



COUNTRY PROFILE

The Constitution of the Republic of Botswana contains no reference to families, though it does guarantee protection from discrimination, including discrimination on the grounds of sex.⁷² Family law in Botswana is governed through statute, the Roman Dutch common law and customary law.⁷³ Historically, these sources of law have been deeply patriarchal and have functioned to entrench intra-familial inequality.⁷⁴ Fortunately, in recent years Botswana has embarked upon a process of progressive law reform,⁷⁵ though the State remains largely politically conservative and many citizens continue to live in rural contexts governed mostly by application of customary law rather than progressive legislation.⁷⁶

Treaty	Date of ratification	Reservations/Declarations
CEDAW	13 August 1996	None
African Charter	17 July 1986	None
Maputo Protocol	While not officially updated on the AU Website, Botswana ratified in October 2023 and deposited its Instrument of Accession with the AU in December 2023. ⁷⁷	-

⁷² Constitution of the Republic of Botswana 1966, amended 2016. Available at https://www.constituteproject.org/constitution/Botswana_2016 (accessed 16 April 2024)

⁷³ J Sloth-Nielsen "A New Children's Law in Botswana: Reshaping Family Relations for the Twenty-First Century" (2012) *The International Survey of Family Law* 27 at 28. Available at https://www.academia.edu/31576434/A_New_Children_Law_in_Botswana_Reshaping_Family_Relations_for_the_Twenty_First_Century (accessed 16 April 2024)

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ <https://soawr.org/2023/12/01/botswana-has-ratified-the-maputo-protocol/> (accessed 16 April 2024)

MAIN TRENDS IN FAMILY LAW

In recent years, Botswana has enjoyed significant progress towards a more just and equitable family law. A key step towards this progress was the enactment of the Abolition of Marital Power Act 2004. Prior to this Act, the common law dictated that concluding a civil marriage (whether in or out of community of property)⁷⁸ vested husbands with marital power. Marital power designated men heads of the family unit, exclusively charged with decision-making power in the family. It also stripped married women of their legal capacity. Instead, their husbands had complete control of the legal personhood of the wife, joint property and even the wife's property if they were married in community of property.⁷⁹ The Act has abolished the marital power doctrine and established married women as full legal persons and equal partners in their marriages. Spousal consent is still required for certain legal transactions, such as the disposal of jointly owned property where the marriage is in community of property, but this requirement applies equally to husbands and wives.⁸⁰

The Married Persons Property Regime enacted under the Married Persons Property Act further provides that under the community of property regime, all property acquired by either spouse before or during the marriage, as well as any income generated from that property, is deemed to be joint property. This means that both spouses have an equal share in the property and must share equally in any profits or losses. It also provides for the dissolution of the marriage and the distribution of property in the event of divorce. In the case of the community of property regime, all joint property is divided equally between the spouses.⁸¹

The Children's Act 2009 has, besides conferring for the first time explicit rights on children,⁸² also contributed to the reform of family law in general. The Children's Act prohibits forced marriages of children and the Marriage Act 2001 sets the minimum age of marriage at 18 years, without any

exception. However, customary and religious marriages are excluded from the scope of the Marriage Act. Previously, the general rules were that custody of children of tender age should be given to the mother, custody of a son should be given to a father and that of a daughter to the mother and custody of a child should not be given to an immoral parent.⁸³ Additionally, married fathers had full guardianship rights and control over children, while unmarried fathers had no rights or duties at all.⁸⁴ However, the Children's Act confirms the position of the Abolition of Marriage Power Act, ensuring guardianship rights for both parents, whether married or unmarried, a presumption of joint, shared custody, and the child's right to know and be cared for by both biological parents. The new Children's Act read with the Abolition of Marriage Powers Act goes a long way to ensuring equality in parental relations, as required by the Maputo Protocol.

Customary law has not escaped the reform process. Tswana law previously prescribed that the family be inherited by either the youngest or oldest son. The High Court, confirmed by the Court of Appeal, ruled in *Mmusi vs Ramantele* that this law was unconstitutional and contrary to obligations contained in international conventions such as CEDAW.⁸⁵ Women are thus able to inherit equally in customary law and male primogeniture has been declared unconstitutional.

Finally, Botswana has taken positive steps to combat violence against women⁸⁶, such as adopting the Domestic Violence Act 2008 to allow civil and customary courts to issue protection orders as well as the National Gender-Based Violence Strategy 2015-2020, a multisectoral approach to eradicating gender-based violence. In 2020, Botswana established special courts to increase the speed of the State's response to violence against women.⁸⁷ In spite of these positive steps, it must be noted that rates of violence and abuse experienced by women remain far higher than the global average.⁸⁸

78 Married in community of property refers to a legal regime where assets and liabilities acquired during the marriage are considered jointly owned by both spouses. It typically implies that each spouse has an equal ownership interest in the property, regardless of the individual contributions made during the marriage

79 See T Jobetta "Recent Developments in Family Law in Botswana: The Abolition of Marital Power Act" (2006) *International Survey of Family Law* at 94-96

80 See Section 7-9 of the Abolition of Marital Power Act 2004. Available at <https://botswanalaws.com/consolidated-statutes/principle-legislation/abolition-of-marital-power> (accessed 17 April 2024)

81 <https://thelawraven.com/the-married-persons-property-regime> (accessed 17 April 2024)

82 See Part III of the Children's Act 2009. Available at <https://botswanalaws.com/consolidated-statutes/principle-legislation/children-s> (accessed 17 April 2024)

83 EK Quansah *Introduction to Family Law in Botswana* (2001) at 67

84 Sloth-Nielsen (n 2 above) at 29

85 *Mmusi vs Ramantele* 2012 MAHLB-000836-10; CACGB-104-12. Available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Mmusi-Court-of-Appeal-Judgment.pdf> (accessed 17 April 2024)

86 <https://wbl.worldbank.org/content/dam/documents/wbl/2024/snapshots/Botswana.pdf>

87 See <https://www.reuters.com/article/botswana-rape-court-idUSL8N2IG3BE>. (accessed 17 April 2024)

88 The United Nations Population Fund states that Botswana's levels of violence against women are double the global average, with nearly 70% of women having experienced physical or sexual abuse. Available at <https://docs.google.com/document/d/1-sqp1oRiyFNpQek2wp5NoiWlpbP2Dgm/edit> (accessed 17 April 2024)

KEY GAPS AND CONTESTATIONS

(i) Same-sex marriage not recognised:

Marriage in Botswana remains reserved for heterosexual couples.⁸⁹ Same-sex partners cannot conclude marriages, civil unions, or form permanent life partnerships. As a result, these partners do not enjoy equal protection of the law. However, the High Court in 2019 decriminalised same-sex sexual relations and the Court of Appeal confirmed this decision in 2021.⁹⁰ Notably, the High Court held that the word “sex” in Section 3 of the Constitution should be interpreted to include sexual orientation, effectively creating a constitution imperative to protect persons from discrimination on the grounds of sexual orientation. The Botswana Democratic Party, currently the ruling party, and the President of Botswana have expressed their support for this decision. This is indicative of shifting public opinion and there is great potential for the decision to lead to further legal progress. In August 2023, Parliament shelved debate on a bill seeking to decriminalise same-sex relations.⁹¹

(ii) No recognition for cohabiting partners:

Another gap in family law is the lack of recognition for cohabiting partners.⁹² There is no legislative provision for cohabiting partners and the common law offers minimal protection for partners after dissolution of those partnerships. In order to obtain a share of joint property or the profits of joint enterprises after dissolution of the partnership, such partners must satisfy stringent standards of proof. In many neighbouring countries, permanent life partnerships or universal partnerships have been established by legislation or precedent to protect the rights of such partners, and in particular, the rights of vulnerable women who might otherwise be left destitute after dissolution of such a partnership.⁹³ Botswana must consider similar measures. There is a proposal to legally recognise cohabitation after 10 years in a Report of the Presidential Commission of Inquiry into the Review of Constitution of Botswana 2022.⁹⁴

RECOMMENDATIONS

Legal reforms:

- ▶ Drawing on existing progressive jurisprudence, Botswana must legalise same-sex marriage.
- ▶ Botswana must recognise and regulate cohabitation relationships outside of marriage in order to protect the rights of vulnerable women.
- ▶ Botswana must clarify that the prohibition on marriage of children under 18 applies to customary and religious marriages as well.
- ▶ Botswana must adopt an updated comprehensive national policy to combat gender-based violence.

Judicial discretion: Courts must be granted greater discretion to determine the division of matrimonial property. This discretion must be used to consider the non-financial contribution of women to marriages.

89 Quansah (n 11 above) at 32

90 *Letsweletse Motshidiemang vs Attorney-General* (LEGABIBO as amicus curiae) MAHGB000591-16. Available at https://www.chr.up.ac.za/images/researchunits/sogie/documents/LM_vs_The_Attorney_General_judgment_June_2019_complete.pdf (accessed 17 April 2024)

91 Botswana Parliament Defers Debate on Controversial Homosexuality Bill. Available at <https://www.voanews.com/a/botswana-parliament-defers-debate-on-controversial-homosexuality-bill/7207181.html> (accessed 15 January 2024)

92 <https://www.pressreader.com/botswana/the-midweek-sun/20210324/281505048993969> (accessed 17 April 2024)

93 Quansah (n 11 above) at 37

94 Report of the Presidential Commission of Inquiry into the Review of Constitution of Botswana 2022 at 95. Available at <https://constitutionnet.org/sites/default/files/2022-12/Final%20Commission%20Report%2028%20Sep%202022.pdf> (accessed 17 April 2024)