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Botswana Matrimonial Causes Act — Further proposals for Divorce Reform

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Introduction

The Matrimonial Causes Act 1 of 1973 (Cap 29:07 of the Laws of Botswana) was passed by the National Assembly on 27 October 1972. It was assented to by the then President of Botswana the Late Sir Seretse Khama, on 2 February 1973 and entered into force a week later on 9 February 1973.

The Act applies to civil marriages only, i.e. marriages concluded in terms of the Marriage Act (Cap 29:01); customary law marriages have been excluded from its operation.¹ As its short title indicates the Act deals with matrimonial causes, that is to say divorce, judicial separation and the annulment of marriages and matters incidental thereto such as the property rights of spouses, custody, guardianship, maintenance and the jurisdiction of the courts.

During its first ten years of existence the Act has been the subject-matter of many a decision of the High Court and provisions of it have been considered also by the Court of Appeal. Most of these decisions deal with divorce. In academic circles, too, the Act received attention, witness the review by Chris Himsworth in the *Journal of African Law*.² This review was written immediately after the Act came into force. An updated account is therefore appropriate. As it is intended to approach the Act from a broader historical and jurisprudential angle, this essay will deal with it afresh rather than use Himsworth's penetrating but positivistic analysis as a frame of reference. It is further intended to concentrate on the Act's provisions relating to divorce because both from the theoretical and practical point of view, these are the Act's key provisions. But before dealing with them, let us first consider the statement by the Attorney-General, Mr M.D. Mokama speaking in the House of Assembly on 26 October 1972, namely that the Matrimonial Causes Act - at that stage still the Matrimonial Causes Bill - was "a very important one in law reform"³.

The Matrimonial Causes Act as an exercise in law reform

There can be no gainsaying that at the time of its enactment the Matrimonial Causes Act put the country in a frontline position among the jurisdictions of Southern Africa, particularly with regard to the law of divorce. But Botswana would not hold that position for long. On 1 July 1979 the South African Divorce Act, Act 70 of 1979, entered into force, and one cannot help observe that the new South African divorce law has some definite advantages over the Botswana one. The shortcomings of the 1973 Matrimonial Causes Act are due partly to careless drafting but more so to the fact that the Act was a half-hearted exercise in law reform.

That the law of divorce was in need of reform had long been evident. The main weakness of the Roman-Dutch law⁴ of divorce was that because of the fault principle upon which it was based, it was too rigid and indeed unrealistic. The assumption that there always had to be an innocent and a guilty party when a divorce was sought, rested obviously on a factual misconception and in many cases had rather bad results. The court was obliged to grant a divorce once there was a ground for divorce, i.e. adultery or malicious desertion, even though the marriage had not irretrievably broken down. On the other hand, where the marriage had broken down beyond repair, the court could only grant a divorce at the instance of the innocent party and upon proof of one of the matrimonial offences just mentioned. As a result, the innocent party could keep the guilty party indefinitely bound to a marriage which had broken down completely, though in practice, the common law of divorce led rather more often, to collusion, spouses manufacturing a ground and perjuring themselves in order to obtain a divorce, or else the manner of proving the fault of one of the spouses resulted in enmity and humiliation that militated against any possible reconciliation and often hurt the children of the marriage as well.

The need for reform being there, it was now all a matter of the right instigation to effect the necessary change. As Professor Alan Watson has pointed out,

for law to be changed there must be a sufficiently strong impulse directed through a Pressure Force operating on a Source of Law. This impulse must overcome the Inertia, the general absence of sustained interest on the part of society and its ruling élite to struggle for the most 'satisfactory' rule.⁵

For Botswana, good luck presented itself in the person of the Honourable J.R. Dendy-Young who was the country's Chief Justice from September 1968 till September 1971 and during his term in office exercised pressure on the government to change the law of marriage particularly with regard to divorce. As the then Minister of Health, Labour and Home Affairs, the Honourable M.P.K. Nwako, explained when he presented the Matrimonial Causes Bill to Parliament:

..... for some time those concerned with the Administration of Justice, have been giving thought to the serious difficulties generally met by one or the other of the parties to a marriage who has cause to petition for resolution (dissolution?). The former Chief Justice, in particular, showed great interest in having a (the?) law dealing with matrimonial causes reviewed and brought in conformity with modern concepts and general facts of life today.⁶

Unfortunately the Matrimonial Causes Act would not turn out to be altogether a case of "happy-go-lucky." Yet, with a bit more effort on the part of the executive and legislative branches of government, Botswana's present divorce law could have been so much better, As it reads, the Matrimonial Causes Act shows all the signs of a hasty piece of law reform. In fact, the Act is a classical example of a legal transplant. It depends heavily upon provisions taken from English statute law, namely the English Matrimonial Causes Act of 1965, the English Divorce Reform Act of 1969 and the English Nullity of Marriage Act of 1971. It really put the crown on the Anglicanisation of family law process in the early seventies. Already, by the Married Persons' Property Act of 1970 (Cap 29:03) the common law community of property regime had lost its preferential position whereas the Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act of 1970 (Cap 31:03) had introduced for Botswana, provisions derived from the English Inheritance (Family Provisions) Act of 1938. Not that there is anything inherently wrong with legal transplants; but in law, as in medicine, transplants carry with them the risk of rejection and for that reason require careful consideration.

That consideration was not given to the legal transplant we are now discussing. From the Memorandum to the Bill it would appear that it was government thinking that what was good for England was good for Botswana; witness the opening sentences of paragraph 3 of the Memorandum:

At the present time a marriage can only be dissolved by a decree of divorce, in general, on the grounds that it has been proved that the defendant has been guilty of adultery or desertion: the present Bill introduces a concept that the sole ground on which a petition for divorce can be presented is that the marriage has broken down irretrievably. Such an approach has been accepted and become law in the United Kingdom consequent upon the adoption of the recommendations of a Committee, presided over by an Anglican Bishop, which sat for a considerable time in the late 1960s, heard a vast amount of evidence, considered widely differing views and finally produced a report.⁷

What is referred to here is the report of a study group appointed by the Archbishop of Canterbury in January 1964 to investigate the formulation of a principle of breakdown of marriage. The report was published in 1966 under the title Putting Asunder, a Divorce Law for Contemporary Society. It was immediately referred by the Lord Chancellor to the Law Commission, and some years later a compromise between the Law Commission and The Archbishop's Group made possible the English Divorce Reform Act of 1969. It is upon this compromise that the present divorce law of Botswana is based. According to Minister Nwako,

the first draft Law codifying all legislation relating to dissolution or annulment of marriages was produced in 1970 and various people learned in Law have had the chance to examine and comment on the draft. The result has been the present Bill....⁸

I do not know how many lawyers commented on the draft or what their comments were. There is, however, no sign of any original contribution on their part. They must have even overlooked that the draft wrongly employed the term "petition" for in Botswana divorce suits are brought by way of action not petition. This oversight was noted in the Select Committee stage of the Bill though. The Select Committee on the Matrimonial Causes Bill sat from Monday 9 till Thursday 12 October 1972. It considered the written evidence of three persons and the oral evidence of two. The Committee, according to its two pages long report,⁹ was satisfied that both written and oral evidence submitted showed a general support for the enactment of the legislation. It was the consideration of the Committee however, that amendments should be made to certain clauses. Some of these suggested amendments will be alluded to later in this paper.

The Attorney-General had certainly been correct in saying that the Bill was "a very important one in law reform...making some radical changes in the matrimonial affairs of the nation", and in asking Parliament to think very seriously about it because "some of these things may in fact work in other countries and work beautifully and may not work in Botswana" and in stressing the importance of Parliament being satisfied that the changes were necessary and in the general interest of the country.¹⁰ At least one parliamentarian, the member for Maun/ Chobe, the Honourable D.R. Monwela showed that he appreciated this when he said that "I don't see the reason why we should hurry it up before we could sit down and compare this with the other laws, even with our customary laws here."¹¹ By saying so, Mr Monwela underlined the utility of the comparative method in the law reform process and at the same time sounded a warning against indiscriminate borrowing or imitation.¹² The warning was appropriate because the 1969 English Divorce Reform Act had become fashionable in Africa, something worth copying, and had already been imitated by the Nigerian and

Ghanaian legislators all claiming that they were adopting their law to their conditions.¹³ As I said earlier, there is nothing inherently wrong with legal transplants. They are, in fact, very common, and it is exactly in the sphere of the law of divorce that one finds nowadays the principal examples of reform based, either wholly or partially, on foreign examples.

Thus, the Australian Matrimonial Causes Act of 1959 and even more so the New Zealand Matrimonial Proceedings Act of 1963 had a very strong influence on the new divorce law in England which as we have so often noted, became itself a popular export product. But law reform involves more than just copying; it is an art, the art of making normative response to ever changing social reality. As such, it definitely requires discipline.¹⁴ If foreign law is used as a model, it must be ascertained whether it answers local aspirations and suits local realities. As a matter of principle and common sense, every effort must be made, especially in the sphere of family law, to communicate the problems of the law and options for reform to the people. In Kenya, for example, the commissions on the law of marriage and divorce, and of succession adopted an extensive programme of community consultation involving written submissions and the taking of oral evidence during tours throughout the country.¹⁵ In Botswana on the other hand, the Select Committee on the Matrimonial Causes Bill sat at one place only, for just four days.

Fortunately for the country the English divorce provisions that were copied had a fairly high degree of transferability. The reason for this is the resemblance between the modern English law of divorce and African customary law on the point. This could be the explanation why parliament found it so easy to adopt the breakdown principle, and would also answer Himsworth's¹⁶ question whether solutions proposed for England would be suitable for Botswana. Professor Antony Allot¹⁷ makes the interesting point that the resemblance between the modern English and the traditional African divorce law is not accidental. He says that a closer examination of the biographies and personal experiences of some of those who have been at the centre of the agitation for the reform of the English divorce law, or who have had a hand in its drafting, will show that a significant number of them have had African experience, which, it is fair to presume, may have given them a quite different perspective on the possibilities and functioning of divorce law. But whether the resemblance between the two types of divorce law was accidental or not, it is unlikely that for reason of this resemblance the government in Gaborone decided to dispense with a broader programme of community consultation in respect of its Matrimonial Causes Bill. It was rather because there simply was not the necessary law reform infrastructure. Ten years later there still is not, for it can hardly be said that the position has been remedied by the establishment in 1979 of a Law Reform Committee. From the point of view of disciplined law reform this body shows serious shortcomings, so much so that it may well prove to be an obstacle rather than an aid. The Law Reform Committee is a Parliamentary Standing Committee appointed in accordance with Standing Order 85C. It presently consists of nine members of Parliament, one of whom is the Attorney-General. It may call for persons and documents and may hold its meetings in public and at places of its own choice. Parliament, the Attorney-General, a Ministry, a community and even individuals may refer matters to the Committee. The Committee does not meet in regular session and consequently also reports on an ad hoc basis.¹⁸ It has no specialised staff at its disposal.

Clearly, the Botswana Law Reform Committee is something quite different from the Law Reform Commissions in countries such as the United Kingdom, Canada, Australia, New Zealand, Sri Lanka, Ghana, Nigeria and Kenya - to confine my examples to the British Commonwealth. The latter, though responsible to Parliament, are not part of Parliament but expert bodies consisting wholly, or for most part, of lawyers. After all,

law reform is essentially a "law-job" which, of course, is not to say that a law reform commission should operate alone. It is however difficult to see how a group of politicians most of whom lack training in the common law of the country as well as its customary law systems, can make an independent contribution to systematic law reform other than by helping formulate public opinion on specific issues. Some may consider even that to be rather too optimistic. Be that as it may, the main theme of this essay is Botswana's divorce law, not law reform as such or the feasibility of a Law Reform Commission for Botswana. The paper therefore proceeds to deal with an analysis of the more important provisions of the Matrimonial Causes Act relating to divorce.

Divorce under the Matrimonial Causes Act

In the unreported decision of *Dube v Dube* (Matrimonial cause 41 of 1980), Hayfron-Benjamin CJ had this to say about the underlying policy and effect of the Matrimonial Causes Act in matters of divorce:

Now the law of divorce has undergone a sea-change and under the Causes Act 1973 of Botswana, no matrimonial offence need be proved. The sole ground of divorce is the irretrievable breakdown of the marriage. A decree cannot be denied a party on the mere proof of collusion, although collusion may be evidence that the marriage has not in fact irretrievably broken down. Though the public interest is still present in an institution creating a statute of such far reaching effects, the procedures for its dissolution have been considerably simplified. In the absence of children who may be adversely affected emotionally, financially or socially by the dissolution of their parents' marriage, the Court should be slow to place impediments in the way of the expeditious dissolution of a marriage, which has obviously and manifestly broken down irretrievably.

However, as the same learned judge remarked in an earlier unreported decision of his, *Mhonda v Mhonda*, (Matrimonial cause 32 of 1978), "the Matrimonial Causes Act of 1973 is not and was not intended to be a Casanova's Charter". In yet another unreported decision of his, *Pillar v Pillar*, (Matrimonial cause 89 of 1979), he explained as follows: "Marriage is a serious institution, and it can be dissolved only on cogent and preponderant evidence clearly establishing that it has become an empty shell". In the opinion of Mr Justice Rooney, expressed in *Mombala v Mombala* (1976 BLR 31 at 32):

It was not the purpose of the Matrimonial Causes Act 1973 to provide for easier divorce. Its aim was to replace the common law, which required a matrimonial offence, however, contrived, before a Court could pronounce the dissolution of a marriage. The Act is based to a large extent on the Divorce Reform Act of 1969 of the United Kingdom and was designed to secure a more rational approach to the subject of divorce. It provided for only one ground of divorce, namely the irretrievable breakdown of the marriage and set out the circumstances, one of which must exist before a Court can conclude that a marriage is at an end. The Act was not intended to condemn or punish a guilty spouse or enable a marriage to be dissolved merely because one partner has been guilty of misbehaviour. There is still a necessity to maintain a balance between the sanctity of marriage as an institution approved and supported by the State and the desires of the parties themselves. It is not therefore every act of misconduct that a Court will consider as sufficient.

I think that Mr Justice Rooney was correct in his remark that the Act was not intended to provide for easier divorce, and that the then Member of Parliament for Boteti the Honourable B. Steinberg was wrong when he warned Parliament that "we are making divorce too easy"¹⁹; and so was the then Member for Francistown and Tati East, the Honourable P. Matante, who thought that "when we have this law passed, the situation will be so easy that where there is trouble in a home alright, marriage will be dissolved in peace and no trouble whatsoever"²⁰. What is in fact the position is that the law of divorce has been made more strict in the sense that to the fault principle has been added the breakdown principle. Himsworth's observation²¹ that the common law matrimonial offences have been "swept away", is just not correct. It is true that s.14 of the Matrimonial Causes Act stipulates that "the sole ground on which an action for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably"; but this statement is of limited effect since the plaintiff is required by s.15(1) of the Act to establish at least one of the four "facts" specified therein, three of which are offence based. These four "facts", or rather factual situations, are the following:

- a. that the defendant has committed adultery and the plaintiff finds it intolerable to live with the defendant;
- b. that the defendant has behaved in such a way that the plaintiff cannot reasonably be expected to live with the defendant;
- c. that the defendant has deserted the plaintiff for a continuous period of at least two years immediately preceding the commencement of the action.
- d. that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the commencement of the action and the defendant consents to a decree being granted".

The first three situations are clearly of the matrimonial offence type. The fourth introduced, in the words of Rooney ACJ in the unreported case of *Glover v Glover*, (Matrimonial cause 31 of 1975), "the possibility of parties consenting to the making of a decree in certain circumstances" but as Hayfron-Benjamin CJ pointed out in Pillar's case, was not meant to introduce divorce by consent into the law of Botswana. The Bill, in conformity with the 1969 English Divorce Reform Act, mentioned a fifth factual situation, namely where "the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition". It will be noted that like in the fourth situation, the plaintiff could be a matrimonial offender but that unlike in the fourth situation, the defendant's consent is not required. According to the Memorandum to the Bill,

where parties have lived apart for five years there is little or no likelihood of a reconciliation and, therefore, it is better to be realistic and allow the dissolution which one party wants rather than compel the husband and wife to continue to be parties to a marriage which exists in name only .

But Parliament, at the recommendation of the Select Committee on the Matrimonial Causes Bill, decided to dispense with this fact, the fact that best justified the claim that the proposed law was based on breakdown.²² The Committee had stated in its report that it felt that the five year clause could be abused and that the other four "facts" were sufficient. According to the Attorney-General, the five year clause would "encourage people to misbehave and then get a divorce from their

misbehaviour".²³ None of these opinions were in any way substantiated. The effect of this decision of Parliament is that in Botswana's divorce law the fault element is proportionally stronger than in the English divorce law and that an "innocent" party can for ever block the dissolution of a marriage that has irretrievably broken down. It is of course true that the matrimonial offence situations and the living apart cum consent to divorce situation are not in themselves grounds for divorce. They are only evidence of breakdown and not necessarily conclusive. Merely to establish one or more of them will not take the plaintiff home for s.15 of the Matrimonial Causes Act envisages two stages of enquiry. In the words of Dendy-Young J A in *Bodulala v Bodulala* (1979-80 BLR 263 at 266), for the plaintiff to have established a factual situation listed in s.15(1) means that he has cleared a "hurdle" which stands in the way of the next question for the court to decide, namely "whether it can yet be affirmed that the breakdown was not irreparable". This question forms the second stage of the investigation as prescribed by s.15(3)²⁴ read with s.15(2). The latter subsection is to the effect that the court has a duty not merely to weigh up the evidence the parties choose to place before it, but "to inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant". In other words, the court is supposed to act not so much as an umpire, but rather as the Inquisition of old in the sense that it should be determined to get at the truth.²⁵ That breakdown should be borne out by the facts is fully in line with the policy of regulating divorce realistically; what reverses that policy however is that breakdown can be inferred from certain factual situations only: unless the plaintiff has satisfied the court of one or more of the four factual situations enumerated in s.15(1), the court may not dissolve the marriage even if it has broken down irretrievably. *Khamane v Khamane* (1976 BLR 22) is a case in point. Rooney ACJ who heard the case found that the Khamane's were ill-matched and that there was little possibility of their re-establishing a matrimonial home; but since the plaintiff/wife had failed to satisfy the court that her husband's behaviour was of such a nature that she could not reasonably be expected to live with him, her wishes in the matter notwithstanding, her action was dismissed. In the words of the learned judge himself this was "an unsatisfactory result". Equally unsatisfactory is the situation where an "innocent" spouse refuses the other a divorce even though the marriage has broken down irretrievably, or where a marriage has been wrecked as a result of a spouse's incurable mental illness or continuous unconsciousness. It is true that the wording of ss.25(3) and 28(2) of the Act suggest that insanity can be a "ground" for divorce but this is not supported by s.14 in terms of which the sole ground on which an action for divorce may be brought is the irretrievable breakdown of the marriage.²⁶ Neither does s.15(1) refer to incurable mental illness or continuous unconsciousness as factual situations that could be proof of breakdown. To classify them under s.15(1)(b) - defendant's behaviour - would, I think, be stretching the ordinary meaning of the word behaviour too far: As it was pointed out by Sir George Baker P in the English case of *Katz v Katz* ((1972) WLR 955 at 960A) "behaviour is something more than a mere state of affairs or a state of mind."²⁷ For similar reasons s.15(1)(c) - defendant's desertion - would be inapplicable.

Finally, with regard to s.15(1), it is important to note that of the factual situations that are recognised therein as proof of breakdown the offence-based ones are most often invoked in practice. Of them again, s.15(1)(b) - defendant's behaviour - enjoys preference. The matrimonial offence of s.15(1)(b) is an innovation as the common law recognised only adultery and malicious desertion as matrimonial offences. Its introduction widened the scope for divorce, be it indirectly, and must have contributed to the rapidly increasing divorce rate over the last ten years.²⁸ (The real reasons for the rise in the divorce rate lie of course outside the law, one such reason being that a growing segment of society, particularly in the urban areas, is coming to regard divorce as a socially tolerable solution and as more acceptable than other outcomes of a broken home). Why the offence-based situations are so popular in court

is difficult to assess. Their popularity will to a large extent be a reflection of actual patterns of behaviour but might also be influenced by the belief on the part of plaintiffs in a divorce suit or their lawyers that the establishment of these situations creates an advantage over the defendant when ancillary matters are decided, or, particularly with regard to s.15(1)(a) and (b), by the desire for a quick divorce. Be that as it may, the costs of invoking the offence based situations are often high, particularly in a defended action; and when I refer to costs, I am not so much thinking of lawyers' fees but of the sorrow caused to the parties, their children and families by the nature of the allegations made and the methods by which evidence is obtained. Alas, many a divorce case is still a far cry from what the English Law Commission declared to be a principal aim of a good divorce law, namely that "when, regretably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."²⁹

Matters incidental to divorce

How does the Matrimonial Causes Act fare with regard to matters incidental to divorce like custody and guardianship in respect of the children, division of property and maintenance? I would submit that whereas the Act says too much about the granting of a divorce, it says too little about the ancillary matters.

In respect of the custody and guardianship of the children of the marriage the Act leaves the common law position unchanged.³⁰ This means that the court is left with a discretion which, in the tradition of the common law, it will exercise with the welfare of the children uppermost in mind.³¹ Of interest to note is that in a considerable number of cases custody is awarded to the father.³²

In respect of the division of property after divorce the Act is once again silent on how the court should exercise its powers.³³ In *Molomo v Molomo* 1979-80 BLR 250, Hannah J dealt with the court's powers as follows, at 251-252:

There is nothing in Section 13 which indicates an intention by the legislature to confer a wide and almost unfettered discretion on the Court to divide matrimonial assets between spouses.

The wording is in stark contrast to Section 24 of the English (Matrimonial Causes Act (1973) which not only specifies the various powers but in the following Section sets out the criteria to be applied in exercising the power.

I hold that the powers of the Court under Section 13 are substantially the same as in any other proceedings where the ownership or possession of property is in issue. The discretion is no wider and no narrower than the ordinary discretion of the Court in such cases.

Reference has been made to the provisions of the section which empower the Court to vary its orders. In my view this power is more referable to orders made under Section 13(1)(b) (custody, guardianship and maintenance of children). I find it difficult to envisage circumstances where the Court, having determined property rights and particularly where the parties have acted on such determination and arranged their affairs accordingly, would intervene at a later date and order a variation. However, if such circumstances should arise I do not regard their existence and the inclusion of a power to vary as a reason to depart from what seems to me to be the ordinary and plain meaning of the words used in the section.

It follows from my view of Section 13 that if it be held that a marriage was in community of property and of profit and loss then on dissolution the Court in exercising its powers under Section 13 will hold that the matrimonial assets with certain possible exceptions are in joint ownership and fall to be divided in equal shares.

On the other hand, if the marriage was out of community each spouse takes his or her separate estate. If the matrimonial assets or part of them are held jointly the Court has to determine a proper division. In such a case the Court has to endeavour to ascertain what was in the minds of the parties at the time of acquisition and then make an order which in the changed conditions, if any, fairly gives effect in law to what the parties must be taken to have intended at the time of the transaction itself. Where the Court can clearly see that the parties intended that a particular property should belong to one or other of them whatever happened there is no discretion in the Court to override that intention. But where the Court is satisfied that the intention was to share, or is satisfied that both parties have a substantial interest, and it is not fairly possible or right to assume some more precise calculation of their shares, equality almost necessarily follows. At page 257 of the report the learned judge finally pointed out that a court can always appoint a liquidator or curator to help formulate a division of the assets.³⁴

Himsworth poses the question whether the forfeiture of benefits rule still applies under the Matrimonial Causes Act. In terms of this rule, a successful plaintiff in a divorce action may request the court to make an order ensuring that the guilty spouse should take no financial benefit out of the marriage. In Himsworth's opinion the rule is totally out of place in a system basing divorce on breakdown and because of its incompatibility with the new statutory provisions its revocation may be implied. I beg to differ. Marital misconduct has been and will always be a factor that leads to the breakdown of marriages. It is true that under the new divorce laws a marriage can no longer be dissolved unless it has broken down irretrievably but now to say that therefore there can no longer be a guilty party is too legalistic an argument. The conduct of parties ought to continue to play a role in so far as the patrimonial consequences of the divorce are concerned.

Similarly with regard to costs, it would be unrealistic to argue that since the ground on which a divorce is now granted is no longer the defendant's marital misconduct, therefore a defendant can no longer be ordered to pay the plaintiff's costs.

Finally there is the matter of maintenance of the erstwhile spouse and the children of the marriage. Relevant are ss.25 and 28 of the Act. They contain the most peculiar provision that the court can order only the former husband to pay maintenance unless the action for divorce was brought by the wife on the "ground" of her husband's insanity, which we have seen is no ground for divorce at all. It cannot be denied that in both European and Tswana traditions the duty to support normally falls on the husband because of his characteristically stronger economic position, but a reversal of this position is always a possibility and occurs more and more often. The common law recognised this possibility. As Himsworth remarked,

to introduce into a system, which knows no distinction during marriage between the spouses' respective duties to maintain, the notion that the prime responsibility for maintenance following 'breakdown' falls upon the husband alone is quite wrong. It was surely not intended, for instance, that a woman legally obliged to support her husband during their marriage should automatically escape such liability on divorce. Greater care, it is submitted, should have been shown in superimposing the new statutory rule upon the position at common law.

Hansard reveals however, that the greatest care was shown, notably by the Attorney-General, to see to it that these discriminatory clauses in the Bill would become law. In fact, most of the parliamentary debate on the Bill turned exactly around this point. For Attorney-General Mokama it was all a matter of Tswana custom:

we do not, as a nation, expect a husband ever to ask support, financial support from his wife. It is the main partner who is the breadwinner. If you are not capable of winning bread, you should not marry in order to be subsidised by your wife's family... The husband...is not entitled to go and ask for maintenance from the wife. I know that in certain cases the wife may be richer than a husband. But we don't allow that any man should be supported by his wife in those circumstances.³⁵

The Attorney-General also warned against fortune seekers among the male sex.³⁶ In fairness to the Attorney-General it must be noted that he made it clear to Parliament that he was not expressing a legal opinion and could be wrong.³⁷ Among the Parliamentarians who thought that the Attorney-General's views were indeed wrong and who expressed an opinion to that effect, was Mr Steinberg who said: "I don't see why we should encourage wives to run away with other men if they have money..."³⁸ The traditionalists, however, would have it their way, but if this is any consolation, the court is instructed by s.25(2) of the Act to take into account the lady's fortune, if any, the husband's ability to pay and the conduct of the parties, presumably in so far as it may be relevant to the breakdown of the marriage.

Proposals for reform

It has been my submission that in several respects the divorce law of Botswana does not make good law. What constitutes good divorce law is of course a matter of personal opinion but I would not be surprised if most people in Botswana would agree that a good divorce law should comply with the following requirements:³⁹

- a. The law should be realistic. This implies that it should not be so lax as to lessen society's regard for the institution of marriage, nor should it be so rigid as to lead to collusion in court or to the formation of extra-marital relationships. Society has an interest in maintaining marriage as an institution but it has also an interest in the dissolution of marriages that have broken down irretrievably. A good divorce law does not aim at making divorce easier or more difficult but only at regulating divorce more realistically.
- b. The law should encourage reconciliation between estranged spouses.
- c. The law should encourage harmonious relationships between the parties and their children and respective families after divorce by seeing to it that "the empty legal shell" is destroyed as fairly and peacefully as possible.
- d. The law should protect those likely to be adversely affected by divorce.

In the light of the requirements stated above the author would like to make some suggestions for reform:

1. s.15(1) (proof of breakdown) of the Matrimonial Causes Act should be deleted altogether or else be added to but then at the same time be rephrased to as to couch it in the form of guidelines only. Personally, I do

not think that the judiciary needs legislative guidelines to establish whether a marriage has broken down beyond repair, as after ten years of experience with the breakdown principle it will be more capable than ever of formulating its own directives. If it is thought that the customary courts are capable of working out this type of guidelines in respect of customary marriages, why not allow the High Court to do the same in respect of civil marriages? These guidelines will no doubt suffice to prevent the type of situation of which the English Law Commission was so wary, namely that the court would have to resort to repeated intensive investigations or ad hoc enquiries as proposed by the Archbishop's Group.

2. The Act should contain an express provision to the effect that the court may postpone divorce proceedings in order that an attempt at reconciliation be made. At present the court would seem to exercise this power as part of its inherent jurisdiction - witness the unreported case of *Pule v Pule*, (Matrimonial cause 98 of 1978).
3. The Act should make special provision for relief in cases of incurable mental illness and continuous unconsciousness and preferably make them separate grounds for divorce as one is concerned here with special situations that ask for special rules.
4. s.21 of the Act which says that, exceptional cases apart, no divorce action may be brought before the court before the expiration of two years from the date of marriage, should be repealed for if a marriage has broken down irretrievably it serves no purpose keeping it in existence.
5. Express provision should be made in the Act for the possibility of forfeiture of benefits and for costs in a divorce suit to be awarded in favour of the plaintiff. Unlike the position under the common law there should however be no obligation on the court to grant a forfeiture of benefits order simply because a successful plaintiff has asked for it, neither should marital misconduct be the only relevant factor nor should the order be necessarily one for a total forfeiture.
6. In addition to s.17 of the Act which in certain cases provides financial protection for the defendant, presumably the defendant/wife only, the Act should also contain a provision to the effect that a decree of divorce shall not be granted unless the court is satisfied that the financial welfare of any minor or dependant child has been attended to.
7. The discriminatory provision within ss.25 and 28 (maintenance) of the Act should be removed as it protects nothing other than a male chauvinist mind that refuses to accept that there may be circumstances in which the wife carries the financial responsibilities.
8. Finally, there are quite a number of inaccuracies in the drafting of the Act which need correction.⁴⁰ In fact, the Act is all but an example of elegant drafting. I don't know whether it was for this reason that Attorney-General Mokama told Parliament: "I think it will be misleading to say that once this Bill comes into force, we are dispensing with lawyers. You would still need lawyers. This law is not as simple as all that."⁴¹

Footnotes

1. See s.3; s.4 further limits relief under the Act to monogamous marriages.
2. Himsworth, C.M.G., "Effects of Matrimonial Causes Legislation in Botswana", Journal of African Law Vol.18 (1974), pp. 173-179.
3. Hansard (National Assembly) vol.42 (1972) 83.
4. The general law of Botswana constitutes a "mixed legal system", i.e. partly Roman-Dutch partly English. See chapter by Simon Roberts, in Allot, A.N. (ed.) Judicial and Legal Systems in Africa, 2ed., London. 1970, pp.261-273; Aguda, A., "Legal Development in Botswana from 1885 to 1966", Botswana Notes and Records, Vol.5, 19 pp.52-63; Saunders, A.J.G.M., "The characteristic features of the Southern African legal system", Comparative and International Law Journal of Southern Africa, Vol.14, (1981) November issue.
5. Watson, A., "Comparative Law and Legal Change", Cambridge Law Journal, Vol.37 (1978) p.331.
6. Hansard (National Assembly) Vol.41 part I (1972) 15.
7. Matrimonial Causes Bill 22 of 1972, Government Gazette Vol.X (1972) supplement B159.
8. Hansard (National Assembly) Vol.41 part I (1972) 15.
9. Report of the Select Committee on the Matrimonial Causes Bill 1972 The National Assembly, Gaborone.
10. Hansard (National Assembly) vol.42 (1972) 83, vol.41 part I (1972) 20.
11. Hansard (National Assembly) vol.42 (1972) 91.
12. On "legislative borrowing", see Kahn-Freund, Otto, "On Uses and Misuses of Comparative Law", The Modern Law Review, Vol.37, (1974), pp. 1-27; Watson, A. "Legal Transplants and Law Reform", The Law Quarterly Review, Vol.92, (1976), pp. 79-84; "Comparative Law and Legal Change" op.cit., pp. 313-336; Allot, A.N., The Limits of Law, 1980.
13. Allot, The Limits of Law, p.117.
14. Compare Allot, A.N. "Reforming the Law in Africa - aims, difficulties and techniques" and Sanders, A.J.G.M., "In search of disciplined law reform" in Sanders (ed.) Southern Africa in need of Law Reform, 1981. pp.228-236 237-245.
15. See Kahn-Freund, Otto, "Law Reform in Kenya", East African Law Journal, Vol.5, (1969, pp.54-87; Read, James S., "Marriage and Divorce: A new Look for the Law in Kenya?", East African Law Journal, Vol.23, (1979), pp.109-114 re the rejection of the Marriage Bill in Kenya.
16. op.cit., p.174
17. The Limits of Law, 119

18. Compare the Report of the Law Reform Committee 1980 Government Printer, Gaborone, on (a) Customary Marriage and the Marriage Act; (b) Citizenship Act; (c) Road Transport Act; (d) British South Africa Land Act; (e) Amendments to the Law to incorporate an Irresistible Impulse; (f) Amendments to the Constitution; (g) Death Duties Act; (h) Liquor Act; (i) Arms and Ammunition Act.
19. Hansard (National Assembly) vol.42 (1972) 87.
20. Hansard (National Assembly) vol.41 part I (1972) 17-18.
21. op.cit., p.174
22. Separation is perhaps the best indication of marital breakdown. Compare Mhlanga v Mhlanga (unreported matrimonial cause 55 of 1977); Noke v Noke 1979 Botswana Law Reports 109; (hereafter BLR) Mogodi v Mogodi (unreported matrimonial cause 36 of 1979); Dube v Dube (unreported, matrimonial cause 41 of 1980).
23. Hansard (National Assembly) vol.42 (1972) 88.
24. s.15(3) reads as follows: "If the court is satisfied on the evidence of any such fact as is mentioned in subsection (1), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall grant a rule nisi for divorce". The marriage is in law only dissolved when the rule nisi is made absolute. The Act is silent as to the period that should lapse between the pronouncement of the rule nisi and the order making it absolute. This period should normally be such as to enable ancillary matters to be settled. The usual practice of the Botswana High Court is of allowing a period of at least six weeks to elapse. See Dube v Dube (unreported, matrimonial cause 41 of 1980) with regard to the history of the rule nisi in divorce suits and Botswana practice.
25. In Pheto v Pheto 1975(1) BLR 59 at 61, Rooney J. found, with reference to Roper v Roper and Another 1972 3 All England Reports, hereafter All ER) 668 and Cleary v Cleary 1974 1 All ER 498, that the court had the duty of satisfying itself, on a balance of probabilities, that the plaintiff was in fact telling the truth and should therefore not accept a plaintiff's bare assertions as conclusive. Other decisions to the same effect are Ncube v Ncube (unreported matrimonial cause 44 of 1973), Modise v Modise 1974(2) BLR 11, Khamane v Khamane 1976 BLR 22, Ratshosa v Ratshosa and another 1978 BLR 64, Noke v Noke 1979 BLR 109.
26. Although according to the law of Botswana and that of other countries following the English rules of statutory interpretation, an Act's travaux préparatoires cannot be used in the interpretation of the Act, it is of interest to note that in parliament there was a strong feeling that insanity should not be a ground for divorce. See Hansard (National Assembly) vol.42 (1972) 90-91.
27. See also Thurlow v Thurlow (1976) Fam 32 at 42.
28. The number of matrimonial causes (almost exclusively divorce cases) in the High Court, which still has exclusive original jurisdiction in this regard, was 47 in 1973, 48 in 1974, 75 in 1975, 81 in 1976, 129 in 1977, 125 in 1978, 122 in 1979, 156 in 1980, 175 in 1981 and 201 in 1982. According to the as yet unofficial 1981 census figures the married population of Botswana is approximately 200,000

on a total population of 940,000. The census figures do not indicate how many of these 200,000 are married according to customary law only. But even if the number of people married according to civil law would be considerably less than 200,000 the number of decrees absolute of divorce per year per 1000 of the married population would be nowhere near the figure in the United Kingdom, for example, which presently stands at 11.

29. The Law Commission Reform of the Grounds of Divorce. The Field of Choice. Report on a reference under section 3(1)(e) of the Law Commissions Act 1965, 1966 Command 3123 para 15. Incidentally the phrase "the marriage has become an empty shell" as a synonym for "the marriage has broken down irretrievably" has become a rather popular one in Botswana divorce decisions - compare, for example, *Riley v Riley* 1979 BLR 100, *Pillar v Pillar* (unreported matrimonial cause 89 of 1979), *Dube v Dube* (unreported matrimonial cause 41 of 1980), *Matumo v Matumo* (unreported) matrimonial cause 150 of 1980, *Dabudabu v Dabudabu* (unreported matrimonial cause 20 of 1981).
30. See ss.13 and 28(1).
31. See *Kadiwa v Kadiwa* (unreported matrimonial cause 13 of 1973) *Peter v Peter* 1974(1) BLR 18, *Ovoya v Ovoya* (unreported matrimonial cause 87 of 1976), *Sebolao v Sebolao* (unreported) matrimonial cause 98 of 1979, *Malope v Malope* (unreported) matrimonial cause 52 of 1980).
32. Compare *Peter v Peter* 1974(1) BLR 18, *Kegakgametse v Kegakgametse* (unreported matrimonial cause 60 of 1977), *Dambuzi v Dambuzi* (unreported matrimonial cause 63 of 1977), *Mokobi v Mokobi* (unreported matrimonial cause 129 of 1977), *Rangongo v Rangongo* (unreported matrimonial cause 67 of 1978), *Sebolao v Sebolao* (unreported, matrimonial cause 98 of 1979), *Baitsile v Baitsile* 1979 BLR 111; see also *Chiepe v Sago* (unreported, civil cause 32 of 1981). In *Malope v Malope* (unreported, matrimonial cause 52 of 1980) and *Mathumo v Mathumo* (unreported, matrimonial cause 128 of 1980), however, it was expressly stated that all things being equal, children of tender age are better off with their mother.
33. See s.13 which says nothing more than that the court shall have jurisdiction to make an order "determining the mutual property rights of the husband and the wife" and to vary such orders.
34. Examples of cases where the court appointed a curator are *Matsheka v Matsheka* 1977 BLR 112, *Isaacs v Isaacs* (unreported, matrimonial cause 65 of 1977) and *Moshageng v Moshageng* (unreported, matrimonial cause 25 of 1980). In *Matsheka's* case the court considered the appointment of a magistrate or district commissioner as a curator impracticable and thought that an accountant would be the proper person. In the important decision of *Moisakamo v Moisakamo* (unreported, matrimonial cause 106 of 1978) (vide the decision of 23 September 1980) the parties to the civil marriage were both Africans. Hayfron-Benjamin CJ refused to follow the ruling of *Hannah J* in *Molomo v Molomo* 1979-80 BLR 250 that the Dissolution of African Marriages (Disposal of Property) Act (Cap 29:06) applied to marriages concluded on or after 16 July 1926 and accordingly held, in terms of s.7 of the Married Persons' Property Act (Cap 29:03), that in the absence of an arrangement otherwise, the parties matrimonial property regime was governed by customary law and had to be divided accordingly, i.e. on the basis of how the property was acquired. The court further found that it would be legally unsound to refer the matter of the division of the matrimonial assets to a customary court.

35. Hansard (National Assembly) vol.42 (1972) 92.
36. Hansard (National Assembly) vol.41 part I (1972) 24.
37. Hansard (National Assembly) vol.41 part I (1972) 24, vol.42 (1972) 93.
38. Hansard (National Assembly) vol.41 part I (1972) 22. Other Members of Parliament who felt that the duty to support should be reciprocal were Messrs. Monwela and Tshane - see Hansard (National Assembly) vol.42 (1972) 93, 95.
39. See, inter alia, Field of Choice
40. For example: in s.7(1)(a) "either spouse" should read "the spouses" - see Egner v Egner 1974(2) BLR 5 at 7.

In ss. 7(1)(b) and 8(1)(b) there should be inserted after the words "In the case of an action brought by a wife" the words "who is not domiciled in Botswana" - see Lincoln v Lincoln 1974(2) BLR 44 at 45.

The reference in s.13(1)(c) to paragraph(a) should be deleted - see Molomo v Molomo 1979-80 BLR 250 at 251-252.

In s.13(1)(b) the word "minor" should be deleted so as to make provision for dependent children above the age of majority as well - see Himsworth op.cit., 177.

In s.17(1)(b) "petition" should read "action"

In ss.17(3)(b) and 21(2) "respondent" should read "defendant"-

S.22 should be redrafted so as to make express provision for a minor's marriage without consent - see Himsworth 178-179, and in s.22(6) the clause "unless such declaration be made on the ground specified in subsection 3(d)", should be deleted - see Himsworth op cit 178 footnote 2.

In s.28(1) should be inserted after the word "custody" the word "guardianship" - see Himsworth op.cit.,177.

In the proviso to s.28(2) "21" should read "18": the Select Committee on the Matrimonial Causes Bill had recommended that the age limit of 21 as stated in the Bill be reduced to 18, and parliament decided accordingly.

Statutory provision should be made for bringing the common law grounds for judicial separation into line with the new divorce law.
41. Hansard (National Assembly) vol.41 part I (1972) 19.