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Marriage: What every woman wants or a Declaration of "civil death"? Some legal aspects of the status of married women in Botswana

by Athaliah Molokomme

Introduction

That "husband and wife are one... and that one is the husband" is an old English common law doctrine which judges and jurists used for centuries to deny married women an independent legal existence from their husbands. Various justifications were put forward for this traditional approach, such as

the civil law, as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic fear as that which properly belongs to the domain and functions of womanhood.¹

While modern developments and feminist struggles have caused some countries to wipe out such laws from their statute books, attitudes persist which put hurdles in the way of married women as they seek to participate in civil life. Others officially adhere in varying degrees to the traditional approach, despite formal declarations of equality of the sexes in their constitutions and other documents. The Botswana legal system unfortunately remains in the latter category in its treatment of married women. This article intends to highlight some aspects of the law affecting married women and suggest ways in which reforms can be made to place them on an equal footing with their husbands.²

Status at Common Law

Although the Roman-Dutch law, now the "common law" of Botswana never recognised the English law concept of the "unipersonality" of husband and wife, it did in some cases develop rules which seem to derive from that assumption. This is especially true of the so-called "invariable consequences" of marriage which attach to all marriages irrespective of whatever arrangements the spouses may make between themselves. These consequences of marriage at common law and their effect on the status and capacity of women shall be discussed below.

a. The Invariable Consequences

Firstly, the law relating to domicile requires that every marriage must have a domicile, known as the "matrimonial domicile" which is necessary for purposes of determining the legal system applicable to the marriage. At common law, the matrimonial domicile is always that of the husband, the wife losing the capacity to acquire a domicile of her choice on marriage. Henceforth she follows her

husband's domicile even where they are living apart for whatever reason. This position has very significant effects on the status of the wife, since domicile is most often used to decide which legal system will apply in determining a person's status.³ To deny her the capacity to choose a domicile, or the right to have a say in her husband's choice of domicile may in fact lead to injustice. In fact, it puts her in a position similar to that of a minor that has a domicile of dependence from its guardian until it reaches majority - except that a married woman must wait for her marriage to be dissolved before she has her capacity to acquire a domicile of choice returned to her.

The second invariable consequence of marriage which seems to emanate from the unipersonality of the marital couple and its incidence in the husband alone is the rule that he is the head of the family, having a final say in household matters. What this means is that the husband is the final decisionmaker, and has the casting vote when the spouses disagree on a particular issue. The implications of this rule for married women and their status and capacity are obvious - they are effectively denied a say in some of the most fundamental decisions such as where they shall live, whether or not they can pursue a career, how many children they will have and so on. Although modern conditions in Botswana might be rendering these meaningless in practice, it is important that these rules still exist and constitute a necessary consequence of marriage under the common law which cannot be contracted out of.

A related consequence of marriage at common law which subordinates women to their husbands is the law relating to the guardianship of the minor children of the marriage. According to this rule, which again cannot be contracted out of, the guardian of a legitimate child is its father, unless in exceptional situations where he may be denied this right by a court. Generally, therefore, it is the father who is responsible for contracting on the minors' behalf and who generally has the final word on matters affecting them. An example in point is the Botswana Marriage Act⁴ which specifically states that the father's consent alone is sufficient to the marriage of his legitimate minor child where the parents cannot agree.

b. The Variable Consequences

The most significant provision of the common law responsible for the subordination of numerous women to their husbands is of course the marital power which, according to strict law, can be excluded by ante-nuptial contract. As will be seen later, this is not entirely true. The origins and exact nature of the husband's marital power over his wife have been the subject of debate among Roman-Dutch writers for a long time.⁵ What is clear however is that the marital power embraces two aspects: the husband's power over his wife's person and his power to administer her separate property or their joint property. In its most archaic form, the power over her person gave the husband the right "moderately to chastise his wife"⁶ or do what he wished with her, but it is doubtful that this is still the case in view of the criminal offence of assault. Today, the husband's marital power over his wife's person is understood to embrace the invariable consequences of marriage discussed above: his position as head of the family, his sole right to determine the matrimonial domicile and his powers of guardianship of the minor children. Those consequences, as will be remembered, attach to all marriages and cannot be excluded by ante-nuptial contract, hence the contention earlier that the marital power can never be completely excluded.

The second aspect of the marital power gives the husband the right to administer their joint property where the marriage is in community of property or her separate property where it is out of community. It is this aspect of the marital power which can be excluded by contract before marriage, and under common law, it should be specifically excluded, otherwise it continues to attach even to marriages out of community. With marriages in community, the marital power automatically attaches, as well as the community of profit and loss.

From the above, it is quite clear that the legal status of a married woman at common law is not determined solely by whether the marriage is in or out of community, but rather by whether the husband's marital power has been excluded or not. Where she is subjected to the marital power, she lacks locus standi in judicio - she cannot, without her husband's assistance or consent, sue or be sued in her own name. He must either bring or defend actions on her behalf or authorise or consent to transactions and legal proceedings. He has the right to deal with her property without consulting her or obtaining her consent, and this right includes alienation of immovable property. Thus a husband who has the marital power may sell the matrimonial home at the stroke of a pen without his wife's knowledge or consent, and the law will rubber stamp such a transaction. A woman who is not subject to the marital power is however protected from such drastic actions - she has locus standi in judicio, does not require her husband's assistance and consent to transact in relation to her separate property or enter contracts. Thus a woman married out of community without the marital power may participate in civil life almost as if she were unmarried, much to the envy of her sisters who are subjected to their husband's marital power. But as has already been seen, she is not completely "her own person" since she still lacks the capacity to choose her own domicile, make family decisions and be the legal guardian of her minor children, since these are invariable consequences of marriage at common law.

Status under Statute

To what extent has the legislature modified the common law status of married women as enunciated above? Unfortunately, the statutory trend has been to either re-enact the common law position, displace it with institutions equally unsatisfactory, or simply enact statutes in language so broad and vague that the position becomes at best ambiguous. A discussion of some of these statutes and their implications for the status of married women follows.

1. The Married Persons Property Act⁷

This is perhaps the best example of an unsuccessful attempt by Parliament to introduce innovations into the law affecting the property of married persons and improving the status of women within marriage. Prior to its enactment, the common law presumption was that all marriages were in community of property, profit and loss with the marital power applied - unless the spouses entered into an ante-nuptial contract. According to this Act, these three aspects of marriage in community are excluded from marriages contracted after January 1st 1971, unless the spouses indicate the contrary by filling in a form expressing their wish to be married IN community of property. In effect, Parliament merely reversed the common law presumption that operated before, without, it is submitted, improving in any way whatsoever the common law status of women married under the two property regimes. This is so for two reasons.

Firstly the Act failed to alter the common law rules relating to marriages in community of property, especially its unfair consequences for women subjected to their husband's marital power. It is interesting, however, to observe that it seemingly had some good and ambitious intentions. In his memorandum⁸ to the bill, the then Minister for Home Affairs correctly stated that the common law rules on marriage in community were prejudicial to wives in that their husbands "entirely controlled" their joint property; that they placed such wives in a position of near minority, and more importantly that this was "inconsistent with the status of women today". Community of property, the memorandum continues, is not entirely without benefit to the wife since on dissolution of the marriage, she is entitled to half the property, thus protecting her especially on her husband's death should she not be his intestate heir. The object of the bill, at this point, was that "community of property should in general disappear, and be replaced by matrimonial regime which puts the wife in the same position as any other adult". At the same time, those wishing to retain community of property could do so by executing an instrument provided by the Act. It is submitted, with due respect to Parliament, that the Act in its final form falls far short of its stated objectives and represents a half way measure or worse, a misdirection. If the intention was indeed to place wives in the position of any other adult, the only way to do so would have necessarily involved tampering with the internal rules of the common law, especially those relating to the marital power. By merely reversing the common law presumption and leaving the spouses free to "choose" their property regime, a choice they in any case had before, the Act is a non-starter.

The second respect in which the Act fails is the manner in which it makes special provision for the proprietary consequences of marriages of Africans married by civil rites. These continue to be governed, for some peculiar reason, by the customary law, unless the spouses express their wish to opt out of the customary law, and have the common law apply to them. They can do the latter by filling in a form to that effect and in addition express their wish either to be married in or out of community of property. This situation is objectionable because it affords a different treatment of the proprietary consequences of African marriages. Why was this done? Possibly, Parliament did not wish to impose the common law consequences of marriage on Africans who may wish to retain some aspects of their traditional way of life. One would assume however that by choosing a marriage by civil as opposed to customary rites, African spouses thereby expressed their intention to opt out of the customary law. Admittedly, it may be true that this may not necessarily be the case, and it may still be argued that people marry by civil rites for other reasons - such as to please their church or simply because it is more fashionable. The significant point to be made here however is that customary law generally treats women inequitably as far as property rights within marriage are concerned, and it would seem unwise to merely refer the proprietary consequences of marriage to the customary law without regard to whether such a system is just.

Quite happily, there is some relief available in the form of the Dissolution of African Marriages (Disposal of Property) Act⁹ of 1926. This Act allows a Magistrate or Judge to apply the common law and not the customary law to the disposal of the property of married Africans in cases where it would seem unjust and inequitable to apply the customary law. Thus one of the spouses may apply to court requesting that the common law be applied to the determination of their property rights at the end of the marriage, but the

court must be satisfied that the spouses' mode of life is such that applying the customary law would be unjust and inequitable. A woman who did not take advantage of the Married Persons Property Act and finds herself subjected to the customary law may therefore avoid its harsh consequences by making such an application. This happened in *Molomo v Molomo*¹⁰ where Judge Hannah decided that the common law would apply to the disposal of the spouses' property even though they had not availed themselves of the provisions of the Married Persons' Property Act. The learned Judge found that the spouses lived in a "sophisticated" way of life and that it would be unjust and inequitable to apply the customary law. The common law was finally applied to divide the matrimonial property, and the wife got half of the property. There is no doubt however that the procedure married African women have to go through to assert their property rights is much too cumbersome and in any event only available at the end of the marriage, by which time it might be too late to be of benefit to them.

The Act does however make a significant modification of the common law as far as marriages out of community of property are concerned. As will be remembered, a woman married out of community may under the common law still be subject to her husband's marital power if she does not specifically exclude it. The Act, however, is worded in such a way that for marriages contracted after 1971, the marital power can never attach to a marriage out of community of property.¹¹ Thus a woman married out of community of property after 1971 is only subject to the personal aspects of her husband's marital power but has full capacity to deal with her separate property.

2. The Deeds Registry Act¹²

This Act, which was enacted before the Married Persons Property Act came into operation reproduces the common law disabilities suffered by married women in so far as dealings with immovable property are concerned. Section 18 requires that women married out of community of property but still subject to the marital power must be assisted by their husbands "in executing any deed or other document" relating to immovable property, unless the Registrar of Deeds deems such assistance unnecessary. Women married in community however lack the capacity to receive immovable property, unless such property is somehow excluded from the community and the marital power. In addition, where a Botswana woman citizen is married to a non-citizen, she has the same capacity to receive immovable property as a woman married out of community and without the marital power. It is submitted however that women married after 1971 out of community of property have full capacity to receive immovable property since, as has been seen, the marital power can no longer attach to marriages out of community under the Married Persons Property Act. Women married in community generally remain unable to deal with immovable property since the Married Persons Property Act did not affect them in any way.

For income tax purposes, husband and wife are once again treated as one, and the Income Tax Act¹³ indeed makes that one the husband. It provides that "any amount accrued to a married woman... shall be deemed to have accrued to her husband and shall be included in his gross income," except where her husband is non-resident. Tax is chargeable in the husband's name irrespective of the wife's earnings, the property regime under which they are married and whether the marital power attaches or not. This seems out of place in view of the Married Persons Property Act and the increasing number of women in formal employment who earn a separate income from that of their husbands.

The Citizenship Act¹⁴

Although this Act does not compel a Motswana woman citizen to forfeit Botswana citizenship on marriage to an alien, it does limit such woman's capacity in two respects. First, she has no capacity to pass Botswana citizenship to her legitimate children, since they acquire their father's foreign citizenship by descent even where they are born in Botswana.¹⁵ Single mothers however have full capacity to pass Botswana citizenship to their children, irrespective of where the children were born or their father's nationality.

Secondly, she has limited capacity to influence her husband's acquisition of Botswana citizenship by naturalisation. This situation is in sharp contrast with the capacity of a citizen male to assist his alien wife obtain a certificate of naturalisation. The Act¹⁶ makes special provision for the acquisition of citizenship by alien women married to citizen men, who may obtain a certificate of naturalisation after a continuous stay of 2½ years. Such provision is apparently consistent with Article 5 of the United Nations Declaration on the Elimination of Discrimination Against Women of 1967.¹⁷ It is submitted, however, that it does not go the whole way in that it discriminates between the capacity of citizen women and that of citizen men to assist their alien spouses obtain a naturalisation certificate.

Conclusions and Proposals for Reform

This article has examined some of the disabilities which married women suffer under the Botswana legal system, many of which were inherited from the received Roman-Dutch Law. It would be simplistic and wrong however to conclude that our common law legacy is entirely responsible for the inferior status of married women because traditional Tswana law treated them in the same way. The state of the law is mainly a result of social attitudes towards women and the role they play in society, so that when the Roman-Dutch laws were introduced into the country, it was easily acceptable since it kept women in an inferior position broadly similar in ideology to Tswana tradition. The question which necessarily arises today is whether these products of cultural bias and historical accident should be retained for their own sake, or whether they should be changed to conform with the realities of modern life. It is submitted that in view of the rapid social change this country is going through, where women are increasingly venturing into what are traditionally male roles it is time these restrictions were lifted to allow women more freedom to engage in commercial traffic and other aspects of civil life regardless of their marital status. It is also clear that before reform can be carried out, a serious exercise in thinking and goal clarification must be gone through; what, for example, is the correct direction for marriage law reform? Although there is no simple and straightforward answer to this question, there is no doubt that one of the objectives reform should aim at is marital harmony, and in order to achieve this, it is submitted that equality within marriage must be the starting point. In the words of McDougal:

Sex, like race, offers no rational criterion for "classification" in determining the legal rights of women or of men". Females, no less than males, require to be treated as persons, not as statistical abstractions".¹⁸

There is no doubt either that reform which aims at equality will benefit not women alone but will also facilitate a more "democratic" atmosphere within the family, where decisions will be made jointly after a process of consultation. As Professor Carmen Nathan¹⁹ aptly put it, clinging to a system originally intended to place absolute power in the hands of men, in conformity with the then prevailing social

attitudes will today result in the gross discomfort of men in the market place and discord in the home. It is therefore the responsibility of those in decision-making positions, in consultation with the population, of which women constitute more than half, to reform the law of marriage and indeed other laws in a just and equitable manner for all. That the key positions of decision-making are occupied by men and that they are advantaged by the present system is significant - and it will mean much compromise on their part as an interest group to tip the scales in order to ensure equal treatment of all without regard to gender. It would be equally simplistic however to assume that things would be better if for instance we had more women in Parliament, but it would help to improve the status of married women once more women with a sense of justice and equity, working together with men, occupy key positions of decision-making. The absence of strong pressure groups and women's organisations to lobby Parliament and other fora has not helped, but in view of the deliberations that have taken place among Botswana women and their coverage by the press during the past couple of years, there is no doubt that the situation is now ripe for serious marriage law reform. With the decade of the United Nations Womens Year drawing to a close in 1985, it is hoped that Parliament will take positive action to put into practice the equality to which our government subscribes in theory. The following principles for reform are therefore suggested:

1. The invariable consequences of common law marriage, which also constitute the personal aspect of the marital power are not "given" or "divinely ordained". They necessarily assume the superiority of men to women in decision-making and effectively deny women a say in some of the most important matters affecting their personal lives. It is suggested that the common law be amended to allow women a say in domicile, guardianship of children and family decision-making - which effectively means abolishing the invariable consequences of marriages at common law - and the personal aspect of the marital power. This would certainly put married women in the same position "as any other adult".
2. Although the property aspect of the marital power may be excluded under the common law by ante-nuptial contract or by merely marrying out of community after January 1st 1971, its automatic inclusion in marriages in community is equally objectionable. In Botswana, this is especially so because it retains its arbitrary common law flavour; it is an absolute power allowing the husband to do what he wishes with the matrimonial property or his wife's separate property without consulting her. In South African law (from where we received our common law) there are statutory safeguards to check abuses of the marital power,²⁰ although the situation is still not completely satisfactory. During 1982, a bill seeking to abolish the marital power in South African law came under heavy criticism by women's organisations and legal writers on the ground that it was a half-way measure since it did not abolish the personal aspects of the marital power - or the invariable consequences of marriage.²¹

It is therefore suggested that this consequence of marriage in community be done away with as well, and be replaced by a system which allows joint administration as opposed to sole administration. The result would be that each spouse has full capacity to transact in relation to the joint property after obtaining the consent of the other. For everyday transactions such as household necessities (which should include more than just food, clothing and medical care), oral consent would suffice, while more expensive transactions (such as selling the matrimonial home or speculating with joint property) would require written consent. The burden of proving consent to the commercial world would rest on the spouses and should these fail, the spouse would be held personally liable for the obligation. In order to ensure justice and equity, a spouse who unreasonably withholds his or her consent to a transaction which the family can

afford and which will benefit the joint estate should be compelled at the Court's discretion to grant it or to refrain from proceeding with a transaction prejudicial to the joint estate.²²

It is further recommended that special courts, styled "subordinate matrimonial courts"²³, be established for each major district to deal with matrimonial matters generally. The main objectives of these courts would be to ensure equality and justice within marriage and promote harmonious relations within the family. Legal representation would not be mandatory, and these courts could also assist in administering other social welfare legislation such as the Deserted Wives and Children Protection Act.²⁴ Admittedly, this would involve some expense but there is always a price to be paid for justice and equity once these two goals are accepted as desirable.

3. Once the marital power is abolished and substituted by the system suggested above, it would follow that section 18 of the Deeds Registry Act should be repealed as it would be redundant, and be replaced by a requirement that the written consent of the other spouse is necessary for transfer of immovable property to either spouse.
4. Income Tax should be charged to the income of women who earn it in their own name irrespective of their marital status, and refunds paid directly to them. As a result, section 13(1) and 109(2) of the Income Tax Act should fall away.
5. Special provision for naturalisation of alien men married to Botswana citizens be made in the same way that section 12 of the Citizenship Act does for the alien wives of citizen men. It is further recommended that women married to aliens be given the capacity to pass on citizenship to their children should they so wish.
6. Finally, it is recommended that section 15 of the Botswana constitution be amended in such a way that in its definition of discrimination, sex-based discrimination is also unlawful.²⁵ Such an amendment would provide a constitutional guarantee against all forms of discrimination by anyone, acting through a public office or through the law-making process.

Footnotes

1. Justice Bradley in Bradwell v. Illinois, 83 U.S. 130 (1873) denying Appellant, a married woman, the capacity to practice law even though she had passed the State bar examination.
2. The inquiry will however be restricted to the legal status of women married by civil rites, under the Marriage Act and not the customary law. The consequences of civil marriage are governed by the Roman-Dutch law which was received into Botswana during the period of foreign rule. However, the application of the common law is restricted in certain instances by statutes passed by the Botswana Parliament.
3. Domicile can also be used to decide whether a particular court has jurisdiction over a particular person. It is a private law concept which refers to the place where for legal purposes, someone is deemed to be constantly present. Thus often it can be a legal fiction - as where someone lives at place A but is held to be domiciled at place B. This is why it is important to distinguish it from residence and nationality.

4. Laws of Botswana, chapter 29:01, section 17.
5. See summary in P.J.J. Olivier, The South African Law of Persons and Family Law, Second Edition, (Durban) Butterworths 1980, pp. 110-130.
6. Professor Carmen Nathan in "The Marital Power Over a Wife's Person", article published in Volume 12, Businessman's Law, 1982.
7. Laws of Botswana, Chapter 29:03.
8. Published in Botswana Government Gazette, No.50 1970.
9. Laws of Botswana, chapter 29:06.
10. 1979-80, Botswana Law Reports p.250. Doubts have been expressed as to whether this Act applies to post 1926 or those prior to that year. It is submitted that Judge Hannah's interpretation is the better view.
11. See the wording of section 3 and Form A of the Second Schedule, Married Persons Property Act. The Act does not define "marital power", thus it is unclear whether both aspects of the marital power are excluded. The latter is doubted however on the principle that an Act of Parliament changes the common law only directly.
12. Laws of Botswana, chapter 33:03.
13. Laws of Botswana, chapter 52:01, section 13 (1)
14. Act 25 1982
15. See proviso to section 4 (1), Citizenship Act. This was apparently done to avoid situations of dual citizenship.
16. Section 12.
17. See Takirambudde, "A Note on the 1982 Botswana Citizenship Act", PULA Vol.3 issue No.2 November 1983, p.78.
18. McDougal in "Human Rights for Women and World Public Order: The outlawing of sex-based discrimination", American Journal of International Law, Volume 69, (1975) p.497.
19. "Equality & Justice - but at what price? Rand Daily Mail, 23.1.84.
20. See Matrimonial Affairs Act, No.37 of 1953.
21. The Bill failed to go through then, but finally came through this year and should be promulgated as the Matrimonial Property Act soon. Although it does not seem to alter the personal aspects of the marital power, it certainly makes significant improvements in the legal capacity of women married in community of property.
22. See the Matrimonial Property Act for details on the new South approach: the property aspect of the marital power is abolished, thus giving women married in community of property the freedom to contract and litigate without their

husbands' consent or assistance. It further gives the same rights of management, disposal, etc., of the joint estate as the husband, and lists the transactions for which mutual consent, written or unwritten, will be required, and those for which it is not necessary.

23. Such a court is already contemplated by the Matrimonial Causes Act, Laws of Botswana, Chapter 29:07.
24. Laws of Botswana, Chapter 28:03.
25. See proviso to 15 of the constitution, Laws of Botswana. Sex as a basis for discrimination is missing conspicuously from the section.