



Institutionalising Gender-based Violence within African Democracies: A Comparative Analysis of South Africa and Botswana¹

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Abstract

Even though international legislation recognises the eradication of gender-based violence as a crucial target for the promotion of human rights and the achievement of the sustainable development of the world, violence against women has received little intellectual attention and scholarly intervention from academia. In the African region, where diverse sociocultural and institutional gender discriminative factors often mean unequal power relations between women and men, the prevalence of gender-based violence is particularly critical. This article examines the institutional implications of violence against women by comparing South Africa and Botswana, two countries that adopted democratic systems after gaining independence from the United Kingdom. It highlights the importance of the Constitutions of both countries and the representation of woman in politics. The divergence between the two states' legal and political approaches to gender equality and human rights underscores the role of gender-specific institutions in the prevalence of violence against women. This article also uncovers the limitations of existing strategies and proposes a better understanding of inequality within gender relations and its reflection within the frame of institutions to find a way to resolve violence against women and achieve gender justice.

Keywords: Botswana Constitution; democracy; gender-based violence; gender and development; gender justice; South African Constitution; women's political participation

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Résumé

Même si pour la législation internationale, l'éradication de la violence sexiste est un objectif essentiel de la promotion des droits humains et la réalisation du développement durable du monde, la violence contre les femmes n'a que très peu piqué l'intérêt des intellectuels et des universitaires. La prévalence de la violence sexiste est particulièrement préoccupante dans la région africaine, où divers facteurs socioculturels et institutionnels, discriminatoires en matière de genre, se traduisent souvent par des relations inégales de pouvoir entre les femmes et les hommes. Cet article examine les implications institutionnelles de la violence à l'égard des femmes en comparant l'Afrique du Sud et le Botswana, deux pays qui ont adopté des systèmes démocratiques après avoir obtenu leur indépendance du Royaume-Uni. Il souligne l'importance des Constitutions des deux pays et de la représentation des femmes en politique. En matière d'égalité des sexes et de droits humains, les divergences entre les approches juridiques et politiques des deux États met en évidence le rôle d'institutions sexospécifiques dans la prévalence de la violence à l'égard des femmes. Cet article révèle également les limites des stratégies existantes. Afin de résoudre la violence contre les femmes et de parvenir à la justice de genre, elle propose une meilleure compréhension des inégalités dans les relations de genre et de leur impact dans le cadre institutionnel.

Mots-clés : Constitution du Botswana ; démocratie ; violence sexiste ; genre et développement ; justice de genre ; Constitution sud-africaine ; participation politique des femmes.

Introduction

Gender-based violence (GBV), or violence against women (VAW), has been a significant problem in international development over the past decades. It varies in forms and patterns, from female genital mutilation and early marriage to domestic violence or human trafficking, and has harmful impacts on women's health and lives and critically impedes the sustainable development of the world. Aiming for a better understanding of the occurrence and resolution of GBV, this study examines the legal and political institutional frameworks around GBV, and their implications, through a comparative analysis of South Africa and Botswana, both of which can be singled out as representing young democracies in Africa (Du Toit 1995).

South Africa and Botswana have considerable regional and historical similarities (De Jager and Sebudubudu 2017). Both of these neighbouring countries located in the southernmost area of Africa used to be colonies of the United Kingdom but achieved independence and established democratic regimes in the middle and late twentieth century. The principle of liberal

democracy espouses tolerance and non-violent means of conflict resolution and thus democratic regimes offer ‘the best protection from the violations of human rights’ (Caprioli 2004:412). By contrast, non-democratic regimes share significant sociocultural characteristics, including patriarchal social norms and marital provisions of customary law that have been the root causes of unequal gender relations and the neglect of VAW in many African countries. Such sociocultural factors commonly include religious customs, conservative social norms and patriarchal attitudes towards women, all of which may become significant underlying elements of unequal gender relations and the endless perpetration of VAW.

However, there is a big difference between the prevalence of GBV in South Africa and Botswana reflected in the data collected by the World Health Organization (WHO) in 2021 (see Table 1). In Botswana, 34 per cent of women in Botswana have ever experienced violence by intimate partners whereas this figure is 24 per cent of women in South Africa. Considering that the world average lifetime prevalence of GBV is 27 per cent and the regional average in southern Africa is 33 per cent, it seems imperative and essential that the gap between the two countries is examined (WHO 2021:xiii).

Table 1: Intimate partner violence prevalence in South Africa and Botswana

	Lifetime Prevalence (%)	Past 12 Months Prevalence (%)
South Africa	24	13
Botswana	34	17

Source: WHO (2021)

This article focuses on the different prevalence levels of VAW in the two states and aims to explore the causes of the difference, presuming that it may be linked to explanations of why the matter of GBV is not being addressed, especially in developing countries, and what should be changed in existing strategies to tackle GBV within institutional apparatuses. The study takes a comparative approach not only to figure out the causal relationship between the two African democratic countries’ GBV and institutional differences in dealing with VAW, but also to uncover the significance of the intersectionality of the causes of VAW and the impacts of unequal power relations between women and men on the prevalence of GBV. In so doing, this study hypothesises causal relationships between the different levels of GBV and differences in institutional qualities shaped within democratic governance.

Adopting the approaches of feminist institutionalism as the theoretical platform, the study uses *legal* and *political* dimensions as critical institutional factors to compare different levels of GBV in South Africa and Botswana. Feminist institutionalism is a strand of new institutionalism that incorporates a gendered analysis. New institutionalism understands the co-constitutive nature of political dynamics, in which institutions shape people's behaviour by constructing rules, norms and policies and the actors of society engender or resist institutional changes (Mackay, Kenny and Chappell 2010:573). In the perspective of feminist institutionalism, *gender*, which is socially constructed and culturally variable, becomes a crucial factor in institutions and social structures. In a nutshell, a gendered analysis can be the key to having a better understanding of the role and impacts of institutions on women's issues, including gender-based discrimination and violence, within social interactions.

Gendering institutionalism in the context of GBV also needs to be filtered by Samuel Huntington's institutional prism on the gap between rapid social change and the slow response to it by political institutions, which is conceptualised as 'political decay' (Huntington 1968). The government's readiness and public action to handle GBV through legal and political institutional strategies would make a difference in mitigating the level of political decay in South Africa and Botswana. Despite the undeniable fact that system-wide transformations in the societal stereotypes of gender relations should be undertaken as a necessary condition to eradicate GBV and minimise political decay, this study concentrates on the two institutional factors – legal and political – rather than the long-term prescription of the system-wide change.

International Discourses on Gender-based Violence

Acknowledging the significance of damage caused by GBV, international society has committed to efforts to eradicate all forms of VAW. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a comprehensive and fundamental women's rights bill, established in 1979 on the basis of the UN's key principles for promoting gender equality and women's rights protection. According to the CEDAW, discrimination against women refers to any distinction, exclusion or restriction made based on sex, which nullifies women's enjoyment of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It clearly declares the states' duties and responsibilities to take all appropriate measures, including legal and institutional means, to prohibit discrimination against women and secure women's rights and equality with men.

In 1992, the Committee on the Elimination of Discrimination against Women adopted General Recommendation No. 19, which states that ‘violence against women is a form of gender-based discrimination that is used to subordinate and oppress women’. It was an essential step in breaking down the perception that VAW is a matter of the private sphere, and identifying it as a matter of equality and human rights. General Recommendation No. 35 of 2017 emphasises that a change of the social norms and stereotypes that allow VAW, in the name of culture, tradition or religion, is necessary to eliminate the practices of gender abuse. It demands that member states take action to repeal all laws and policies that excuse or facilitate GBV – directly or indirectly – and calls for women’s autonomy and capability of decision-making to be equally promoted in all spheres of life (OHCHR 2017).

The UN Declaration on the Elimination of Violence against Women (DEVAW) of 1993 triggered the UN General Assembly to pass resolutions on GBV and force the member states to act. It clearly affirms that ‘violence against women is a manifestation of historically unequal power relations between men and women’, which results in men’s domination over women and the prevention of the full advancement of women’s rights and fundamental freedoms (UN General Assembly 1993). These resolutions called for co-operation to eliminate VAW, including domestic violence, human trafficking, rape and other forms of sexual violence, and enhanced global efforts to eradicate gender-discriminative traditional and customary practices, such as genital mutilation and early (or forced) marriage, affecting the health and safety of women and girls. At the Fourth World Conference on Women, in 1995, the Beijing Declaration and Platform for Action – the most progressive commitment to promoting women’s rights – committed to preventing and eliminating all forms of violence against women and girls because this is presumed to be a key social mechanism that results in women’s subordination.

More recently, the matter of VAW has been understood from the perspective of international development. The UN Millennium Development Goals (MDGs) of 2000 and Sustainable Development Goals (SDGs) of 2015 include gender equality and empowerment of women and girls as a part of the cross-cutting goals to achieve world development. Accordingly, both MDGs and SDGs have explicitly made the eradication of GBV and harmful practices against women and girls the specific target that needs to be tackled for the sustainable development of the world. Nonetheless, even though international society has continued discussions and efforts to address GBV as the foremost task, women have never been free from violence, no matter their region, class, race or age. The WHO

estimates that more than 30 per cent of women aged 15 years and older have been subjected to physical and sexual violence (WHO). This means that from 736 million and up to 852 million women and girls in the world have ever experienced violence from their current or former male partners as well as by non-partners.

Gender-based Violence in Africa

Even if GBV is one of the most prevalent types of violence that occurs nowhere but everywhere, it is crucial to take a closer look into the GBV experienced by women in developing countries not only because the rate of violence against women there is higher but also because women and girls are more vulnerable to and critically affected by gendered violence and abusive practices in underdeveloped circumstances. Moreover, the extent of the violence is greater, and its impacts are fatal to many more women in developing countries. States with low levels of social development and governance are less likely to provide the necessary protection and support for victims of GBV; vice versa, the social and economic costs caused by highly prevalent violence can barely promote the sustainable development of the society.

Table 2: Regional prevalence of intimate partner violence

Region	Lifetime Prevalence (%)	Past 12 Months Prevalence (%)
World	27	13
North America	25	6
Latin America & Caribbean	25	8
Eastern Asia	20	7
Southern & South-Eastern Asia	28	14
North-Western Europe	22	5
Eastern Europe & Central Asia	18	6
Western Asia	29	13
Northern Africa	30	15
Sub-Saharan Africa	33	20

Source: WHO (2021)

Comparing the prevalence of intimate partner violence (IPV)² by region, the ratios of women who have ever experienced IPV are particularly high in developing countries (see Table 2) in the global South, particularly in African regions. In contrast, the prevalence of violence seems to be lower than the average in Europe and North America.

Patterns of violence

The term ‘gender-based violence’ refers to any types of acts of violence caused by unequal gender relations – physical and sexual violence, sexual harassment, enforced sexual prostitution and pornography, sex trafficking, etc. This comparative analysis focuses mainly on domestic violence and harmful practices that incorporate the major common types of violence that women in Africa suffer every day. Both domestic violence and harmful practices are mostly intertwined with multidimensional gender-discriminative factors that are rooted in the region’s religious and cultural backgrounds as well as legal-institutional circumstances (Cohn and Blumberg 2020; Benería, Berik and Floro 2003).

Domestic violence

Domestic violence refers to a behaviour that is used to obtain or maintain power and control within the household, particularly over female partners. Many women, no matter their region, race, age, class and ethnicity, suffer a variety of forms of domestic violence, which include physical, sexual, emotional, economic or psychological actions or threatening behaviour that frightens, intimidates, terrorises, manipulates, hurts, humiliates, blames, injures or wounds women within their home (UN n.d.). Though domestic violence is widespread and threatens women and girls in everyday life, the social reaction to domestic violence tends to recognise it as a private matter that should be dealt with at home. As the Beijing Declaration of 1995 stated, viewing domestic violence as a private matter is related to the high ratio of unreported violence within families and people having negative perceptions about social or political intervention in private matters. At the same time, the US Department of Justice argues that it is more difficult for victims of domestic violence to free themselves from an abusive environment because the violence between intimate partners is often accompanied by complex family issues, including children custody and family property (US Department of Justice 2000).

Most of the victimisation that occurs in the home is barely reported to the police because the victims may not consider the police an appropriate channel to address the conflicts within their relationships. Besides, victims may be afraid of the perpetrators, feel ashamed of publicising their experience of violence, or want to protect their relationships with partners and children. Since people’s understanding of the use of VAW significantly matters in reporting and preventing domestic violence, it is

presumable that the ratio of reported violence shall be much lower in societies where gender relations are more hierarchical on the grounds of cultural and religious characteristics.

Harmful practices

Harmful practices, which are often considered a part of religious traditions, are another deadly form of violence that affect a number of women and girls especially in developing countries. They include female genital mutilation, early marriage forced on girls, female infanticide and polygamy. These harmful practices are mostly conducted by the state or community in the name of culture and tradition – that is, they are officially accepted by a society even while critically violating women's rights and autonomy over their bodies and lives. The matter of GBV is particularly difficult and complicated to address in African countries not just because of the low level of government capacity and resources, but also because African women's experience of violence is deeply intertwined with gender hierarchical norms and practices that are rooted in their society and culture as well as the legal-institutional conditions that solidify the unequal gender relations and fail to protect women's rights and security from abusive circumstances.

One of the most remarkable characteristics of GBV in African countries is legal pluralism, which refers to a legal system that incorporates common law and African customary law. The common law systems in Africa originate from the colonial powers and form the basis of the normative and institutional state law systems. However, state law also recognises customary law, which has been indigenously 'invented' in the region, and incorporates norms of customary law (Woodman 2001:28–29). The recognition of customary law significantly matters to GBV in the African region because, within the society, the norms and principles of customary law often embody religious and cultural traditions that construct gender-discriminative mechanisms via entrenched customs and myths or even misogyny. The principle of customary law that recognises men's economic dominance in households enhances women's dependency on their husbands. As a result, the gender hierarchy of married couples is strengthened and ultimately contributes to making it much more difficult for women to be free from abusive circumstances. Indeed, the legal system found in African countries that recognises customary law has been criticised as a significant cause of widespread GBV in the African region. It becomes the foundation of the state's dismissal of men's use of violence to control women in a married relationship and a justification by the society of harmful practices exercised against women and girls for religious reasons.

Just as in other developing countries that experience high rates of GBV, most African countries have limited resources and capabilities to address GBV. They lack effective government policies to systematically prevent and monitor VAW and institutionalise the necessary support and protection for women from their abusive partners. Their governments may have a low capacity to monitor and control the violence exercised against women and to effectively prohibit the violence. Even if these states have legal strategies to curb GBV, women and men may have unequal access to legal information and the system itself because of the gender hierarchies within the society.

South Africa and Botswana: A Comparative Perspective

Through a comparative analysis of South Africa's and Botswana's Constitution and the role of women in politics, this study examines the differences in how the two states recognise gender inequality, how they regulate the relationship between women and men within the private and public sphere, how acts of VAW are perceived in courts as well as in society, and how they address GBV within their institutions. The legal dimension explores the differences between the two states' gender provisions in their constitutions and delves into how these provisions influence the establishment of the states' laws and policies that deal with GBV. The political dimension compares women's political representation, specifically in the Parliament of South Africa and Botswana. Using the number of seats held by female parliamentarians as a basis, this study focuses on the direct and indirect role of women in politics who have the legislative authority to debate and pass gender-specific laws, including regulations that protect women from violence and gender-based abuse. Moreover, the study attempts to find the causal factors of the different levels of women's political representation by exploring the party structure and electoral system of the two states.

Constitutionalising gender equality and human rights

The Constitution of each state is the most reliable point of comparison for how South Africa and Botswana regulate acts of discrimination or VAW and approach GBV in the legal dimension. The Constitution matters to issues of gender equality and GBV because the gender provisions within it regulate the understanding of gender differences and shape the foundation of the state's gender-specific policies and institutional strategies around women's issues (Scribner and Lambert 2010). Constitutional gender equality provisions have a great impact on establishing a legal framework that facilitates and supports necessary legislations and policies that help to create social norms about gender relations and regulate the state's responsibility to promote

women's empowerment and gender equality. Constitutional provisions can also inspire the contexts of policies that define the relations of women and men and influence judicial decisions by setting the extension of the court's interpretation of legislative rights. Constitutional gender equality provisions can also provide the legal basis and legitimacy of women's rights advocates to combat unequal gender relations and use their voice to drive legal and institutional changes.

Exploring how the gender-related constitutional provisions that structure legislation and policies to promote gender equality and protect women's rights and freedom are put into practice, we compare some major High Court cases. These reveal the significance of constitutionalising gender equality on the judicial decisions around gender-based violence crimes. The way in which South Africa constitutionalises gender equality and human rights is remarkably different from Botswana's. Whereas South Africa's Constitution has a decidedly egalitarian perspective on regulating the equal rights and freedom of women and men, Botswana's constitutional provisions are essentially gender-neutral to recognise the inequality or differences between women and men.

South Africa

In the Constitution of South Africa, human dignity, equality and human rights and freedoms are regulated as the fundamental values of the state. Its founding provisions include non-racism and non-sexism, and thus the state emphasises the significance of equality among race or gender for the constitutional principle of the state (see Ch.1 Sec.1).

Ch. 1 Founding Provisions

Sec. 1 Republic of South Africa: The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- (b) Non-racialism and non-sexism;
- (c) Supremacy of the Constitution and the rule of law.

Moreover, the provisions of the Bill of Rights enforce the principle of non-discrimination of individuals by gender, sex and more (see Ch.2 Sec.9). It is worth noting that the provision specifies not only sex, but also gender, pregnancy and marital status, as the grounds of non-discrimination because it reveals the state's recognition of the significance of the social construction of gender role and identities, masculinities and femininities, and the impact of getting married on women's positions and lives.

Ch. 2 Bill of Rights

Sec. 9 Equality: 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Bill of Rights also includes some specific provisions which are more directly related to the state's commitment to preventing GBV. For instance, the deprivation of one's freedom and security and all forms of violence are prohibited (see Ch.2 Sec.12).

Ch. 2 Bill of Rights

Sec. 12 Freedom and security of the person: 1. Everyone has the right to freedom and security of the person, which includes the right:

- (a) not to be deprived of freedom arbitrarily or without just cause; ...
- (c) to be free from all forms of violence from either public or private sources

Botswana

Botswana's Constitution includes the principle of non-discrimination of fundamental human rights and freedoms of individuals, no matter their race, colour, sex and etc (see Ch.2 Sec.3). However, it lacks a specific commitment to maintaining the state's responsibility and role to advance gender equality and proactively guarantee women's rights and security from gender-based discriminations or abuses.

Ch. 2 Protection of Fundamental Rights and Freedoms of the Individual

Sec. 3 Fundamental rights and freedoms of the individual: Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, [but subject to respect for the rights and freedoms of others and for the public interest...].

As above, while Botswana's Constitution has a single provision with a rather neutral and limited manner of statement, South Africa's Constitution specifies the principle of gender equality to fundamental human rights and freedom and explicitly prohibits gender-based discrimination and violence through multiple provisions. As South Africa has been known to have one of the most advanced and inclusive Constitutions in the world, the provisions not only lay out the principle of human rights but sharply underline the role of the state to encourage human dignity for both women

and men and promote the equality and diversity of the society (Scribner and Lambert 2010:51–52). Some of its clauses are particularly progressive in constitutionally recognising the systematic inequality between gender and resolving the discrimination that has persisted throughout its history.

Common law versus customary law in the constitutions

The two states' Constitutions can be examined also for any divergence in their acknowledgement of the relationship between customary law and common law. Both South Africa and Botswana have a legal system which incorporates the common law system that was imported from the Western colonial powers' Roman-Dutch Law and African customary law, which has structured gender-discriminative practices and norms in the region in line with religious and cultural traditions.³ South Africa has a mixed legal system which compounds Roman-Dutch civilian law, English common law, customary law and religious personal law, and Botswana has a dual legal system which incorporates Roman-Dutch law and customary law, each of which separately governed the settlers and the Indigenous inhabitants during the colonial period. However, even though the Constitution of both states accepts the validity of customary law within its legal framework, the balance between common law and customary law is completely different particularly in respect of GBV and the recognition of women's rights and security within marriage and divorce issues (Goldblatt 2018).

The marital and family laws under customary law traditionally regulate unequal roles and positions for women and men within the household and often become the legal background of gender-discriminative practices or customs. For instance, the traditions of male dominance in decision-making authority and men's prioritised rights and access to family property are rooted in the marriage-related provisions of customary law. In many cases, these clauses of unequal power relations between women and men conflict with the constitutional provisions that fundamentally guarantee the principle of equality, individual rights and freedom for both women and men.

Consequently, disagreements between common law and customary law have been criticised as a key obstacle to addressing gender-based discrimination and violence. The 1995 Beijing Declaration emphasises the responsibility of the state to prohibit and eliminate 'any harmful aspect of certain traditional, customary or modern practices that violates the rights of women' and enforces state governments to remove derived religious practices that undermine women's rights, dignity and health. Thus, the way

in which Constitutions perceive the conflicting provisions of customary law and common law are crucial to analyse, particularly in the case where customary law neglects or enforces discrimination or abuses against women.

South Africa

In South Africa, the Constitution explicitly prioritises the constitutional principle over the practices enforced by customary law. It regulates that the exercise of rights and practices under certain cultures and religions should be agreeable to the Bill of Rights (see Ch.2 Sec.31) and the interpretation of both common law and customary law must promote the objectives of the Bill of Rights (Ch.2 Sec.39). South Africa also directs the courts to apply customary law only when it is applicable and subject to the Constitution (see Ch.12 Sec.211).

Ch. 2 Bill of Rights

Sec. 31 Cultural, religious and linguistic communities:

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community;
2. The rights [to exercise cultural rights...] may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Sec. 39 Interpretation of Bill of Rights:

2. When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. ...
3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Ch. 12 Traditional Leaders

Sec. 211 Recognition: 3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Botswana

In contrast, Botswana's Constitution lacks such provisions to guarantee the security of women's rights prior to gender-discriminative customs and traditions conducted within their household. In Botswana, customary law is exempted from the constitutional provisions of gender equality and non-discrimination and the practices of customary law are free from the fundamental human rights and equality principles. Although the provision of

protection from discrimination prohibits different treatment of individuals because of their race, tribe, place of origin, political opinions, colour, creed or sex, Botswana's Constitution articulates that the provision shall not be applied to any law that is related to adoption, marriage, divorce, ... or other private matters regulated under customary law (see Ch.2 Sec.15).

Ch.2 Protection of Fundamental Rights and Freedoms of the Individual

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

- (1) no law shall make any provisions that is discriminatory...;
- (3) affording different treatment to different persons...by race, tribe, place of origin, political opinions, colour, creed or sex ...;
- (4) subsection (1) of this section shall not apply to any law so far as that law makes provision – ...
 - a) 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

Differences in constitutional gender provisions

One factor that might explain the differences between how the Constitutions of South Africa and Botswana deal with gender equality is the timing of the two states' transition to democracy. South Africa's Constitution was approved by its Constitutional Court in December 1996, not only two years after apartheid was ended but also when the stream of global women's rights movements was reaching its height.⁴ South Africa's transition to democracy was in the middle of the grand international campaigns to promote women's rights, which extended the discussions around women's participation in political and economic development. Accordingly, together with the influx of huge international gender movements, South African women's rights advocates played a crucial role in designing the state's Constitution to include proactive gender-specific provisions. The women's rights movements also had a great impact on the state's political climate in making it favourable to women's voices. Domestic advocates for gender equality enabled women's rights activists to be part of the process of building the political party structure and implementing gender perspectives into the institutions to protect women's rights and security against any discrimination or abuse (Tournadre 2022). Furthermore, anti-apartheid activists were focused on revealing the gender discrimination conducted under the racial segregationist institutions of apartheid.

Botswana's transition to democracy, however, took place before the wave of international women's rights movements reached enough significance to influence the state's domestic political circumstances. Botswana achieved its independence from the United Kingdom in 1966 and adopted its new Constitution in the same year – about thirty years earlier than South Africa. Unlike in South Africa, the voices of international women's movements could barely intervene as the state established its democratic regime and Constitution. In consequence, women's participation in building the foundation of a democratic regime was critically limited compared to South Africa because of the lack of recognition of women's rights and roles in the social and political spheres. There was much less opportunity for international advocates of gender transformation to influence how Botswana's government dealt with women's issues and gender equality in its institutional framework.

The constitutional gender provisions in South Africa and Botswana have extensive impacts on the two states' laws and policies to recognise gender inequality, regulate GBV and discrimination and protect women's rights and security. Strengthening the states' legal framework to promote gender equality is crucial to eradicating VAW as it would improve women's rights in marriage and divorce, property ownership and child custody, which have the power to change women's position in relationships with their partners in the household. These rights are supported by the laws and policies that criminalise GBV, enhance police capacity and the criminal justice system in responding to VAW and provide better protection and support for those who experience the violence. Moreover, as Constitutions can regulate the balance between common law and customary law, the effectiveness of laws dealing with women's protection from certain abusive customs and practices enforced by customary law also depends on the states' constitutional provisions.

Legislation

In South Africa, the Constitution is critical in providing a legal basis for necessary legislations to support the promotion of gender equality and control the dominance of male power within households, which aggravates gender-based abuse, such as domestic violence and harmful practices, in the private sphere. The constitutionalised principles of human rights and gender equality structured the legislations that support judicial decisions to admit GBV as an act of crime and punish the perpetrators. As the state constitutionally enforces the accommodation of customary law with the Bill

of Rights, there exist specific legislations to put customary law in line with the norms of the Constitution and international laws. The Recognition of Customary Marriage Act (Sec. 6) states that 'the wife in a customary marriage has in all aspects a status equal to that of her husband' to resolve unequal relations within the married couple and discard husband's power as a guardian of his wife.

South Africa also has established gender-specific laws and institutions to make the government protect victimised women and punish the perpetrators. The Parliament of South Africa passed the Domestic Violence Act (No. 116) in 1998 to prevent husbands' use of violence against their female partners. The Act played an essential role in providing a definition of a wide range of domestic violence, which includes physical, emotional, economic abuse and harassment. It ultimately encourages society to recognise domestic violence as a serious act of crime and decisively rules the state's responsibility to end violence against women and children, from the perspective of promoting constitutional rights, such as freedom and equality and the women's rights principles embedded in international commitments, including the CEDAW.

This legislation also declares the duty of judicial institutions to provide certain legal protections for victims, by specifying the procedures and obligations of the police and court activities. For instance, the Domestic Violence Act of South Africa is recognised as having particularly innovative clauses which grant the court's responsibility for a Temporary Protection Order in case the actions of the aggressor seem to pose imminent harm to the complainant. It allows the state to provide the needed protection for the applicant's health, safety and wellbeing, by ruling the eviction of the aggressor from the matrimonial home and providing financial relief to the applicant. As a result, it is possible to ensure that constitutional principles such as equal rights and dignity are guaranteed within the household and prohibit gender-based abuses, while preserving the religious traditions of marriage and divorce. The case of South Africa reveals that gender-specific constitutional provisions can be the legal framework that challenges gender-discriminative activities and VAW.

On the other hand, Botswana's Constitution is much less proactive and less momentous than that of South Africa in prohibiting gender-based discrimination or abuses caused by an unequal relationship between women and men. Nevertheless, the single constitutional provision of gender equality (see Ch.2 Sec.3) has been the core instrument of the state's strategies to deal with GBV and promote women's rights and authority under abusive circumstances. Botswana enacted the Domestic Violence Act (No.10 of

2008) which recognises ‘any controlling or abusive behaviour that harms the health or safety of the person’ as an act of crime and prohibits domestic violence, including the acts of physical, emotional and sexual abuse, economic abuse, intimidation, harassment and property damages’. Other legislations enforce the empowerment of women’s rights within the family, such as the Deed Registry Act (1960) and the Abolition of Marital Power Act (2004).

Having said that, the existence of a law does not necessarily mean the enforcement or application of the law. Even if Botswana’s government established the Domestic Violence Act, it failed to regulate the legal prohibition of marital rape – which means that victims of intimate partner violence cannot be protected under the law.⁵ Given the customary law’s principles that allow male dominance and men’s guardianship over women in the household, domestic violence has been confined under the frame of a private matter and become legitimately exempted from other laws and regulations. Also, harmful practices and other gender-discriminative customs are not subject to such legislations because the matters related to marriage and divorce are primarily recognised under the principles of customary law – just like their exemption from the Constitution.

Thus, notwithstanding CEDAW’s concerns about the risk of women’s rights violations caused by conflicts between the principles of common law and customary law, Botswana’s legislations lack the power to legitimately prevent sexual violence within marriage or cohabiting relations because the state’s Constitution recognises the exemption of customary law from constitutional human rights principles. Moreover, even though further advocacies to establish gender-specific legislation were driven by women’s rights movements, newly established or reformed laws could not go beyond removing the discriminatory provisions of existing laws rather than proposing comprehensive laws to proactively guarantee women’s rights and freedoms in their private and public lives, because of the fundamental limitations of their Constitution and legal structure (Scribner and Lambert 2010: 51–52).

Judicial Decisions

In South Africa, the courts played a crucial role in ensuring that the implementation of customary law conformed with the constitutional norms of human rights and gender equality. As South Africa’s Constitution accentuates the Bill of Rights as the priority before any laws, the South African High Court interprets all legislation, including customary law, under the principles of the Bill of Rights. The Constitutional Court of

South Africa underlines that the Constitution imposes an obligation on the courts to judge whether to develop its legislation, both the common law and customary law, to bring it in line with the Constitution (Ndulo 2011: 113). Furthermore, the Constitutional Court of South Africa declares that the central principles of customary law, including male primogeniture which defines the husband's predominant rights to inheritance and succession and other traditional beliefs and practices, are anchored in patriarchy and essentially violate women's rights to human dignity and equality (Ndulo 2011: 102). Based on the supremacy of human rights norms that are equally guaranteed for women and men by the constitutional provisions, the decisions of the Constitutional Court have shown that unconstitutional customary values or practices, such as early marriage and female genital mutilation, are unacceptable and inexcusable in modern society.

For example, in the case of *Prior v. Battle and Others* of 1999, the South African Constitutional Court ruled that customary law that guarantees husband's guardianship over wife is 'outmoded and anachronistic'.⁶ The Court's decision influenced the social and legal recognition of husband's guardianship. Consequently, five years later Parliament passed the Abolition of Marital Power Act to prohibit the regulations of marital power that conflict with the constitutional gender equality norms. In the *Shilubana v. Nwamitwa* case of 2008, the court ruled that 'male primogeniture of succession of chieftaincy' is a gender-discriminative tradition and clearly proposed that customary law needs to evolve in a way to promote gender equality as constitutionally guaranteed.⁷

The South African Constitutional Court's attention to the principles of the Constitution also had a crucial impact on specific court rulings in cases of GBV crime. Regarding the domestic violence crime in the *S v Baloyi* case of 2000, the court asserted that 'the constitutional right to gender equality is jeopardised' because the legal system could not appropriately resolve the crime.⁸ On the other hand, the Constitutional Court on *Van Eeden v. Minister of Safety and Security* of 2001 demanded the state's responsibility to protect women's rights and security from abuse, affirming that 'the state is obliged under international law to protect women' against crimes of GBV and discrimination.⁹

In contrast, decisions from the courts in Botswana have been completely different from those of South Africa in gender-based violence cases. The courts have not virtually committed to condemning the customary traditions and practices that infringe constitutional norms regarding the promotion of women's human rights. The principles of customary law have become the foundation of decisions in Botswana's courts in GBV crimes that occur

within the private sphere, as they are guaranteed and protected prior to norms and values from the Constitution and other legislations about the protection of women's rights and security from violence.

In reality, the spousal or marital exemption principles of customary law support the courts in presuming matrimonial consent to the intimate partner's violence and imply that the 'wife has given up herself on her husband'. In the case of *Mogodu v. State* of 2003, although the High Court of Botswana upheld the conviction of rape, the appellant appealed his conviction for rape because the evidence did not show a lack of consent.¹⁰ Moreover, the Constitutional Court of Botswana ruled that 'the marriage presumes the consent between husband and wife because the Customary law allows a man to chastise his wife' (Selolwane 1998). Thus, it has been almost impossible to recognise a husband's abuse of his wife as an act of violence and Botswana's courts fail to effectively prohibit and penalise domestic violence because of the institutional limitations.

Women in Politics

This section examines the proportion of seats held by women in the Parliaments of South Africa and Botswana and compares the role and impacts of female parliamentarians on legislative strategies for tackling GBV in the two states.

Women's political representation

According to the Gender Monitor of 2016, published by the Southern African Development Community (SADC), women's representation in South Africa's Parliament was 42.4 per cent, with 169 of 399 seats taken by women.¹¹ South Africa ranked the second-highest in the region, after Seychelles, for the number of women in Parliament. Botswana, on the other hand, was reported to have the third-lowest proportion of women in politics, after the Democratic Republic of Congo and Swaziland, which had 9.5 per cent of female parliamentarians – only six women among sixty-three seats. Moreover, the gap between women's political representation in South Africa and Botswana has been increasing over the past twenty years. In South Africa, the proportion of women in Parliament has maintained an upward trend since the first election of 1994. It started with 25 per cent of the total number of seats held by women and peaked at 46.3 per cent in the most recent election in 2019.¹² However, in Botswana, the proportion of seats held by women in Parliament increased from 8.5 per cent in 1997 to 17 per cent in 2000 but dropped back to 10.7 per cent in the election of

2019 (Figure 1). Thus, in South Africa, together with the gender equality principles of the constitutional framework, the high proportion of women's representation in politics has become the institutional and structural basis for the national gender machinery.¹³

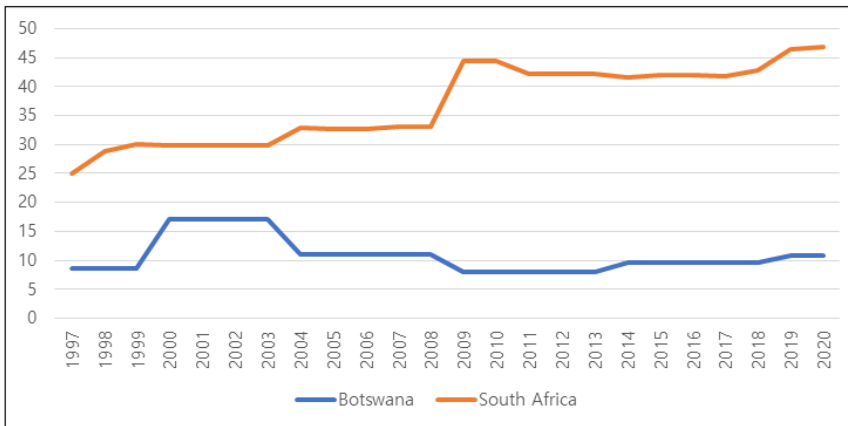


Figure 1: Proportion of seats held by women in South Africa's and Botswana's Parliament (World Bank, 2022)

What are the causes of women having substantially different political representation in South Africa and Botswana? The Protocol on Gender and Development, adopted by SADC in August 2008, demands the efforts of the member states of the Southern African region to increase women's participation in the governance sectors. It calls for the states to endeavour to save at least 50 per cent of decision-making positions for women in the public and private sectors (Article 12 *Representation*). Also, the protocol directs the states to assure the equal participation of women and men through adopting policies and strategies for women's capacity-building, changing discriminatory attitudes and norms and encouraging men's participation in gender-related training and community mobilisation (Article 13 *Participation*).

As a strategy to enhance women's representation, the government of South Africa adopted the Electoral Act (No. 73 of 1998) which enforces the state parties to facilitate full and equal participation of women in political activities and to ensure women's free access to public meetings, marches, demonstrations, rallies and other public events. South Africa's efforts to increase the proportion of women in Parliament were also inaugurated by women's rights movements, including anti-apartheid activities, which promoted the direct and indirect transformation of women's issues into

political issues, through demanding legislative and institutional changes. For instance, the Women's National Coalition (WNC), established in 1992 by integrating ninety different women's organisations in South Africa, protested for the expansion of women's representation as a measure of delivering unified and powerful voices for women (Scribner and Lambert 2010: 47–48). As a result, the initiative of electoral gender quota was driven by the dominant party of South Africa, the African National Congress (ANC), which declared that it would increase the proportion of women's seats in Parliament to 30 per cent.

In Botswana, however, there have been no electoral quotas for women nor other institutional instruments to guarantee women's equal rights for political participation despite SADC's commitment to women's inclusion in decision-making bodies. Women have been marginalised in political party structures as men dominate the ruling party, which has been unfavourable to women's rights and gender equality issues. Additionally, Botswana has a First-Past-The-Post (FPTP) electoral system which is criticised as the least woman-friendly electoral system and antagonistic to gender quotas. Many other countries that adopt the same electoral system, including Liberia, Ghana and Nigeria, have no electoral gender quotas and as a result have a very low proportion of women in Parliament. Male dominance and the marginalisation of women in the elections have been further aggravated once the conservative party, Botswana Democratic Party (BDP), dominated the FPTP system. Even though women's NGOs in the state have advocated for the need for gender quotas and women's involvement in politics, they have failed to implement the quotas to promote their representation. It is unlikely that the dominant party BDP will support electoral reforms as they will seek to maintain their power in politics under the existing party structure (Van Allen 2007).

Botswana's institutional constraints for women's representation are seemingly related to the social perception of women's political participation. Based on the focus group discussion conducted by Kavita Datta (2004: 265), there still exists a prejudice that men's voices are more legitimate in public spaces, whereas 'women's voices cannot be accepted with equal legitimacy'. Consensus on women's subordination to men in political decision-making is made clear in the statement of a discussion participant: 'men should make decisions, women should consult men before making decisions – men must have the final word' (Datta 2004:265).

Implications of women having legislative leadership

How does the number of women's seats in Parliaments affect the incidence of GBV? It is worth noting that the underrepresentation of women in power, politics and legal positions is a causal factor that perpetuates domestic violence, and the limited organisation of women as a political force and the low level of women's participation in the political structure are related to the factors that exacerbate women's experience of violence (Heise 1993). Women's representation is significant from the perspective of achieving justice and strengthening the values of democracy through diversifying the composition of Parliament (Phillips 1998). It is therefore crucial to recognise the role of women in Parliament, as in legislative leadership. Female parliamentarians, compared to their male colleagues, are more likely to sponsor policy-making that represents women's interests and demands. Accordingly, having enough women in Parliament is critical in the procedure of gender-related legislation, because they are key in introducing women's issues to political debate. Women in politics can drive the legislative agendas and broaden practical discussions in politics to address women's issues, including GBV.

Female parliamentarians in developing nations can proactively persuade male members of parliament (MPs) and enforce government institutions to pass or establish laws and policies that deal with the protection of women's rights and security from discriminative circumstances in the household and society (Fallon, Swiss and Viterna 2012). In Botswana, female MPs played an essential role in passing the Domestic Violence Act (2008) and the Abolition of Marital Powers Act (2004), by opposing male colleagues. When there are civil society movements for or against government policies related to gender issues, women's representation in the legislature can precipitate the political debates to proceed with legal and institutional reforms. Female MPs can also inspire other women to take note and make an effort to take up political approaches to protect their rights and security. This can provide a strong basis and support for women in other government departments, including local officials, civil servants and those involved in administrative and policy-making processes (Bauer and Burnet 2013:109–110).

Nonetheless, although female MPs have had successful legislative outcomes, their accomplishments have been limited to eliminating the provisions that disadvantage women, rather than taking a further step to enact laws that promote women's rights and freedoms. In the case of Botswana, the lowest ratio of female MPs and the limitations of political party structure mean that women's issues are underrepresented and less

reflected in the procedure of legislation. They therefore failed to adopt a gender budget initiative, which had serious impacts on the society's resource allocation for women's empowerment (Bauer and Burnet 2013:109). In this regard, the matter of women's political participation is ultimately linked to questions regarding the social construction of femininities and masculinities or the gender disparity in access to social and economic resources and opportunities. The male-dominant party structure not only adversely affects women's political participation but also creates unfavourable circumstances for the promotion of women's rights and status in the economic and social realms.

Conclusion and Tasks Ahead

This study is a comparative analysis of GBV in two African democracies – South Africa and Botswana – to fathom the institutional backgrounds and characteristics that explain the gap between the prevalence of GBV in the two countries. As the divergence between the two states' Constitutions and women's political representation is revealed, it is essential to adopt a gender lens in the states' institutions to eliminate VAW. Sophisticatedly designed gender-specific institutions can have a major impact on the way GBV is dealt with within society as they can provide the fundamental systematic basis for the states to guarantee gender equality in human rights and freedoms as well as to establish necessary gender-specific legislation and policies to protect women from violence.

First, there is a big difference in the recognition of gender equality and women's rights in the Constitutions of South Africa and Botswana. South Africa's Constitution has multiple provisions that proactively guarantee equal human rights and freedoms for both women and men and clauses that specifically prohibit discrimination and abuse based on gender. However, Botswana's Constitution is essentially neutral to gender issues, as it has a single gender-specific provision that declares the fundamental rights and freedoms of individuals no matter the sex.

Another remarkable difference between the two states is that South Africa's Constitution clearly regulates that customary law is subject to the constitutional principles and its religious and traditional customs can be exercised only if they are consistent with the Bill of Rights. By contrast, in Botswana, the constitutional principles of gender equality and non-discrimination are not applied to the customs and practices conducted within the married relationships regulated by customary law. These differences between the two states' Constitutions have crucial significance

in how GBV is perceived in the society and how the states deal with VAW. It is vital to re-emphasise that the Constitution becomes the foundational framework for gender-specific legislation and institutions to protect women from abuses and provides the legal basis of the court decisions in GBV crimes.

Second, women have a different level of political representation in South Africa and Botswana. The SADC directed its member states to promote the equal participation of women and men in decision-making positions in public and private sectors, thereby changing gender discriminatory attitudes and norms. Whereas women's full advancement of political representation is guaranteed through gender quotas and the Electoral Act in South Africa, women are largely marginalised in the political party structure of Botswana in the sense that its electoral system lacks gender quotas or legislations that guarantee women's representation. Comparing the most recent elections, the proportion of seats held by women in South Africa's parliament is 46.3 per cent, has a continuous upward trend and is ranked the second-highest in the region. In contrast, Botswana's proportion of female parliamentarians reached 10.7 per cent and it remains in a downward trend.

The level of women's representation in the two states is not only linked to the social construction of unequal relations of women and men in their households and society but also has a significant impact on women's legislative leadership to initiate political debates and pass necessary legislations for women, such as anti-GBV laws, in Parliament. A small number of women in Parliament results in the lack of a gender lens in the process of reviewing legislation and relative budgets, which ultimately weaken a state's capacity to provide support for victims and resolve GBV. The Botswana courts' failure to penalise and prohibit domestic violence indicates that institutional transformation is necessary as a resolution to fundamentally address GBV in that country.

What we derive from this comparative analysis is that both legal and political dimensions construct crucial parts of the institutional characteristics and their significance on the prevalence of GBV in South Africa and Botswana. However, there are still limitations that need to be addressed to continue further discussions on the eradication of VAW. First, a critical barrier to resolving GBV comes from the fact that it is impossible to discern the scale of women's experience of violence with any accuracy. Even though this study used official statistics provided by the WHO, huge reliability gaps have come about between the data on the prevalence of GBV, depending on the data-collecting agencies. Whereas the WHO data shows that the lifetime

prevalence of VAW is 24 per cent in South Africa, domestically collected data reveals that 77 per cent of women in Limpopo province, 51 per cent in Gauteng province and 45 per cent in Western Cape province have ever experienced GBV and more than 50 per cent of women have experienced abuses by their intimate partners (Gender Links and SAMRC 2011). In the case of Botswana, 67 per cent of women reported having experienced GBV, and 48 per cent of men admitted to perpetrating violence against their female partners (Gender Links and Women's Affairs Department 2012). It may be because investigators employ different measures in the survey, including different forms of violence, or that victimised women may have differing willingness to report their experience of violence.

More significantly, Samuel Huntington's institutional myth remains one of the major impediments in executing a long-term plan for the eradication of GBV (Groth 1979). Huntington (1968) claims that if the pace of social mobilisation outran the ability of political institutions to incorporate new actors, society would submit to political decay. While both countries have legal and institutional strategies, grassroots women's rights movements and diverse gender-transformative programmes to tackle GBV, system-wide changes in the social and cultural stereotypes of gender relations seem to take much longer. It is necessary to explore proper measures to remove the unfreedoms of women, generated by structural gender inequalities that have been worsened under colonialism and patriarchy, especially in the African region. Essentially, GBV in Africa cannot be addressed unless the intersectionality of sociocultural and institutional limitations, which constructs unequal power relations between women and men, is properly challenged. This task can be achieved only when domestic and international policymakers consider the multilayered discriminative factors that allow VAW in an integrated and inclusive fashion.

The strategy to tackle GBV should overcome and go beyond the instrumental rhetoric of victimising women for the sake of resource mobilisations for national development, regarding them as the subjects of development. Instead, it requires the reforms of laws and institutions to have gender-discriminative norms and attitudes and the social recognition of GBV as a manifestation of unequal power relations between women and men. To resolve VAW and achieve ultimate gender justice, it requires a better understanding of inequality within gender relations and of the significance of the impacts of institutions, laws and policies and civil society's movements on recognising and tackling the systematic construction of gender disparity.

Notes

1. This work was supported by the Ministry of Education of the Republic of Korea and the National Research Foundation of Korea (NRF-2021S1A5B8096026), as well as the Asia-Africa Center of Seoul National University.
2. IPV refers to the gendered violence conducted by a current or former husband or male intimate partner, while non-partner violence refers to the violence perpetrated by anyone else other than the partners, including male relatives, friends, acquaintances, or strangers. The research utilises the data of IPV because there are no specific statistics about the prevalence of non-partner violence by country.
3. <https://unimelb.libguides.com/c.php?g=929734&p=6718215>, accessed 17 April 2022; <https://www.gov.bw/legal/background-judiciary>, accessed 17 April 2022.
4. For more details on South Africa's constitutional change in 1996, refer to Dixon and Roux (2018).
5. <http://www.mmegi.bw>, accessed 27 August 2022.
6. *Prior v Battle and Others* (1999) (2) SA 850 (TK).
7. *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).
8. *S v Baloyi* 2000 (1) BCLR 86 (CC).
9. *Van Eeden v Minister of Safety and Security* 2001(4) SA 646 (T).
10. *Mogodu v State*. Maun Criminal Case No. M 05 of 2003.
11. The Southern African Development Community (SADC) was established as a form of development coordinating conference (SADCC) in 1980 and then transformed into a community for the development of southern African countries in 1992. It aimed at achieving equitable and sustainable development, including economic development, peace and security, and enhanced quality of life of the peoples in southern Africa through regional co-operation and integration. SADC Objectives: <https://www.sadc.int/about-sadc/overview/sadc-objectiv/>, accessed 20 April 2022.
12. See <https://www.sahistory.org.za/article/south-africas-2019-general-election-post-analysis> Accessed 15 July 2023.
13. South Africa's national gender machinery has been led by three major institutions: the Office on the Status of Women (OSW) at the national executive level, the Committee on the Improvement of the Quality of Life and the Status of Women (CIQLSW) at the parliamentary level, and the Commission on Gender Equality (CGE), a constitutionally established independent body.

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