal society, therefore when a man gets married in the Kalanga culture, the woman has to move to where she has been married. For example, if a Kalanga woman from this village (Jackalas No.1) gets married in another ethnic group, she has to move to her in-laws. This is the case with the Citizenship Act of 1984. It was the right law, women married to foreigners were supposed to move to the countries in which they were married. If a Kalanga woman from Botswana gets married to a Zimbabwean man, she has to go there, hence changing her citizenship even that of her children. I do not agree with the new law in place, where by the woman can determine the children's nationality. Another example is that even within Botswana, when my daughter gets married to a Mokgatla, I will expect her to move to Kgatleng and she becomes a Mokgatla too.

As for the Abolition of Marital Power Act (2004), I totally agree with it. Marital power on its own could break communication between spouses leading to marriage failure, and when people become married to be considered to be one according to my Bible. As a chief, I am obliged to solve misunderstandings between people even couple. I have therefore dealt with such cases below, whereby husbands who believe so much in marital power tend to abuse the wives, some even threatening to send them away just because the wife does not want to be treated like a child. I also had a case where a woman came to complain about how her husband wouldn't allow her to drive to church, simply because he believes the car belongs to him, but in actual fact the couple was married in community of property, which means the car belonged to her as well.



## Appendix 5

### CONSTITUTION OF BOTSWANA

#### SECTION 15

15. Protection from discrimination on the grounds of race, etc.

(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, 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.

s. 4. (3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

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

(a) for the appropriation of public revenues or other public funds;

(b) with respect to persons who are not citizens of Botswana;

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

(d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or

(e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law.

(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorized by section 9(2), 11(5), 12(2) 13(2), or 14(3), as the case may be.

(8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section

(a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or

(b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.

## Appendix 6

### INTERVIEW WITH TABOKA PHEKO

My name is Taboka Pheko, I got married at a very young age. I went to school up to Form 2 (which is middle school). When I met my husband he was a very loving man and even suggested that I stop working as he could provide me with everything. I got married under both the common law and customary law. After our marriage we moved to Gaborone because he owned businesses there. He later retired and we moved to the village. You have to understand that I am married to a traditionalist who is over thirty years older than me. Even after the Abolition of Marital Power Act under the common law, my husband is still favoured by customary law. He does not believe in a wife being an equal partner. I have tried to tell him that things have changed, but he told me that this in our home are going to work the same way as in his father's house. He does not allow me to own a bank account or find a job because he is the sole provider and the head of the house. I am a minor in this house; there is no difference between me and my children with the treatment I get from this man. I have asked for assistance from professionals but he does not listen. He does not care about the common law and even women's rights. He says there can only be one head and that is him. He was once married and his marriage ended badly and now on top of his mentality that women should be treated as minors, I am also paying for the sins of his former wife. I cannot do anything without his consent, for example I fail to join women societies whereby we contribute money every month to help each in times of difficulties. This is because I never know the next time I will have money. He told me that if I ever want to leave him, I can but the only thing I will carry out of this place is my bag of clothes nothing else as everything belongs to him.

## Appendix 7



### Legal release form

Name: -----

Address: -----

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I consent and agree that University of the Free State, South Africa, its employees or agents, have the right to interview me for possible inclusion in Unaludo Sechele's Master's thesis, and any publications derived from the project.

I release to University of the Free State, its employees or agents, and future researchers, the right to use, at their discretion, the material in print or digital form for educational purposes.

If you decide you no longer wish your interview to be used in the project, you have up to two weeks from the date signed to withdraw.

Your contact details will be kept confidential. Your identity will be preserved in the recordings and any reproduction unless you request to remain anonymous. If so state here.....

I am at least 18 years of age, have read and understand the above statements and am competent to execute this agreement.

Signed.....

Date.....

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### **Interviews Conducted by the Researcher**

Interview with Agnes Malanga, 10/02/14.

Interview with Chabo Nleya, 04/02/14.

Interview with Eckenia Sekai, 10/02/14.

Interview with Elizabeth Mbotho, 10/02/14.

Interview with Ester Maweni, 10/02/14.

Interview with Kesentseng Matebu, 03/02/14.

Interview with Kudzani Tagana, 05/02/14.

Interview with Lebogang Lopang, 06/02/14.

Interview with Sibongile Matopote, 09/02/14.

Interview with Sibusisiwe Boy, 13/02/14.

Interview with Taboka Pheko, 03/02/14.

Interview with Tapson Jackalas, 03/02/14.

At the request of the informants some of the names are anonymised, and for that reason the places where the interviews were held are not included.

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