Attorney-General v Dow
Court of appeal, Botswana, 3 July 1992

ATTORNEY-GENERAL v DOW 1992 BLR 119 (CA)

COURT OF APPEAL (FULL BENCH), LOBATSE

Judge Amissah JP, Aguda JA, Bizos JA, Schreiner JA, and Puckrin JA

Judgment July 3, 1992

Amissah JP

This appeal is brought by the Attorney-General against the judgment given by Horwitz AJ in favor of Unity Dow in her claim that her constitutional rights had been infringed by certain specified provisions of the Citizenship Act 1984.

The facts of the case which gave cause for the respondent's complaint were well summarized by the learned judge *a quo*, and for convenience and with due apologies I will repeat that summary. As he said:

> The Applicant Unity Dow is a citizen of Botswana having been born in Botswana of parents who are members of one of the indigenous tribes of Botswana. She is married to Peter Nathan Dow who although he has been in residence in Botswana for nearly 14 years is not a citizen of Botswana but a citizen of the United States of America.
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> Prior to their marriage on 7 March 1984 a child was born to them on 29 October, 1979 named Cheshe Maitumelo Dow and after the marriage two more children were born Tumisang Tad Dow born on 26 March 1985 and Natasha Selemo Dow born on 26 November 1987.
>
> She states further in her founding affidavit that "my family and I have established our home in Raserura Ward in Mochudi and all the children regard that place and no other as their home.
>
> In terms of the laws in force prior to the Citizenship Act of 1984 the daughter born before the marriage is a Botswana citizen and therefore a Motswana, whereas in terms of the Citizenship Act of 1984 the children born during the marriage are not citizens of Botswana (although children of the same parents), and are therefore aliens in the land of their birth.

The respondent claimed that the provisions of the Citizenship Act of 1984 which denied citizenship to her two younger children were sections 4, 5. Those sections read as follows:

> 4(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth:- (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana. (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

> 5(1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth: (a) his father was a citizen of Botswana; (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana. (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

I should hereby add that the respondent's case before the court *a quo* also embraced discriminatory treatment which she claimed the Act gave to alien men married to Botswana women on the one hand and alien women married to Botswana men on the other. The section of the Citizenship Act of 1984 which, according to the respondent, perpetrated this distinction was section 15. But as the judgment of the court *a quo* did not refer to that aspect of the case in its determination of the injustice suffered by the respondent from the Citizenship Act, I shall refrain from going further into that aspect of the case.

The case which the respondent sought to establish and which was accepted by the Court *a quo* was captured by paragraphs 13 to 15, and paragraphs 18, 19, 21 and 22 of her founding affidavit. They read as follows:

> 13. I am prejudiced by the section 4(1) of the Citizenship Act by reason of my being female from passing citizenship to my two children Tumisang and Natasha.
> 14. I am precluded by the discriminatory effect of the said law in that my said children are aliens in the land of mine and their birth and thus enjoy limited rights and legal protections.
> 15. I verily believe that the discriminatory effect of the said sections, (4 and 5 supra) offend against section 3(a) of the Constitution of the Republic of Botswana.
> 18. I am desirous of being afforded the same protection of the law as a male Botswana citizen and in this regard I am desirous that my children be accorded with Botswana citizenship...
> 19. As set out above, I verily believe and state that the provisions of section 3 of the Constitution, have been contravened in relation to myself.
> 21. As a citizen of the Republic of Botswana, I am guaranteed under the Constitution, immunity from expulsion from Botswana and verily believe that such immunity is interfered with and limited by the practical implications of sections 4, 5, and 13 of the said Citizenship Act.
> 22. I verily believe that the provisions of the Constitution have been contravened in relation to myself.

The sections of the Constitution of the Republic which the respondent prayed in aid in this regard, therefore, are sections 3 and 14. Section 3 is the section which deals with the fundamental rights and freedoms of the individual. Section 14 deals with the protection of the freedom of movement. I shall have occasion to recite them and to refer to them in some detail in the course of this judgment.

After hearing the respondent, then the applicant in the case, and the Attorney General in opposition, the learned judge *a quo* found in favor of the former. The relevant parts of his judgment are as follows:

> I therefore find that section 4 [of the Citizenship Act] is discriminatory in its effect on women in that, as a matter of policy,
> (i) It may compel them to live and bear children outside of wedlock.

(ii) Since her children are only entitled to remain in Botswana if they are in possession of a residence permit and since they are not granted permits in their own right, their right to remain in Botswana is dependent upon their forming part of their father's residence permit.
(iii) The residence permits are granted for no more than two years at a time, and if the applicant's husbands permit were not renewed both he and applicant's minor children would be obliged to leave Botswana.
(iv) In addition applicant is jointly responsible with her husband for the education of their children. Citizens of Botswana qualify for financial assistance in the form of bursaries to meet the costs of University education. This is a benefit which is not available to a non-citizen. In the result the applicant is financially prejudiced by the fact that her children are not Botswana citizens.
(v) Since the children would be obliged to travel on their father's passport the applicant will not be entitled to return to Botswana with her children in the absence of their father.

What I have set out at length may inhibit women in Botswana from marrying the man whom they love. It is no answer to say that there are laws against marrying close blood relatives - that is a reasonable exclusion... It seems to me that the effect of section 4 is to punish a female citizen for marrying a non-citizen male. For this she is put in the unfavorable position in which she finds herself vis-à-vis her children and her country. The fact that according to the Citizenship Act a child born to a marriage between a citizen female and a non-citizen male follows the citizenship of the father [may] not in fact have that result. It depends on the law of the foreign country. The result may be that the child may be rendered stateless unless its parents emigrate. If they are forced to emigrate then the unfortunate consequences which I have set out earlier in this judgment may ensue. I therefore come to the conclusion that the application succeeds. I have also come to the conclusion that section 5 of the Act must join the fate of section 4.

The appellant has appealed against this decision on several grounds. He complains that the Court *a quo* erred in holding that the applicant had sufficiently shown that any of the provisions of sections 3-16 (inclusive) of the Constitution had been, was being, or was likely to be contravened in relation to her by reason of the provisions of section 4 or section 5 of the Citizenship Act so as to confer on her *locus standi* to apply to the High Court for redress pursuant to section 18 of the Constitution. After holding that the provisions of the Constitution should be given a "generous interpretation", the Court *a quo* erred in failing to give any or any adequate effect to other principles of construction, in particular, the principle that an Act of the National Assembly must be presumed to be infra vires the Constitution: the principle that an Act or instrument, including the Constitution should be construed as a whole; and with regard to section 15 (3) of the Constitution, the principle of "*inclusio unius exclusio alterius*", to which effect is given in section 33 of the Interpretation Act. The Court *a quo* also erred, in that instead of holding that the word "sex" had been intentionally omitted from section 15 (3) of the Constitution so as to accommodate, subject to the fundamental rights protected by section 3 thereof, the patrilineal structure of Botswana

society, in terms of the common law, the customary law, and statute law, it held that section 15 (3) of the Constitution merely listed examples of different grounds of discrimination and was to be interpreted as including discrimination on the grounds of "sex", and that section 4 and/or section 5 of the Citizenship Act denied to the respondent by reason of sex her rights under the Constitution. The rights mentioned in the appellant's grounds of his appeal being the respondent's: her right to liberty and/or her right to the protection of the law under section 3 of the Constitution, her right to freedom of movement and immunity from expulsion from Botswana under section 14 of the Constitution, and her protection from subjection to degrading punishment or treatment under section 7 of the Constitution. According to the complaint neither section 4 nor section 5 in fact denied the respondent any of the rights and protections mentioned. Further, the complaint went on, the Court *a quo,* having extended the definition of discrimination in section 15 (3) of the Constitution, also erred in failing to consider and apply the limitations to the rights and freedoms protected by section 15 of the Constitution which are contained in sub-section 4 (c) (the law of citizenship being a branch of personal law), sub-section (4) (e) and sub-section (9) (to the extent that the Citizenship Act re-enacts prior laws), or to avert its mind to the special nature of citizenship legislation, and the fact that citizenship was not a right protected under Chapter II of the Constitution, nor was any right "to pass on citizenship" there created or protected. Finally, the complaint stated, the Court *a quo* erred in holding that section 4 and section 5 of the Citizenship Act were discriminatory in their effect or contravened section 15 of the Constitution.

Argument was offered before us on most of the grounds stated above, but rearranged to follow a somewhat different format. Apart from the *locus standi* point, the basic question was whether upon a proper interpretation of Chapter II of the Constitution, the Chapter on fundamental rights and freedoms of the individual, especially sections 3, 14, 15 and 18, the constitutional right which the respondent claimed to have been infringed had actually not been infringed with respect to her by sections 4 or 5 of the Citizenship Act of 1984. The other submissions were formulated as argument around that central theme.
It will be recalled from her founding affidavit which has been recited above that the respondent complained in the court below that she was prejudiced by section 4(1) of the Citizenship Act by reason of her being female from passing citizenship to her two children Tumisang and Natasha; that the law in question had discriminatory effect in that her children named were aliens in her own land and the land of their birth, and they thus enjoyed limited rights and legal protections therein; that she believed that the discriminatory effect of specified sections of the Citizenship Act offended against section 3 (a) of the Constitution; and that she believed that the provisions of section 3 of the Constitution had been contravened in relation to herself.

We are here faced with some difficult questions of constitutional interpretation. But our problems are to some extent eased by the fact that not all matters for our consideration were in dispute between the parties: neither party maintained that

the Constitution had to be construed narrowly or restrictively. Both parties agreed that a generous approach had to be taken in Constitutional interpretation. Both sides also agreed that section 3 of the Constitution was a substantive section conferring rights on the individual. This, in my view, put an end to any argument about whether the section was a preamble or not. It also, in my view, totally undermines any judgement based on the premise that section 3 is only a preamble. The sections of the Constitution which arose for construction were also, more or less, agreed.

With regard to the approach to the interpretation of the Constitution, learned counsel for the appellant further drew our attention to the Interpretation Act of 1984 (Cap. 01:01) which in section 26 provides that:

> Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.

He then submitted that by section 2 of the Act, each provision of the Act applied to every enactment, whether made before, on or after the commencement of the Act, including the Constitution. This section, he submitted, therefore, must be the section which has to be applied to the present case. I agree that the provisions of the Interpretation Act apply to the interpretation of the Constitution. The section cited, however, is not inconsistent with viewing the Constitution as a special enactment which in many ways differs from the ordinary legislation designed, for example, to establish some public utility or to remedy some identified defect in the body politic.

A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state; allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people themselves. A constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all further state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the constitution; no person can make any such claim. The constitution contains not only the design and disposition of the powers of the state which is being established but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the peoples' future. The makers of a constitution do not intend that it be amended as often as other legislation; indeed, it is not unusual for provisions of the constitution to be made amendable only by special procedures imposing more difficult forms and heavier majorities of the members of the legislature. By nature and definition, even when using ordinary prescriptions of statutory construction, it is impossible to consider a constitution of this nature on the same footing as any other legislation passed by a legislature which is itself established, with powers circumscribed, by the constitution. The object it is designed to achieve evolves with the evolving

development and aspirations of its people. In terms of the Interpretation Act, the remedial objective is to chart a future for the people, a liberal interpretation of that objective brings into focus considerations which cannot apply to ordinary legislation designed to fit a specific situation. As Lord Wright put it when dealing with the Australian case of *James v Commonwealth of Australia* (1936) AC 578 at page 614:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.

We in this Court, however, are not bereft of previous authority of our own to guide us in our deliberations on the meaning of the Botswana Constitution. The present case does not present us with a first opportunity to explore unchartered waters and to interpret the Constitution free from all judicial authority. We do have some guidance form previous pronouncements of this Court as to the approach which we should follow in this matter.

In *Attorney-General v Magi* 1981 BLR 1 at page 32, Kentridge JA said:

> a constitution such as the Constitution of Botswana, embodying fundamental rights, should as far as its language permits be given a broad constriction. Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.

In *Petrus and Another v The State* (1984) BLR 14, my brother, Aguda JA had occasion to review the courts' approach to constitutional construction. In that review, he said at page 34:

> It was once thought that there should he no difference in approach to constitutional construction from other statutory interpretation. Given the British system of Government and the British judicial set-up, that was understandable, it being remembered that whatever statutes that might have the look of constitutional enactment in Britain, such statutes are nevertheless mere statutes like any others and can be amended or repealed at the will of Parliament. But the position where there is a written Constitution is different.

Aguda JA then cited in support, the view of Higgins J in the Australian High Court in *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at pp 611-612, that:

> ...although we interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting - to remember that it is a Constitution a mechanism under which laws are to be made and not a mere Act which declares what the law is to be.

He also cited Sir Udo Udoma of the Supreme Court of Nigeria in *Rain Rabin v The State* (1981) 2 NCLR 293 ATP 326 where that learned judge said:

> ...the Supreme Law of the Land; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn... that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities, must involve, ours being a plural, dynamic society, and therefore, more technical rules of interpretation of statues are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution.

Finally, he cited Justice White of the Supreme Court of the United States in *South Dakota v North Carolina* (1940) 192 US 268; 48 ED 448 at p 465, where the learned judge said:

> I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to he so interpreted as to effectuate the great purpose of the instrument.

Aguda JA concludes his review in the *Petrus* Case by saying:

> ...it is another well known principles of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad constructions. *Corey v Knight* (1957) Cal App 2d 671; 310 p 2d 673 at p 679.

With such pronouncements from our own Court as guide, we do not really need to seek outside support for the views we express. But just to show that we are not alone in the approach we have adopted in this country towards constitutional interpretation, I refer to similar dicta of judges from various jurisdictions such as Wilberforce in *Minister of Home Affairs (Bermuda) and Another v Fisher and Another [1980*) AC 319 al pages 328 to 329; Dicksen CJ in the Canadian case of *R v Big M Drug Mart Ltd* (1985) 1 SCR 295 at page 344 the Namibian case of *Mwondingi v Minister of Defence, Namibia* 1991 (1) SA 851 (run) at 8576 -858B; and the Zimbabwe cases of *Hewlett v Minister of Finance and Another* 1982 (1) SA 490(c) at 495D-496E and *Ministry of Home Affairs v Bickle and Others* 1984 (2) SA 439 per Georges CJ at page 447; United States cases such as *Boyd v United States* I 16 US 616 at 635 and Trop *v Dunes* 356 US 86.

In my view, these statements of learned judges who have had occasion to grapple with the problem of constitutional interpretation capture the spirit of the document they had to interpret, and I find them apposite in considering the provisions of the Botswana Constitution which we are now asked to construe. The lessons they teach are that the very nature of a constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution; and that where rights and freedoms are conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed.

It is now necessary to examine the constitutional provisions giving rise to the dispute in this case. Section 3 states that:

> 3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin„ political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and the public interest to each and all the following freedoms, namely:
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, as being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The first impression gained from the opening ‘whereas’ is that section 3 is a preamble. If it were so, different consequences might arise from it when compared with the consequences arising from it being a substantive provision conferring rights on the individual. In section 272 of Bennion on *Statutory Interpretation* the effect of a preamble is given as follows:

> The preamble is an optional feature in public general Acts, though compulsory in private Acts. It appears immediately after the long title, and states the reason for passing the Act. It may include a recital of the mischief towards which the Act is directed. When present, it is thus a useful guide to the legislative intention.

Obviously section 3 is not a preamble to the whole of the Constitution. An argument made that it is a preamble, therefore would have to limit its operative effect as such, if any, to Chapter II on the Protection of Fundamental Rights and Freedoms of the Individual. Were it a preamble, it would have to be taken as a guide to the intention of the framers of the Constitution in enacting the provisions of that chapter.

A careful look at the section, however, shows that it was not intended merely as a preamble indicating the legislative intent for the provisions of chapter 2 at all. The internal evidence from the structure of the section is against such an interpretation. Although the section begins with ‘whereas’, it accepts that ‘every person in Botswana is entitled to the fundamental rights and freedoms of the individual, . . . whatever his race, place of origin, political opinions, colour, creed or sex’ is, and continues to enact positively that ‘the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms (that is, the rights and freedoms itemised in (a), (b) and (c) of section 3), subject to such limitations as are contained in those provisions (that is, the provisions in the whole of Chapter 2), being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest’. That positively enacted part of section 3 alone should be sufficient to refute a suggestion that it

is a mere preamble. But section 18(1) of the Constitution which finds itself in the same Chapter 2 put the matter beyond doubt. It provides that:

> Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

If a preamble confers no right but merely provides an aid to the discovery of legislative intention, it is impossible to hold otherwise than that from section 18(1), it is clear that contravention of section 3 leads to enforcement by legal action.

From the wording of section 3, it seems to me that the section is not only a substantive provision, but that it is the key or umbrella provision in chapter 2 under which all rights and freedoms protected under that chapter must be subsumed. Under the section, every person is entitled to the stated fundamental rights and freedoms. Those rights and freedoms are subject to limitations only on two grounds, that is to say, in the first place, 'limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others', and secondly on the ground of 'public interest'. Those limitations are provided in the provisions of chapter 2 itself, which is constituted by sections 3 (but effectively, section 4) to 19, of the Constitution.

The argument has been advanced that even if rights and freedoms are conferred by section 3, that section makes no mention of discrimination, and therefore, that section does not deal with the question of discrimination at all. Discrimination is mentioned only in section 15 of the Constitution; it is, therefore, that section only which we ought to look at in a case which basically alleges discrimination. But that argument assumes that section 15 is an independent section standing alone in chapter 2 of the Constitution. It is only if section 15 is considered as standing on its own, separate and distinct, and conferring new rights unconnected with the rights and freedoms stated in section 3 that it can be said that section 15 has no connection with section 3. As I have tried to demonstrate by the examination of the wording used in section 3, that assumption cannot be right. The wording is such that the rest of the provisions of chapter 2, other than those dealing with derogations under the general powers exercisable in times of war and emergency in sections 17 and 18, and the interpretation section 19 of the Constitution, have to be read in conjunction with section 3. They must be construed as expanding on or placing limitations on section 3, and be construed within the context of that section. As pointed out before, the wording of section 3 itself shows clearly that whatever exposition, elaboration or limitation is found in sections 4 to 19, must be exposition, elaboration or limitation of the basic fundamental rights and freedoms conferred by section 3. Section 3 encapsulates the sum total of the individual's rights and freedoms under the Constitution in general terms, which may be expanded upon in the expository, elaborating and

limiting sections ensuing in the Chapter. We are reminded of the lesson that all the provisions of a constitution which have a bearing on a particular interpretation have to be read together. If that is the case then section 15 cannot be taken in isolation as requiring separate treatment from the other relevant provisions of chapter 2, or indeed from those of the rest, of the Constitution.

Support is given to this view by a look at other provisions of chapter 2. A number of rights and freedoms dealt with in section 3 are not specifically referred to in the express terms in which they are later dealt with in the succeeding sections of chapter 2.

Take, for example, section 6 of chapter 2 which details the protection against slavery, servitude or forced labour. Section 3 does not specifically mention the words 'slavery', 'servitude' or 'forced labour'. But clearly these words can, and in the structure of the Constitution must, be subsumed under some general expression or term in section 3. That section confers the right and freedom to 'liberty' and 'security of the person'. A person who is put in slavery or servitude or made to do forced labour cannot be said to enjoy a right to liberty or security of his person. Infringing section 6 will automatically infringe section 3. Take section 7 of the same chapter 2 which gives protection against torture or inhuman or degrading treatment. Section 3 does not specifically mention 'torture', 'inhuman treatment' or 'degrading treatment'. But section 3(a) confers the right to 'life, liberty, security of the person and the protection of the law'. It would be strange to propound the argument that a person who has been subjected to torture, inhuman or degrading treatment has only his right under section 7 infringed, but that his right to life, liberty, security of the person and the protection of the law remains intact because torture, inhuman or degrading treatment are not specifically mentioned in section 3. The same applies to section 14 which deals with freedom of movement. Again freedom of movement is not mentioned in section 3 although the person deprived of such freedom cannot be said to be enjoying his 'liberty' or 'security of the person' which are mentioned in section 3.

The United States constitution makes no specific reference to discrimination as such. Yet several statutes have been held to be in contravention of the Constitution on the ground of discrimination. These cases have been decided on the basis of the 14th Amendment of the Constitution passed in 1868 which forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws' (see, for example, *Reed v Reed* 404 US 71; *Craig v Boren, Governor of Oklahoma, et al* 429 US 190; *Abdiel Caba v Kazim Mohammend and Maria Mohammend* 441 US 380) or on the equally wide due process clause in the 5th Amendment passed in 1791 (for example, *Frontiero v Richardson, Secretary of Defence* 411 US 677; *Weinberger, Secretary of Health, Education and Welfare v Wiesenfeld* 420 US 636), or sometimes on both Amendments.

In Botswana, when the Constitution, in section 3, provides that 'every person . . . is entitled to the fundamental rights and freedoms of the individual', and counts

among these rights and freedoms 'the protection of the law', that fact must mean that, with all enjoying the rights and freedoms, the protection of the law given by the Constitution must be equal protection. Indeed, the appellant generously agreed that the provision in section 3 should be taken as conferring equal protection of the law on individuals. I see section 3 in that same light. That the word 'discrimination' is not mentioned in section 3, therefore, does not mean that discrimination, in the sense of unequal treatment, is not proscribed under the section.

I also conclude from the foregoing that the fact that discrimination is not mentioned in section 3, does not detract from section 3 being the key or umbrella provision conferring rights and freedoms under the Constitution under and in relation to which the other sections in chapter 2 merely expound further, elaborate or limit those rights and freedoms. Section 15, which specifically mentions and deals with discrimination, therefore does not, in my view, confer an independent right standing on its own.

One other possible argument may be advanced against section 3 as the section of the Constitution conferring rights and freedoms: it arises from the question whether the proposition can seriously be maintained that the section gives the same right to every person in Botswana. What, it may be asked in this connection, about children? Do they have the same rights and freedoms as adults? What about aliens? Can they claim the same rights and freedoms as citizens? The answer to both questions is, while under the jurisdiction of the State of Botswana, yes. But subject to whatever derogations or limitations may have been placed by specific provisions of the Constitution with respect to them. With regard to a child, section 5 which gives protection against deprivation of personal liberty, for example, makes in subsection 1(f) an exception by restrictions imposed on him 'with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years'. Section 10(11)(b) places a limitation on the right of persons under the age of eighteen to free access to proceedings in court. The qualifications for the office of President (section 33) places a minimum age of thirty five on the capacity to be elected President, and a minimum age limit of twenty-one years is placed on the capacity for election of a member of Parliament. These are all limitations to his freedoms under the Constitution.

Aliens, on the other hand, have their rights and freedoms curtailed by, for example, section 14(3)(b) which permits the imposition of restrictions on the freedom of movement of any person who is not a citizen of Botswana; and by section 15(4)(b) which permits discrimination 'with respect to persons who are not citizens of Botswana'.
Where other derogations or limitations are made to the general rights and freedoms conferred by section 3 of the Constitution, they are made in sections 4 to 16 or through specific provisions of the Constitution which are inconsistent with the rights or freedoms conferred.

If my reading of sections 3 to 16 of the Constitution is correct, and if section 3 provides, as I think, equal treatment to all save in so far as derogated from or limited by other sections, the question in this particular case is whether and how section 15 derogates from the rights and freedoms conferred by section 3(a) which requires equal protection of the law to all persons irrespective of sex.

The case made for the appellant in this respect is, to put it succinctly, that section 15 is the section of the Constitution which deals with discrimination; that, significantly, whereas section 3 confers rights and freedoms irrespective of sex, the word 'sex' is not mentioned among the identified categories in the definition of 'discriminatory' treatment in section 15(3); that the omission of sex is intentional and is made in order to permit legislation in Botswana which is discriminatory on grounds of sex; that discrimination on grounds of sex must be permitted in Botswana society as the society is patrilineal and, therefore, male oriented. The appellant accepts that the Citizenship Act 1984 is discriminatory, but this was intentionally made so in order to preserve the male orientation of the society; that Act, though discriminatory, was not actually intended to be so, its real objective being to promote the male orientation of society and to avoid dual citizenship, the medium for achieving these ends being to make citizenship follow the descent of the child; and that even if the act were as a result discriminatory, it was not unconstitutional.

Before I attempt to answer the question whether any of the sections of the Citizenship Act infringes the rights and freedoms conferred by section 3(a), as the respondent has complained that they do, it is necessary that one or two incidental matters put forward in support of the central theme described be disposed of. It was submitted by the appellant that Parliament could enact any law for the peace, order and good government of Botswana, and that the Citizenship Act was a law based on descent which was required to ensure that the male orientation imperative of Botswana society and the need to avoid dual citizenship be advanced. There is no doubt that the Citizenship Act is an Act of Parliament. I also accept that an Act of Parliament is presumed to be *intra vires* the Constitution. But it must be added that that presumption is not irrebutable. The power of Parliament to legislate in the terms propounded is found in section 86 of the Constitution. It is a provision which, I daresay, is found in the constitutions of all former colonies and protectorates of Britain, and which gives the legislature the amplitude of power to legislate on all matters necessary for the proper governance of a country. In Britain, the power of Parliament to legislate is uncircumscribed. The fact was what led Philip Herbert, fourth Earl of Pembroke and Montgomery, in a speech at Oxford on April 11, 1648 to say that, "My father said, that a Parliament could do anything but make a man a woman, and a woman a man".

But as we know, when in the 19th Century Kay LJ gave a property and mathematical rendition of the same sentiment by saying in *Metropolitan Railway*

Co v Fowler (1892) 1 OB 165 at 183, that, ‘Even an Act of Parliament cannot make a freehold estate in land an easement, any more than it could make two plus two equal five.’ Scrutton LJ in *Taff Vale Railway Co v Cardiff Railway Co* (1917) 1 Ch 199 at 317 countered by saying, ‘I respectfully disagree with him, and think that ‘for the purposes of the Act’ it can effect both statutory results.’ (See Megarry *A Second Miscellany-at-Law*.)

Scrutton LJ’s statement is correct because Britain does not live under a written constitution; no piece of legislation by Parliament has primacy over others and Parliament cannot legislate to bind future Parliaments. We, therefore, speak of the supremacy of Parliament in Britain. What the British Parliament has done or is capable of doing is no sure guide to us trying to understand a written constitution. The American revolution which started off the era of written constitutions changed all that. With a written constitution, under which the existence and powers of the legislature are made dependent on the constitution, the power to legislate is circumscribed by the constitution. As section 86 of the Botswana Constitution put it, the power of parliament ‘to make laws for the peace, order and good government of Botswana’, is ‘subject to the provisions of the Constitution’. Parliament cannot, therefore, legislate to take away or restrict the fundamental rights and freedoms of the individual, unless it is on a subject on which the Constitution has made an exception by giving Parliament power to do so, or the Constitution itself is properly amended. Instead of the supremacy of Parliament, we have, if anything, the supremacy of the Constitution.

As the legislative powers of Parliament in Botswana are limited by the provisions of the Constitution, where the Constitution lays down matters on which Parliament cannot legislate in ordinary form, as it does in chapter 2, for example, or guarantees to the people certain rights and freedoms, Parliament has no power to legislate by its normal procedures in contravention or derogation of these prescriptions. This view of a constitution is, of course, contrary to the law and practice of the British Constitution under which the normal canons of construction of Acts of Parliament are formulated.

Our attention has been drawn to the patrilineal customs and traditions of the Botswana people to show, I believe, that it was proper for Parliament to legislate to preserve or advance such customs and traditions. Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must *a fortiori*, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform with the Constitution. But where this is impossible, it is custom not the Constitution which must go.

In this connection a document entitled *Report of the Law Reform Committee on: (i) Marriage Act (ii) Law of Inheritance (iii) Electoral Law and (iv) Citizenship Law* was put before us for our consideration. The report apparently covered the

activities of the Committee from June to December 1986, and was laid before parliament in March 1989. The Committee had, apparently, gone round the country finding out the reaction of the people to the laws named. The authority for placing the report before us was said to be section 24(1) of the Interpretation Act which provides that:

> 24(1) For the purpose of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any textbook or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment, to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates in the Assembly.

The object of putting the report before us was, presumably, to demonstrate that the majority of the people whose views were collected wanted or agreed to the differentiation or discrimination made between men and women under the Citizenship Act. It is noticed, however, from the report itself that the expression of the people was made in the form of answers to questions. The manner in which those questions were put does not appear in the report. Neither do we know the explanations made to the people before they came out with the recorded answers. There is nowhere in the report where a reference is made to the fact that the provisions of the Citizenship Act, at least, may possibly be affected by the Constitution. For this reason, the report loses much of its value as an expression of the people after all relevant facts and considerations had been placed before them.

Besides, the report is a document prepared some years after both the Constitution and Citizenship Act were passed. The Constitution was promulgated in 1966. The Act was passed in 1984. The activities of the Committee resulting in the report were in 1986, and the document was laid before Parliament in 1989. I must say that with the interpretation of the provisions of the Citizenship Act I have no difficulty whatsoever. Its provisions are clear. What difficulty I have is in respect to the Constitution which we are trying to unravel in this case, not the Citizenship Act, I would have derived some value from the report if the activities of the Committee leading to it had been before, not after, the Constitution was promulgated. For then, I would have got some indication of what the people of Botswana thought was the overriding characteristic of their society which should not be altered by any rights or freedoms to individuals conferred by the Constitution. That would have given me some assistance, other defects aside for the moment, in determining the intention of the framers of the Constitution in enacting the fundamental rights and freedoms chapter. But that is not the case here. Even if, therefore, the report qualifies under section 24(1) under “any papers laid before the national assembly in reference to the enactment or to its subject matter”, I do not think it in any way aids my efforts at interpreting the Constitution, which is the question at hand, or whether provisions of the Citizenship Act, which to me are quite clear, infringe the Constitution.

It seems to me that the argument of the appellant was to some extent influenced by a premise that citizenship must necessarily follow the customary or traditional systems of the people. I do not think that view is supported by the development of the law relating to citizenship. Botswana as a sovereign republic dates from 30 September 1966. Before then persons who were within the territorial area which is now Botswana acquired their citizenship under British laws. The law of citizenship in Britain is now governed by legislation. But the development of the concept of citizenship, like most other political concepts, dates as far back as from ancient Greece. Walker in *The Oxford Companion to Law* describes citizenship as

> The legal link between an individual and a particular state or political community under which the individual receives certain rights, privileges, and protections in return for allegiance and duties. Whether an individual has citizenship of a particular state depends on its own legal system and by reason of differences between legal systems some individuals may be stateless and others have citizenship of more than one state.
>
> In ancient Athens only some of the population were citizens; resident aliens, women, and slaves were excluded. The Romans similarly initially had a restricted concept of citizenship, but gradually extended it until in AD 212. Caracalla's *Constitutio Antoniana* gave citizenship to most of the freemen of the Empire. The concept was in abeyance in the middle ages until city dwellers became a third force in politics, with the nobles and clergy. Citizenship was the relationship to a city implying certain liberties. The American and French Revolutions gave a new meaning to citizenship, contrasting it with 'subject', while in the twentieth century the movement for women's rights has further extended the concept.
>
> In modern practice what rights and duties attach to citizenship depends on the municipal law of each state.

Mr Justice Gray of the American Supreme Court in *United States v Wong Ark* 169 US, 18 Sup Ct 456, 42 L Ed 890 (1898) saw the development of the law on citizenship in the following terms

> II The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'legality', 'obedience', 'faith', or 'power', of the King. The principle embraced all persons born within the king's allegiance and subject to his protection. .
>
> It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English sovereign; and therefore every child born in England of alien parents was a natural born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.
>
> III The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.

That must also have been the position with Botswana until independence. All who were born within the protection or jurisdiction of the sovereign power

became citizens by birth. That, however, is not claimed to have interfered with the male orientation of Botswana customary society.

The old classic, Oppenheim on *International Law* volume 1 (Peace) (8ed 1955) gives the international law aspect of the matter. At 645, it makes the following distinction:

> 'Nationality' in the sense of citizenship of a certain state, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race. Thus, according to international law, Englishmen and Scotsmen are, despite their different nationality as regards race, all of British nationality as regards their citizenship. Thus further, although all Polish individuals are of Polish nationality *qua* race, for many generations there were no Poles *qua* citizenship.

By this, I understand that Botswana nationality in the sense of the identity of the Batswana people, which like the Poles would be a matter of descent, need not be the same as Botswana nationality in the sense of citizenship. Although it is possible that citizenship should by municipal law be based on descent or guardianship, there is no historical reason for compelling any state to so base its citizenship laws, especially where there is some serious obstacle like a constitutional guarantee in the way. Even in Britain, where until the Guardianship Act of 1973, all parental rights, including guardianship, were vested in the father, unless the child was born out of wedlock, nationality was not based on descent or guardianship. I find, therefore, no necessary *nexus* mandating that citizenship should be based on traditional or customary ideas of descent or guardianship. The British concept of citizenship, which at one time must have governed the position in Botswana, had started with a question of allegiance, and been conferred on a basis of birth within the territorial jurisdiction. In Taswell-Langmead's *Constitutional History* (11ed 1960) by TFT Plucknett, at 678, the position of the alien, the opposite of the citizen, was contrasted with that of the citizen in these words

> By way of a conclusion we may consider the position of the alien who strictly had no civil liberties. There were many reasons for this. He was often a merchant intent on the dangerous operation of taking money out of the realm; he was sometimes a usurer; he might be a cleric with obnoxious bulls and provisions from Rome; he might be an enemy; after the Reformation his theology as well as his trading might arouse antipathy.

It is clear that what the State of Britain was trying to guard against was not purity in descent or guardianship, but a host of prejudicial activities which those not within the sovereigns allegiance threatened. Of course in modern states, it is the municipal law which determines the citizenship of the individual. The legislature may choose which prescription to follow. The basis may be birth to parents who are themselves citizens irrespective of where the child is born, or may be birth within the territorial jurisdiction, while yet a third course may have a mixture of both. There may be other prescriptions. It is all a matter for the State legislature. But whatever course municipal law adopts must comply with two prerequisites: it must, in the first place, conform to the constitution of the state in question, and

secondly it must conform to international law. For as Oppenheim points out, at 643-4,

> While it is for each state to determine under its law who are nationals, such law must be recognised by other states only 'in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.

As he points out by way of example, a state which imposes its nationality upon aliens residing for a brief period in its territory or upon persons resident abroad, may not have the privilege so conferred accepted by other members of the international community.

I may mention also in passing that the fact that different states follow different criteria in conferring citizenship means that whatever Botswana provides in its citizenship laws may not achieve the objective of eliminating dual citizenship, if that indeed is what is desired, because where some states confer citizenship by birth to parents, whether through the male or the female line, and others confer citizenship by birth within a territorial area, cases will occur where a child born to citizens of state A, which follows the descent principle, within the territorial jurisdiction of state B, which follows the territorial area principle, will initially acquire the citizenship of both states A and B. Other combinations between the parents may produce similar results. In this very case, the respondent's eldest child, Cheshe, who acquired Botswana citizenship at birth because her parents were not married at the time, also became, and presumably still is, an American citizen by descent. Such a child may continue with this dual citizenship for the rest of his or her life. But those states which want to avoid dual nationality would then require the child to opt for the citizenship which he or she wishes to continue with upon attaining majority. The device for eliminating dual citizenship does not, therefore, appear to me to lie in legislation which discriminates between the sexes of the parents.

As far as the present case is concerned, the more important prerequisite which each legislation must comply with is the requirement that the legislative formula chosen must not infringe the provisions of the Constitution. It cannot be correct that because the legislature is entitled to lay down the principles of citizenship, it should, in doing so, flout the provisions of the Constitution under which it operates. Where the legislature is confronted with passing a law on citizenship, its only course is to adopt a prescription which complies with the imperatives of the Constitution, especially those which confer fundamental rights to individuals in the State.

With those considerations in mind, I come now to deal with the central question, namely, whether section 15 of the Constitution allows discrimination on the ground of sex. The provisions of the section which are for the moment relevant to this issue are subsections (1), (2), (3) and (4). They state as follows:

> 15(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
(3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.
(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision–
    a. for the appropriation of public revenues or other public funds;
    b. with respect to persons who are not citizens of Botswana;
    c. with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law
    d. for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or
    e. whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to these persons or to persons of any other such description, is reasonably justifiable in a democratic society.

Subsection (1) mandates that 'no law shall made any provision that is discriminatory either of itself or in its effect'. Subsection (2) mandates that 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'. Subsection (3) then defines what discriminatory means in this section. It is 'affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description'. The word 'sex' is not included in the categories mentioned. According to the appellant, therefore, 'sex' had been intentionally omitted from the definition in section 15(3) of the Constitution so as to accommodate, subject to the fundamental rights protected by section 3 thereof, the patrilineal structure of Botswana society, in terms of the common law, the customary law, and statute law.

If that is so, the next question is whether the definition in section 15(3) in any way affects anything stated in section 3 of the Constitution. We must always bear in mind that section 3 confers on the individual the right to equal treatment of the law. That right is conferred irrespective of the person's sex. The definition in section 15(3) on the other hand is expressly stated to be valid 'in this section'. In

that case, how can it be said that the right which is expressly conferred is abridged by a provision which in a definition for the purposes of another section of the Constitution merely omits to mention sex? I know of no principle of construction in law which says that a fundamental right conferred by the Constitution on an individual can be circumscribed by a definition in another section for the purposes of that other section. Giving the matter the most generous interpretation that I can muster, I find it surprising that such a limitation could be made, especially where the manner of limitation claimed is the omission of a word in a definition in that other section which is valid only for that section. What the legal position, however, is, is not that the Courts should give the matter a generous interpretation but that they should regard limitations to fundamental rights and freedoms strictly.

If one comes imploring the Court for a declaration that his or her right under section 3 of the Constitution has been infringed on the ground that, as a male or female, unequal protection of the law has been accorded to him or her as compared to members of the other gender, the Court cannot drive that person away empty handed with the answer that a definition in section 15 of the Constitution does not mention sex so her right conferred under section 3 has not been infringed. How can the right to equal protection of the law under section 3 be amended or qualified by an omission in a definition for the purposes of section 15? We are told that the answer lies in an application of the rule of construction *expressio unius exclusio alterius*.

Before testing the validity of that maxim in this case, I think we should examine further the manner in which limitations on the fundamental rights and freedoms of chapter 2 of the Constitution are set out in the Constitution itself. A number of sections in the chapter make exceptions or place limitations on the rights and freedoms conferred. A close reading of the provisions of the chapter discloses that whenever a provision wishes to state an exception or limitation to a described right or freedom, it does so expressly in a form which is bold and clear. In some cases the form of words used occurs so frequently that it can even be characterised as a formula. In section 4(2) the protection of the right to life is limited by–

> 4(2) A person shall not be regarded as having been deprived of his life in contravention to subsection (1) of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justified– (a) for the defence of any person from violence or for the defence of property . . .

In section 6(3) the protection from slavery, servitude and forced labour is limited by–

> 6(3) For the purposes of this section, the expression ‘forced labour’ does not include– (a) any labour required in consequence of the sentence or order of this court . . .

In section 7(2) the protection from inhuman treatment is limited by–

> 7(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was unlawful in the former Protectorate of Bechuanaland immediately before the coming into operation of this Constitution.

The expression “nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention . . . of this section to the extent that the law ‘authorises’ or ‘makes provision for’”, in particular, is often used to create the required exceptions. It is again used in section 8(5) with respect to the protection from deprivation of property; in section 9(2), with respect to the limitations on the protection for privacy of home and other property; in section 10(12), with respect to limitations to the provisions to secure protection of law; in section 11(5) with respect to limitations on the protection of freedom of conscience; in section 12(2) with respect to limitations on the protection of freedom of expression; in section 13(2), with respect to the limitation to the protection of freedom of assembly and association; and in section 14(3) with respect to the limitation on the protection of freedom of movement. Section 16(1) which gives a general and comprehensive power to derogate from fundamental rights and freedoms in time of war or where a state of emergency has been declared under section 17 uses a variation of the formula.

Even section 15 follows that pattern. As we have seen, subsection (1) proscribes laws which make any provision which is discriminatory either of itself or in its effect, and subsection (2) proscribes discriminatory treatment in actions under any law or public office or authority. Then subsection (4) places the limitations on that proscription. It opens by saying, “Subsection (1) of this section shall not apply to any law so far as that law makes provision–” and proceeds to itemise the provisions which are exempted from the application of subsections 15(1) and (2). Then in subsection (5) a limitation is placed on the protection from discrimination with respect to qualifications for service as a public officer etcetera by the use of what has been described before as the formula, “Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section . . .” And in subsection (9), where savings are made from the protection with respect to laws in force immediately before the coming into force of the Constitution or to written laws repealed and re-enacted, a variation of the same formula is used.

If the makers of the Constitution had intended that equal treatment of males and females be excepted from the application of subsections 15(1) or (2), I feel confident, after the examination of these provisions, that they would have adopted one of the express exclusion forms of words that they had used in this very same section and in the sister sections referred to. I would expect that, just as section 3 boldly states that every person is entitled to the protection of the law irrespective of sex, in other words giving a guarantee of equal protection, section 15 in some part would also say, again equally expressly, that for the purposes of maintaining the patrilineal structure of the society, or for whatever reason the

framers of the Constitution thought necessary, discriminatory laws or treatment may be passed for or meted to men and women. Nowhere in the Constitution is this done. Nowhere is it mentioned that its objective is the preservation of the patrilineal structure of the society. But I am left to surmise that the Constitution intended sex-based legislation by the omission of the word "sex" from section 15(3) and that the reason for the word's omission was to preserve the patrilineal structure of the society. I find it a startling proposition. If that were so, is it not extraordinary that equal protection is conferred irrespective of sex at all by section 3? What is even more serious is that section 15 would then, under subsection (1), permit not only the making of laws which are discriminatory on the basis of sex, but under subsection (2) it would permit the treatment of people in a discriminatory manner by "any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority". Does this mean that differential treatment is permissible under the Constitution by any person in the performance of any public office or any public authority depending on whether the person being dealt with is a man or a woman? That interpretation boggles the mind.

Faced with the remarkable consistency in the manner in which the Constitution makes exceptions to or places limitations on the protections that it grants, I have the greatest difficulty in accepting that the Constitution chose only the all important question of sex discrimination to make its desired exception by omission in a definition. Why did the framers of the Constitution choose, in this most crucial issue of sex-based discrimination, required to preserve the male orientation of traditional society, to leave the matter to this method? Why did they make the discovery of their intention on this vital question dependent on an aid to construction, an aid which is not conclusive in its application, when in other cases desired exclusions had been so boldly and expressly stated? I can find no satisfactory answers to these questions. My difficulty is further compounded when I consider that this omission in the definition is expected not only to exclude "sex" from a protection conferred in section 15 but also to actually limit or quality a right expressly conferred by section 3, the basic and umbrella provision for the protection of fundamental rights and freedoms under the Constitution.

The application of the *expressio unius* principle to statutory interpretation in Botswana, which has to compete for supremacy in this case with conclusions derived from the positive internal evidence of the Constitution itself as to how it makes exceptions when desired, is, according to the argument of the appellant, provided for by section 33 of the Interpretation Act (Cap 01:04) which states that:

> 33. Where an enactment qualifies a general expression by providing that it shall include a number of particular matters or things, any matter or thing which is not expressly included is by implication excluded from the meaning of the general expression.

It is true that "sex" is omitted from the categories mentioned in the definition in section 15(3) of the Constitution. But even if that definition through the omission qualifies any general expression found in the subsection, it appears to me that it

does not qualify any general expression in section 3, which is the section under which the respondent complained. Nevertheless, as the appellant submits that the respondent could challenge the provisions of the Citizenship Act, if at all, only on the ground that her rights under section 15 of the Constitution have been contravened, the *expressio unius* principle calls for examination. In any event, section 24(2) of the Interpretation Act admits all aids to the construction of an enactment in dispute when it provides that:

> 24(2) The aids to construction referred to in this section (that is, those dealing with what material could be used by a Court as an aid to construction) are in addition to any other accepted aid.

The occasions on which the *expressio unius* principle applies are summarised in Bennion on *Statutory Interpretation* at 844 as:

> . . . it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples, or *ex abundanti cautela*, or for some other sufficient reason, the rest are taken to be excluded from the proposition . . . (it) is also applied where a formula which in itself may or may not include a certain class is accompanied by words of *extension* naming only some members of that class. The remaining members of the class are then taken to be excluded. Again the principle may apply where an item is mentioned in relation to one matter but not in relation to another equally eligible.

The competing claims in this case are that the omission was deliberate and intended to exclude sex-based discrimination, the alternative being that the omission was neither intentional nor made with the object of excluding sex-based discrimination. I have already shown how exclusions from the protections in the fundamental rights chapter of the Constitution have in other cases been made. The method is wholly against the argument based on the application of the *exclusio unius* principle. Further, when the categories mentioned in sections 3 and 15(3) of the Constitution are compared, it will be seen that they do not exactly match. Not only is “sex” omitted from the definition in section 15(3) although it appears in section 3, but “tribe” is added to the definition in section 15(3) so that it reads, “race, tribe, place of origin, political opinions, colour or creed”, although “tribe” does not appear in section 3. The appellant explained the addition of “tribe” on the ground that it was specifically included because of the concern that the framers of the Constitution had for possible discrimination on that ground. That indicates that the classes were mentioned in order to highlight some vulnerable groups or classes that might be affected by discriminatory treatment. I find this conforming more to mention of the class or group being *ex abundanti cautela* rather than with the intention to exclude from cover under section 15 a class upon which rights had been conferred by section 3. Here, as Bennion points out at 850, the ruling *maxim* is *abundans cautela non nocet* (abundance of caution does not harm) (see the Canadian case of *Docksteader v Clark* (1903) 11 BCR 37, cited by EA Driedger in *The Construction of Statutes*). I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in

section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as far-sighted people trying to look into the future, they would have contemplated that with the passage of time not only the groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination.

I am fortified in this view by the fact that other classes or groups with respect to which discrimination would be unjust and inhuman and which, therefore, should have been included in the definition were not. A typical example is the disabled. Discrimination wholly or mainly attributable to them as a group as such would, in my view, offend as much against section 15 as discrimination against any group or class. Discrimination based wholly or mainly on language or geographical divisions within Botswana would similarly be offensive, although not mentioned. Arguably religion is different from creed, but although creed is mentioned, religion is not. Incidentally, it should also be noticed, that although the definition mentions “race” and “tribe”, it does not mention “community”, yet the limitation placed on subsection 15(1) by section 15(4) refers to “a particular race, community or tribe”. All these lead me to the conclusion that the words included in the definition are more by way of example than as an exclusive itemisation. The main thrust of that definition in section 15(3) is that discrimination means affording different treatment to different persons wholly or mainly attributable to their respective characteristic groups. Then, of course, section 15(4) comes in to state the exceptions when such differential treatment is acceptable under the Constitution. I am, therefore, in agreement with the learned Judge *a quo* when he says that the classes or groups mentioned in section 15(3) are by way of example.

On the basis of the appellant’s argument, the legislature relying on the omission of “sex” in section 15(3), could, for example legislate that the women of Botswana shall have no vote. Legislation in Botswana may also provide in that case that no woman shall be President or be a member of parliament. The appellant states that the legislature will not do that because there will be no rational basis for it, and in any case it will not, under subsection 15(4)(e), be reasonably justifiable in a democratic society. But is not the basis for such legislation the same as the preservation of the patrilineal structure of the society which, as has been urged, led to the deliberate omission of “sex” in the definition of discrimination? In any case, the appellant cannot, for this purpose, take advantage of the exception provided in section 15(4)(e) which permits discrimination which is reasonably justifiable in a democratic society to support his argument on the rationality of the basis of the legislation, because in the first place that would be using the exception for purposes directly opposite to what was intended, and secondly, on his own argument, if “sex” is deliberately left out

of the definition of discrimination in subsection (3) in order to perpetuate the patrilineal society, it is left out for all purposes of section 15, including the provisions of subsection (4)(e). That provision in subsection 15(4)(e) expressly refers to “persons of any description as is mentioned in subsection (3) of this section . . .” That, by the argument of the appellant, cannot include anything done on the basis of the sex of the person.

Fundamental rights are conferred on individuals by constitutions not on the basis of the track records of governments of a state. If that were the criterion, fundamental rights need not be put in the constitution of a state which is known for the benevolent actions of its government. In any event, if the constitution is the basic or founding document of the particular state, that state would have no track record for anyone to go by. In the best of all possible worlds, entrenchment of fundamental rights in a constitution should not be necessary. All that these rights require in such state would be accorded as a matter of course by the government. Fundamental rights are conferred on the basis that, irrespective of the government’s nature or predilections, the individual should be able to assert his rights and freedoms without reliance on its goodwill or courtesy. It is protection against possible tyranny, oppression or deprivations of those self same rights. A fundamental right or freedom once conferred by the constitution can only be taken away or circumscribed by an express and unambiguous statement in that constitution or by a valid amendment of it. It cannot be taken away or circumscribed by inference. It is for these reasons that I find it difficult to accept the argument of the appellant which asks us to infer from the omission of the word “sex” in the definition of discrimination in section 15(3) that the right to equal protection of the law given in section 3 of the Constitution to all persons has, in the case of sex-based differentiation in equality of treatment, been taken away.

Questions as to whether every act of differentiation between classes or groups amounts to discrimination and what categories of persons are protected under section 15 may arise. If the categories of groups or classes mentioned in section 15(3) are but examples, where does one draw the line as to the categories to be included? Of course, treatment to different sexes based on biological differences cannot be taken as discrimination in the sense that section 15(3) proscribes. With regard to the classes which are protected, it would be wrong to lay down any hard and fast rules. The vulnerable classes identified in sections 3 and 15 are well known. I would add that not only the classes mentioned in the definition in section 15(3), but, for example, the class also mentioned in subsection (4)(d), where it speaks of “community” in addition to “race” and “tribe” have to be taken as vulnerable. Civilised society requires that different treatment should not be given to people wholly or mainly on the ground of membership of the designated classes or groups. But as has been shown with respect to race and gender based discrimination the development of thought and conduct on these matters may take years. One feels a sense of outrage that there was a time when a Chief

Justice of the United States would say, as did Taney CJ in *Dred Scott v Sanford* 19 How 393 (1857):

> The question then arises, whether the provisions of the Constitution, in relation to personal rights and privileges to which the citizen of a state should be entitled, embraced the Negro African race, at that time in this country . . . In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument . . . They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit . . . This opinion was at that time fixed and universal in the civilised portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Today, it is universally accepted that discrimination on the ground of race is an evil. It is within the memory of men still living today in some countries that women were without a vote and could not acquire degrees from institutions of higher learning, and were otherwise discriminated against in a number of ways. Yet today the comity of nations speaks clearly against discrimination against women. Changes occur. The only general criterion which could be put forward to identify the classes or groups is what to the right thinking man is outrageous treatment only or mainly because of membership of that class or group and what the comity of nations has come to adopt as unacceptable behaviour.

One point was taken by the appellant in his grounds of appeal but not developed further by him before us. That is the argument that in section 15(4)(c) of the Constitution there is an exclusion from the provisions of subsection (1) “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law”, and that an exclusion with regard to the law of citizenship is an exclusion which qualifies under “other matters of personal law”. I raise this point here only to show that it has not been overlooked, and that in my view it is not valid. In the first place, as stated in connection with the argument which prayed in aid the provisions of section 15(4)(3), the underlying argument that on the basis of the omnibus clause in section 15(4)(c) discriminatory laws on citizenship could be made on the basis of sex is defeated by the fact that section 15 as a whole does not deal with discrimination on the basis of sex at all. Proceeding from that general exclusion to exclude further from the section discrimination in citizenship cases on the ground of sex seems to me to be excluding sex-based discrimination from a provision which does not in any case apply. That cannot achieve the desired object. On the other hand, there is a sense in which the expression “personal law” may be used to describe the

aggregate of elements affecting the legal status of a person. That would be the case, for example, when one is considering matters of personal law as opposed to the law of things. But it does not seem to me to be the use made of that expression here. The more common meaning of personal law is the system of law which applies to a person and his transactions determined by the law of his tribe, religious group, case, or other personal factor, as distinct from the territorial law of the country to which he belongs, in which he finds himself, or in which the transaction takes place. (See Walker in *The Oxford Companion to Law*.) That, I think, is the sense in which personal law is used here. Apart from the laws on "adoption, marriage, divorce, burial, devolution of property on death" of the communities to which persons belong which are expressly mentioned in the provision, I would expect the omnibus clause, "other matters of personal law", to cover related matters of family law on, for example, domicile, guardianship, legal capacity, and rights and duties in the community and such matters. Otherwise, if the wider meaning of all laws affecting personal legal status is taken as the correct meaning, the omnibus clause in the exception would serve to wipe out practically all protections given to individuals as persons. In the usual narrow sense, however, citizenship, which is conferred by statute on a state-wide basis is not a matter of personal law.

The point was also mentioned, though not developed, that the provisions of the Citizenship Act questioned were re-enactments of previously existing legislation, and, therefore, were saved from challenge by section 15(9)(b) which states that:

> 15(9) Nothing contained in or done under authority of any law shall be held to be inconsistent with the provisions of this section – (b) to be extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.

Serious examination of this provision shows that it clearly does not apply to the situation in this case. It would apply if sections 4 and 5 of the Citizenship Act had existed as laws before the Constitution came into effect. We know they did not. Even sections 21 and 22 of the Constitution which they were intended to replace were not in existence as laws prior to the coming into operation of the Constitution. But above all, I think that section 15(9)(b) applies only when a written law in existence before the Constitution, and therefore, one which is protected whatever its terms by section 15(9) if it continues after the Constitution, is repealed and re-enacted exactly or at least substantially in the same form as before. By this test, the provisions of section 4 and 5 would not qualify, even if they had replaced some written law in existence before the Constitution. They were not exactly the same or even substantially the same as the provisions before.

The point was rightly taken that if discrimination on the basis of sex was disallowed by the Constitution, the Constitution itself proceeded to break its prescription by providing in the original form, after section 21 which dealt with births within Botswana in terms which were gender neutral, section 22 which provided that:

22. A person born outside Botswana or after 30 September 1966 shall become a citizen of Botswana at the date of his birth if at that date his father is a citizen of Botswana.

Obviously, the Constitution there treated children of Botswana men differently from children of Botswana women, in that the children of Botswana men acquired citizenship which children of Botswana women did not necessarily acquire. In their wisdom, the framers of the Constitution at the time, thought that the prescriptions they provided for the acquisition of nationality for persons born outside its territory or jurisdiction should be limited to descent through the male line. It made no distinction between birth within wedlock or otherwise. It made no provision with respect to the mother of the child. That was how the Constitution framers thought Batswana citizens born outside Botswana should be traced. We cannot declare a provision in the Constitution unconstitutional. It would otherwise be a contradiction in terms. The Constitution had always had the power to place limitations in its own grants. If it did so, what it enacted was as valid as any other limitation which the Constitution placed on rights and freedoms granted. What a constitutional provision can do, however, ordinary legislation cannot necessarily do. The same limiting provision which the Constitution places on a grant, if put into ordinary legislation may be open to review on the ground of vires, and if found to infringe any of the provisions of the Constitution will be declared unvalid, unless it could otherwise be justified under the Constitution itself. The fact that the Constitution differentiated between men and women in its citizenship has to be accepted as a legitimate exception which the framers thought right. But that does not provide a general license for discrimination on the basis of sex. My view on the meaning of sections 3 and 15, therefore, is not altered by the original provision in section 22.

Incidentally, it would be noticed from the original constitutional provisions on citizenship that no distinction was drawn between descent through the male or female line in the case of persons born within the jurisdiction. If the framers had intended that a distinction in citizenship be made dependent on the nationality of the father in order to preserve the male orientation of Botswana society, this was where it would have been found. It was the most important provision on the acquisition of citizenship because it was the provision governing the acquisition of citizenship by the overwhelming number of Botswana. Yet the repealed section 21 of the Constitution simply stated that: “Every person born in Botswana on or after 30 September 1966 shall become a citizen of Botswana.”

The learned Judge *a quo* referred to the intentional obligations of Botswana in his judgment in support of his decision that sex-based discrimination was forbidden under the Constitution. That was objected to by the appellant. But by the law of Botswana, relevant international treaties and conventions, may be referred to as an aid to interpretation. We noticed this in our earlier citation of section 24 of the Interpretation Act which stated that, “as an aid to the construction of the enactment a court may have regard to . . . any relevant international treaty, agreement or convention . . .” The appellant conceded that international treaties

and conventions may be used as an aid to interpretation. His objection to the use by the learned Judge *a quo* of the African Charter on Human and Peoples' Rights, the Convention for the Protection of Human Rights and Freedoms, and the Declaration on the Elimination of Discrimination against Women, was founded on two grounds. In the first place, he argued that none of them had been incorporated into the domestic law by legislation, although international treaties became part of the law only when so incorporated. According to this argument, of the treaties referred to by the learned Judge *a quo*, Botswana had ratified only the African Charter on Human and Peoples' Rights, but had not incorporated it into domestic law. That, the appellant admitted, however, did not deny that particular charter the status of an aid to interpretation. The appellant's second objection was that treaties were only of assistance in interpretation when the language of the statute under consideration was unclear. But the meaning of both section 15(3) of the Constitution and sections 4 and 5 of the Citizenship Act was quite clear, and, therefore, no interpretative aids were required.

I agree that the meaning of the questioned provisions of the Citizenship Act is clear. But from the strenuous efforts that the appellant has made in justification of his interpretation of section 15(3) of the Constitution his claim that the meaning of that subsection is clear seems more doubtful. The problem before us is one of discrimination on the basis of sex under the Constitution. Why, one may ask, do sections 3 and 15 of the Constitution apparently say contradictory things? It is the provisions of the Constitution itself which give rise to the difficulty of interpretation, if any; not the Citizenship Act. What we have to look at when trying to determine the intentions of the framers of the Constitution, is the ethos, the environment, which the framers thought Botswana was entering into by its acquisition of statehood, and what, if anything, can be found likely to have contributed to the formulation of their intentions in the Constitution that they made. Botswana was, at the time the Constitution was promulgated, about to enter the comity of nations. What could have been the intentions and expectations of the framers of its Constitution? It is to be recalled that Maisels P in the *Petrus* case, referred to earlier, at 714 to 715 said in this connection that:

> . . . Botswana is a member of a comity of civilised nations and the rights and freedoms of its citizens are entrenched in its constitution which is binding on the legislature.

The comity of civilised nations was the international society into which Botswana was about to enter at the time its Constitution was drawn up. Lord Wilberforce in the case of *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319, at 329 to 329 spoke of this international environment acting as one of the contributory influences which fashioned and informed the approach of the framers of the Constitution of Bermuda in words which could, with slight modification, have been written equally for Botswana. He said:

> "Here, however, we are concerned with a constitution, brought in force certainly by Act of Parliament, the Bermudian Constitution Act 1967 of the United Kingdom, but established by a self-contained document. . . . It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter 1, drafted in a broad

> and ample style which lays down principles of width and generality. 2. Chapter 1 is headed protection of fundamental rights and freedoms of the individual.
>
> It is known that this chapter, as similar portions of other constitutions instruments drafted in the post-colonial period, starting from Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the protection of human rights and fundamental freedoms (1953) . . . That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

The antecedents of the Constitution of Botswana with regard to the imperatives of the international community could not have been any different from the antecedents found by Lord Wilberforce in the case of Bermuda. Article 2 the Universal Declaration of Human Rights of 1948 states that:

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The British Government must have subscribed to this declaration on behalf of itself and all dependent territories, including Bechuanaland, long before Botswana became a State. And it must have formed part of the backdrop of aspirations and desires against which the framers of the Constitution of Botswana formulted its provisions.

Article 2 of the African Chapter on Human and Peoples' Rights provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Then paragraphs 1 and 2 of article 12 state that:

> 1. Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.
>
> 2. Every individual shall have the right to leave any country including his own, and return to his country. This right may only be subject to restriction, provided for by law for the protection of national security, law and order, public health and morality.

Botswana is a signatory to this charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the charter. The learned Judge *a quo* made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to

understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution. The reference made by the learned Judge *a quo* to these materials amounted to nothing more than that. What he had said was:

> I am strengthened in my view by the fact that Botswana is a signatory to the OAU Convention on discrimination. I bear in mind that signing the convention does not give it power of law in Botswana but the effect of the adherence by Botswana to the convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the convention must be preferable to a 'narrow construction' which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex.

That does not seem to me to be saying that the OAU convention, or by its proper name the African Charter of Human and Peoples' Rights, is binding within Botswana as legislation passed by its Parliament. The learned Judge said that we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the charter or other international obligations. Indeed, my brother Aguda JA referred in his judgment at 37 to the charter and other international conventions in a similar light in the *Petrus* case. I am in agreement that Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex.

I now come to the submission in *locus standi*. I have left the point until the end because like the appellant who himself admitted in his submissions that, "This is a case where in view of the 'circularity' of some of the arguments, it may be necessary for the Court to consider the merits before coming to a conclusion on the *locus standi*", I feel that it could not have been determined without first going into the merits. With respect to the point, the appellant argued that the Court *a quo* erred in holding that the respondent had *locus standi* to ask to pass on either section 4 or 5 of the Citizenship Act. The appellant, it was submitted, is a practising lawyer, who on marrying on 7 March 1984, freely married into an existing citizenship regime carrying with it all the consequences referred to by the Judge *a quo*, namely, that not only her husband but by her children by the marriage were liable to be expelled from Botswana, and that if her husband were to decide to leave both Botswana and herself, the children, assuming that they were left behind, could only continue to live in Botswana if granted residence permits. She was, went on the argument, at the time of her marriage exercising her right to liberty, and could not now be heard to complain of a consequence which she had consciously invited. Nor could she rely on the choice she freely made as an infringement of her rights which should confer jurisdiction under section 18 of the Constitution. In any event, the appellant argued, there was no

threat or likelihood of it alleged by the respondent of expulsion of her husband, who had been in Botswana for fifteen years, and potential adverse consequences of a speculative nature was not sufficient to confer *locus standi* under section 18. Section 5 of the Citizenship Act, the appellant argued had no relevance at all to the respondent; the argument advanced that she was still of child-bearing age and might choose to have another child outside Botswana was too remote for consideration.

And, in the case of her present children, it was submitted that there were strong reasons for holding that she was not sufficiently closely affected by any action taken against them as a result of section 4 of the Act to enable her to claim that the provisions of the Constitution were being or likely to be contravened in relation to her by such action as required by section 18.

I do not think a person should be prejudiced in the enjoyment of his or her constitutional rights just because that person is a lawyer.

On the *locus* point, the appellant further argued that the *popularis actio* of Roman law, which gave an individual a right of action in matters of public interest was not a part of Roman-Dutch common law. The principle of our law being that a private individual must sue on his own behalf; the right he sought to enforce must be available to him personally, or the injury for which he or she claimed redress must be sustained or apprehended by himself. The cases of *Darymple v Colonial Treasurer* 1910 TS 372; *Director of Education, Tvl v MacCagie* 1918 AD at 621; *Veriava v President of SA Medical and Dental Council* 1985 (2) SA 293 (T) at 315; and *Cabinet of the Transitional Government of SWA v Eins* 1988 (3) 369 (A) were cited as authorities to show that section 18 of the Constitution reflected this principle when it provided that the wrong (that is, the actual threatened contravention of the relevant sections) must be in relation to the applicant. But the point made by those authorities has been distinguished in cases affecting the liberty of the subject by the South African Appellate Division in *Wood v Odangwa Tribal Authority* 1975 (2) SA 294 (A) at 310 where Rumpff CJ, after analysing the proposition that the *actio pupularis* did not apply in Roman-Dutch law, said:

> Nevertheless, I think it follows from what I have said above, that although the *actiones populares* generally have become obsolete in the sense that a person is not entitled 'to protect the rights of the public', or 'champion the cause of the people' it does not mean that when the liberty of a person is at stake, the interest of the person who applies for the interdict *de libero homine exhibendo* should be narrowly construed. On the contrary, in my view it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order.

I need not, however, go into these cases in detail. Section 18 speaks for itself. I have recited the relevant provisions in subsection (1) earlier on in this judgment. It says that "if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him", that person may apply to the High Court for redress. The section

shows that the applicant must "allege" that one of the named sections of the Constitution has been, is being or is likely to be infringed in respect of him. He must therefore sue only for acts or threats to himself. But the section does not say that the applicant must establish as a matter of proof that any of these things has or is likely to happen to him. The meaning of "allege" is "declare to be the case, especially without proof" or "advance as an argument or excuse" (see *Concise Oxford Dictionary* (8ed 1990)). I believe that in the context of section 18(1), it is the earlier of the two meanings that the word has. Of course, the allegation to enable the applicant to seek the aid of the courts must not be frivolous or without some foundation. But that is not the same thing as a requirement to establish positively. In my opinion, we here see an example of a case where constitutional rights should not be whittled down by principles derived from the common law, whether Roman-Dutch, English or Botswana. Under section 18(1), an applicant has the right to come before the courts for redress if he declares with some foundation of fact that the breach he complains of has, is in the process of being or is likely to be committed in respect of him. Where a person comes requesting the aid of the courts to enforce a constitutional right, therefore, the question which has to be asked in order that the courts might listen to the merits of his case is whether he makes the required allegation with reasonable foundation. If that is shown the courts ought to hear him. Any more rigid test would deny persons their rights on some purely technical grounds. In this connection I refer to a parallel situation in the case of *Craig v Boren* cited earlier in which the United States Supreme Court at 194 *et seq* demonstrated, on the point of *locus* to bring a constitutional challenge on the ground of discrimination, that persons not directly affected within the class discriminated against could bring the action if they could show that they were or could bring the action if they could show that they were or could be adversely affected by the application of the law. In that case, the question was whether a law prohibiting the sale of "non-intoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18 constituted gender based discrimination that denied males between 18 and 20 years of age the equal protection of the laws. The Court held that a licensed vendor of the beer had standing to challenge the law.

Did the applicant allege that her constitutional right had been, was being, or was likely to be infringed? That question I now proceed to answer in the case of the respondent. We recall from the paragraphs of her founding affidavit which are recited in the earlier part of this judgment that after setting out what she believed to be the constitutional provisions which had been infringed, she continued in paragraph 19 thereof to state that as set out above she verily believed that "the provisions of section 3 of the Constitution had been contravened in relation to myself". I do not think the allegation could be clearer.

Has that allegation some basis of truth? No doubt due to a mixture of some adventitious claims made by her with respect to her husband, who is without doubt an alien and could under the Constitution be placed under some disabilities, her case seems to have been misunderstood. It was, for example,

argued by the appellant that the Citizenship Act laid down how citizenship should be acquired and taken away, and therefore, for a person to attack the Act he or she must be shown to be a person who did not enjoy the rights of citizenship, not one, like respondent who was enjoying full rights of citizenship. In this case, the respondent's children might, according to the argument, have been affected by the Citizenship Act, not herself. But the Citizenship Act, although defining who should be a citizen, has consequences which affect a person's right to come into, live in and go out of this country, when he likes. Such consequences may primarily affect the person declared not to be a citizen. But there could be circumstances where such consequences would extend to others. In such circumstances, the courts are not entitled to look at life in a compartmentalised form, with the misfortunes and disabilities of one always kept separate and sanitised from the misfortunes and disabilities of others.

The case which I understand the respondent to make is that due to the disabilities under which her children were likely to be placed in her own country of birth by the provisions of the Citizenship Act, her own freedom of movement protected by section 14 of the Constitution was correspondingly likely to be infringed and that gave her the right under section 18(1) to come to court to test the validity of the Act. What she says is that it is her freedom which has been circumscribed by the disabilities placed on her children. If there is any substance to this allegation, the courts ought to hear her. The argument that a mother's relationship to her children is entirely emotional and that an emotional feeling cannot found a legal right does not sound right to me. Nor am I impressed by the argument that a mother has no responsibility towards a child because it is only the guardian who has a responsibility recognised by law, and in Botswana, that guardian is the father. The very Constitution which all in Botswana must revere recognises a parent's, as distinct from the guardian's, responsibility towards the child. Recall that section 5(1)(f) states that:

> 5(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say – (f) under order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years.

This provision assumes that before the child is 18 years of age, the parent, a term which we all must agree includes a mother, also has some responsibility towards the child's education and welfare. In any case he or she can control what happens to the child. During that period, especially at the younger end of the infant's life span, the parents', especially, the mother's, movements are to a large extent determined by the child's. At about this same time, the welfare of a child in a broken home is generally considered better protected in the custody of the mother than that of the father. It is totally unrealistic to think that you could permanently keep the child out of Botswana and yet by that not interfere with the freedom of movement of the mother. When the freedom of the mother to enter Botswana to live and to leave when she wishes is indirectly controlled by the location of the child, excluding the child from Botswana is in effect excluding the mother from Botswana. If the exclusion is the result of a determination of the

child's citizenship which is wrong, surely this would amount to an interference with, and therefore an infringement of, the mother's freedom of movement.

But, then, the argument goes, the respondent has not shown that there was any likelihood of her non-Botswana children being kept out of Botswana. The answer to that is that governments with a discretion to exercise do not always give advance notice of how they intend to exercise that discretion. It is not unknown for a government which decides to deport or expel an alien to do so without prior notice of its intention. Must the person who is subject to, or may indirectly be affected by, such expulsion wait until the expulsion order is made before he or she can bring legal proceedings? When is he or she threatened with the likelihood that an order could be made? To the question whether the immigration officers in Botswana had a discretion to turn away an alien from entering the country, the appellant's reply was that they had.

The appellant also put in an affidavit made by the immigration officers at the Gabarone Airport with respect to the latest entry into Botswana of the respondent's husband and her non-citizen children. I believe this was intended to refute allegations indicating various forms of harassment or inconveniences that the respondent claimed the husband and children had suffered. I quote it because it is educative. The senior immigration officer in charge of the department's affairs at the airport on the date of arrival deposed to the fact that the respondent was known to her, and that at no time did the respondent complain to her of any harassment or threats made to her family by the immigration officers. She had consulted her officers, none of whom had any recollection of the incident referred to by the respondent. Then she proceeded to state the normal procedure followed by persons arriving at the airport. She said:

> When passengers arrive at Sir Seretse Khama Airport Botswana passport holders are not required to fill in forms, but proceed straight through the booth reserved for them to the immigration checkpoint, then on to clear customs. In the case of visitors or returning residents holding foreign passports, these fill in entry forms which they produce with their passports to the immigration officers in the booths reserved for foreign passport holders. If everything is in order they are given a green card which is presented at the immigration checkpoint and they pass through to customs.
>
> 1 If there is a query then the passport holder is given a red card to present at the immigration checkpoint, where further inquiries are made and the problem is sorted out. Where a returning resident does not have a valid residence permit or visitor's permit endorsed in his passport then one of two things will happen – either
>
> (a) a form 7 is served upon the visitor, requiring him to appear before an immigration officer at a given time for examination as to whether he is entitled to remain in Botswana; or
>
> (b) his passport is endorsed for a short period to enable him to regularise his stay in Botswana.
>
> (c) The latter is what appears to have happened to Mr Dow and his non-citizen children, as it appears that his passport did not reflect a valid residence permit or visitor's permit at that time. The record of his entry is not, however, available as this was over twelve months ago.

Botswana is entitled to deal with aliens in the manner described. The Constitution allows it and international law and practice recognises it. The respondent in the affidavit to which the senior immigration officer's was in answer alleged that she was in the company of her husband and her three children on that occasion, all having arrived back from holiday. She and the eldest daughter, the Botswana citizen, were granted unconditional entry into Botswana, while the husband and her other two children were put through the alien treatment. The senior immigration officer's affidavit did not deny that the respondent and the eldest daughter were also present at the time. It also, at least, confirmed that different treatment was normally accorded to citizens and non-citizens. The chief immigration officer also made an affidavit in answer to the respondent's. In it he said:

> 4. According to the file Mr Dow arrived in Botswana on 12 October 1977 as a United States Peace Corps Volunteer teacher. He remained exempted from holding a residence permit as an employee of the Botswana Government until 21 January 1990. On 16 July 1990 Mr Dow submitted an application for a residence permit for himself and his two younger children. While his application was being processed, he continued his studies on the basis of three months waivers, which is standard procedure in a case such as this. This was the situation during December 1990/January 1991.
>
> 5. Mr Dow's application was duly approved by the Immigration Selection Board on 17 April 1991. After preparation of the permit, this was despatched to the Dean of Students, University of Botswana on 29 May 1991, marked 'for Peter Nathan Dow'. It appears from the affidavit that Mr Dow did not receive the permit, but merely continued having the waiver certificate in his possession stamped every three months by his nearest immigration officer.
>
> 6. On 8 January 1992, at his request, a replacement permit was issued to Mr Dow, including the two children and valid 17 April 1991 to 30 June 1992, when his course was to expire.

I do not think I need comment on the disturbing experiences of a mother who finds different and unfavourable treatment as to residence meted by authority to some of her three children in comparison to others who are accorded completely opposite treatment by the same authority. Whether or not the authorities think that eventually the required permission sought by the disadvantaged children will be given, during her wait she must go through a period of uncertainty, anxiety and mental agony. In this case, it seems that for some time, at least, two of the respondent's three children had no more than three months granted each time for their stay in Botswana. Chasing after the extensions itself cannot be a matter of joy. The mother's concern for permission for her children to stay cannot be lightly dismissed on the ground that it was no business of hers, the responsibility being the children's father's. Well-knit families do not compartmentalise responsibilities that way. As long as the discretion lies with the governmental authorities to decide whether or not to extend further the residence permit of the husband, on whose stay in Botswana the stay of the respondent's children depend, the likelihood of the children's sudden exhaustion of their welcome in the country of their mother's birth and citizenship is real. Those with the power to grant the permission have the power to refuse. Were they to be refused

continued stay, not only the children's position but the mother's enjoyment of life and her freedom of movement would be prejudiced. It does seem to me not unreasonable that a citizen of Botswana should feel resentful and aggrieved by a law which puts her in this invidious position as a woman when that same law is not made to apply in the same manner to other citizens, just because they are men. Equal treatment by the law irrespective of sex has been denied her.

The respondent has, in my view, substantiated her allegation that the Citizenship Act circumscribes her freedom of movement given by section 14 of the Constitution. She has made a case that as a mother her movements are determined by what happens to her children. If her children are liable to be barred from entry into or thrown out of her own native country as aliens, her right to live in Botswana would be limited. As a mother of young children she would have to follow them. Her allegation of infringement of her rights under section 14 of the Constitution by section 4 of the Citizenship Act seems to me to have substance. The Court *a quo*, therefore, had no alternative but to hear her on the merits.

The appellant has argued that if even the respondent had *locus standi* with respect to a challenge to section 4 of the Citizenship Act, she certainly did not have *locus* with respect to section 5, as the situation which that section provides for, namely, the citizenship of children born outside Botswana, does not apply to the respondent in any of the cases of her children. The possibility of the respondent giving birth at some future date to children abroad was too remote to form a basis for a challenge to section 5. With this submission I agree. But I must point out that the objections to section 4 may well apply to section 5. I, however, make no final judgment on that.

The appellant has argued that because of the manner in which the repeal and re-enactment of the laws on citizenship was done, declaring that section 4 was unconstitutional would create a vacuum. On that I would like to adopt the words of Centlivres CJ in the case of *Harris v Minister of Interior* 1952 (2) SA 428 (A) at 456 where he says:

> The Court in declaring that such a statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by statute; its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging that is controlling the legislature. See Bryce's *American Constitution* (3ed, volume 1 at 582). It is hardly necessary to add that Courts of law are not concerned with the question whether an Act of Parliament is reasonable, politic or impolitic. See *Swart NO and Nicol NO v De Kock and Garner* 1951 (3) SA 589 at 606 (AD).

I expect if there is indeed a vacuum, Parliament would advise itself as to how to meet the situation.

The upshot of this discourse is that in my judgment the Court *a quo* was right in holding that section 4 of the Citizenship Act infringes the fundamental rights and freedoms of the respondent conferred by sections 3 (on fundamental rights and

freedoms of the individual), 14 (on protection of freedom of movement) and 15 (on protection from discrimination) of the Constitution. The respondent has, however, not given a satisfactory basis for *locus standi* with respect to section 5 of the Act. And I therefore make no pronouncement in that regard. The learned Judge *a quo* in the course of his judgment accepted the argument of counsel for the respondent that sections 4 and 5 of the Act denied the respondent protection from subjection to degrading treatment. I do not think it necessary to go into that question for the purposes of this decision. The declaration of the Court *a quo* that sections 4 and 5 of the Citizenship Act (Cape 01:01) are *ultra vires* the Constitution, is, accordingly, varied by deleting the reference to section 5. Otherwise the appeal is dismissed.

It remains for me to thank counsel for the very able and painstaking manner in which they have researched and presented their cases. I think here I speak for all my brothers if I say that we have indeed profited from, and enjoyed the manner of presentation of their arguments.

Aguda JA

Introduction

I have had the privilege of reading in draft the judgment of the Judge President just delivered, and I agree with the conclusions reached in that judgment together with the reasons upon which he based the conclusions. I also agree on the orders made. However, because of the importance to which this case is entitled I feel constrained to add my own words to those of the Judge President not merely to lend support to his powerful words for which in my view no further support is needed, but merely to expatiate upon certain aspects of the matter about which I feel I should express some opinion.

All the relevant facts of this case have already been set down by the learned Judge President, and I therefore do not feel obliged to repeat those facts save those of them that will make this judgment intelligible and to make my views as clear as I possibly can.

The original application by the applicant at the High Court on 22 June 1990 was for an order declaring certain sections of the Citizenship Act of 1984, namely sections 4 and 5 *ultra vires* the Constitution of Botswana. In support of the application the respondent, an advocate in practice before this Court, swore to an affidavit containing 22 paragraphs. All the facts deposed to in that affidavit stand unchallenged, and in law this Court is bound to accept them as established save those which may be obviously untrue; but I have not discovered any such.

On 7 March 1984, the respondent was lawfully married to a United States citizen by the name of Peter Nathan Dow. As at the time of the application there were, and indeed there continue to be, three children of the marriage. The first of these was born on 29 October 1979, that is before both parties were lawfully married,

the second on 26 March 1985 and the third on 26 November 1987. As would be expected the respondent cited the attorney-general of Botswana as the respondent to the application. The attorney-general opposed the application, and in a considered judgment, Horwitz AJ on 11 June 1991 found in favour of the applicant and held that sections 4 and 5 of the Citizenship Act (Cap 01:01) are *ultra vires* the Constitution of Botswana.

The legal issues in dispute between the parties

It would appear that in her original application the applicant had sought 9 orders namely:

1. declaring section 4 of the Citizenship Act *ultra vires* section 3 of the Constitution;
2. declaring section 5 of the Act *ultra vires* section 3 of the Constitution;
3. declaring section 13 of the Act *ultra vires* section 3 of the Constitution;
4. ordering and directing that sections 4 and 5 of the Act be gender neutral;
5. ordering and directing that section 13 of the Act be gender neutral;
6. declaring sections 4 and 5 and 13 of the Act *ultra vires* section 7 of the Constitution;
7. declaring sections 4, 5 and 13 of the act *ultra vires* section 14 of the Constitution;
8. declaring the two younger children Botswana citizens notwithstanding any other citizenship they may have; and
9. declaring the applicant's spouse to be entitled to make an application for naturalisation

However, as I understand it the suit was fought almost entirely on the allegation that section 4 and 5 of the Citizenship Act are *ultra vires* section 3 of the Constitution and secondarily that they are also *ultra vires* sections 7 and 14 of the Constitution. AS there were no allegations of facts in the founding affidavit which relate or can remotely be made to relate to section 5 of the Act, I take the view that to the extent that the order made by the Court below relates to that section, that order cannot be allowed to remain and must therefore be set aside.

Now the relevant provisions of section 4 of the Act says–

> A person born in Botswana shall be a citizen of Botswana by birth and by descent if, at the time of his birth – (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

The case of the respondent is that this provision is a breach of her fundamental rights as it specifically makes provision which is discriminatory in nature on the ground that whilst a male Botswana can pass his citizenship to his children born in wedlock, she as a woman cannot do so. It is also her case that in these circumstances she is being subjected to degrading treatment which is prohibited by the Constitution, section 7, and that her right to freedom of movement as enshrined under section 14 of the Constitution is also breached.

The history of the Citizenship Act has been well set out in the judgment of the Judge President and I need not repeat it here save to say that what I would concern myself with is the Act 17 of 1984, now Cap 01:01 in respect of which this action was brought. Now section 3 of the Constitution says:

> Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his 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 to each and all of the following, namely – (a) life, liberty, security of the person and the protection of the law
>
> …
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

The Constitution then goes on in sections 4 to 15 to make provisions as regards the protection of certain specific rights and certain derogations from each of such protected rights.

Shorn of all frills the case of the appellant is that section 4 of the Act is *intra vires* the Constitution, since the Constitution by itself in section 15 permits the enactment of legislation which by itself is discriminatory on grounds of sex. Appellant also argues that the respondent has no *locus standi* to have brought the action. I shall defer my consideration on this point to a latter part of this judgment. For now I would like to point out that section 15 provides (*inter alia*) that –

> (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect
>
> …
>
> (3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The appelant's argument

Mr Kirby, deputy attorney-general argues with all the force at his command as follows. Since the word "sex" is omitted from section 15 of the Constitution, then it would be permissible to enact any laws which is discriminatory on the grounds of sex. After all, he argues, Parliament has the power and indeed the right under section 86 to legislate for the country, and there is no limitation to that power provided that such legislation is "for the peace, order and good government of Botswana". He argues further that section 4 of the Act is concerned with the conferment of citizenship on children (of either sex). On any natural interpretation of the words, the section is neither intended to, nor has the effect of, subjecting women to any "disabilities or restrictions to which men are not subjected", nor, as

the argument goes, does the "section confer on men privileges or advantages which are not accorded to women". Mr *Kirby* then points out that –

> The aim and effect of the sections (that is, 4 and 5) is not to disadvantage any person but rather to seek to provide certainty of citizenship, and achieving the practical objective that a child should acquire initially the citizenship of his guardian (whatever his sex) whose domicile he also acquires.

Finally on this point the learned deputy attorney-general says that

> Even if it be held that sections 4 and 5 of the Act discriminate against women, the law is, it is submitted, having regard to its nature . . . reasonably justifiable in a democratic society, so as to render it exceptionally permissible under section 15(4)(e).

Application of section 15(4)(e) of the Constitution

I now find it necessary to quote subsection (4)(e) of section 15 of the Constitution under which the appellant seeks succour. The relevant part of that subsection (4) reads as follows:

> Subsection (1) of this section shall not apply to any law so far as the law makes provision – … (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which having regard to its nature and to special circumstances pertaining to those persons or to persons of any such description, is reasonably justifiable in a democratic society.

The submission of learned deputy attorney-general in respect of the last mentioned matter can be easily disposed of. He says that discrimination on grounds of sex does not come within the purview of subsection (3) of section 15, because the word "sex" is omitted from the wording of the subsection. I find it difficult to understand how he can at the same time seek succour under subsection (4) which is only referable to persons of the description mentioned in subsection (3). And in event, legislation which in general terms and for general application prescribes discrimination on grounds of sex cannot, for reasons which will unfold later, be held to be reasonably justifiable in a democratic society in this age and time.

As stated earlier, one of the submissions of the learned deputy attorney-general is that the aim and effect of section 4 (with which I am now concerned) is not to disadvantage any person but rather to seek to provide certainty of citizenship. With great respect to the learned deputy attorney-general, this argument is not only untenable but rather strange. It is plain and beyond any controversy, in my view, that the effect of section 4 of the Act is to accord an advantage or a privilege to a man which is denied to a woman. The language of the section is extremely clear and the effect is inconvertible, namely that whilst the offspring of a Botswana man acquires his citizenship if the child is born in wedlock such an offspring of a Botswana woman similarly born does not acquire such citizenship. A more discriminatory provision can hardly be imagined.

The question still remains whether the discrimination on the ground of sex can be held to be permitted by the Constitution, for, if it is, there is nothing this Court can do about it under its adjudicatory powers. Therefore the question that must now be answered is whether the Constitution of Botswana either in terms or by intent gives general powers of sex discrimination by legislation or by executive acts. In coming to a determination of this issue we are bound to construe sections 3 and 15 of the Constitution.

Canons of constitutional construction

At the outset let me say that I have had no reasons to change my mind as regards the principles to be followed in the construction of the Constitution which I stated in *Petrus v S* (1984) BLR 14, at 34 to 35. Here I wish to refer in particular to what White J of the Supreme Court of the United States said in *South Dakota v North Carolina* (1904) 192 US 268 48 L ED 448 at 465 thus:

> I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view to be so interpreted as to effectuate the great purpose of the instrument.

I would also wish to refer once again to what Sir Udo Udoma of the Supreme Court of Nigeria said in *Nafiu Rabiu v S* (1981) 2 NCLR 293 at 326 thus:

> I do not conceive it to be the duty of this Court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.

And in *Ifezu v Mbadugha* (1984) 1 SC NLR 427; 5 SC 79, Bello JSC put the matter thus:

> The fundamental principal is that such interpretation as would serve the interest of the Constitution and would best carry out its object and purpose should be preferred. To achieve this goal its relevant provisions must be read together and not disjointly
> . . . where the provisions of the Constitution are capable of two meanings the Court must choose the meaning that would give force and effect to the Constitution and promote its purpose.

To these I would like to add the very important voice of Lord Diplock in *Attorney-General of the Gambia v Jobe* (1985) LRC (Const) 556 PC at 565 thus:

> A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction.

Generous construction means in my own understanding that you must interpret the provisions of the Constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration and aspiration of the basic concepts which the

Constitution must for ever ensure, in our case the fundamental rights and freedoms entrenched in section 3.

The Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand the Courts must continue to breathe life into it from time to time as the occasion may arise to ensure the healthy growth and development of the State through it. In my view the first task of a Court when called upon to construe any of provisions of the Constitution is to have a sober and objective appraisal of the general canvass upon which the details of the constitutional picture are painted. It will be doing violence to the Constitution to take a particular provision and interpret it one way which will destroy or mutilate the whole basis of the Constitution when by a different construction the beauty, cohesion, integrity and healthy development of the State through the Constitution will be maintained. We must not shy away from a basic fact that whilst a particular construction of a constitutional provision may be able to meet the demands of the society of a certain age such construction may not meet those of a later age. In my view the overriding principle must be an adherence to the general picture presented by the Constitution into which each individual provision must fit in order to maintain in essential details the picture of which the framers could have painted had they been faced with circumstances of today. To hold otherwise would be to stultify the living Constitution in its growth. It seems to me that a stultification of the Constitution must be prevented if this is possible without doing extreme violence to the language of the Constitution. I conceive it that the primary duty of the Judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.

Status of customary law and the common law

The learned deputy attorney-general did all his possible best to inform this Court of the rules of customary law and of the common law under which women are seriously discriminated against, and that this provided the background which informed the enactment of the Act in 1984. This may well be so, but what we are called upon to do is to consider section 4 of the Act in the light of the Constitution and see how that Constitution must be construed today bearing in mind the changed circumstances of our society. It is clear of course, and I have not the slightest doubt on the issue, that if any rule of customary law or of the common law is inconsistent with any of the provisions of the Constitution, but especially of the entrenched provisions, such rule of customary law or/and the common law must be held to have been abrogated by the provisions of the Constitution to the extent of such inconsistency. Here I would with respect like to make reference to what Karibi-Whyte JSC of the Supreme Court of Nigeria said in *Adediran v Interland Transport Ltd* (1991) 9 NWLR 155. In that case the defendant objected to the capacity of the plaintiff in instituting the suit. The ground of objection was that the subject matter of the suit for a redress of a public nuisance, the only

person competent to institute the action under the applicable English common law was the attorney-general, and not the plaintiff. In dismissing this contention the learned Justice of the Supreme Court said (at 180 of the report):

> The Constitution has vested the Courts with the powers for the determination of any question as to the civil rights and obligations between government or authority and any person in Nigeria . . . Accordingly, where the determination of the civil rights and obligations of a person is in issue, any law which imposes conditions inconsistent with the free and unrestrained exercise of that right is void to the extent of such inconsistency. Thus the restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions . . . of the Constitution, and to that extent void.

And Kentridge JA made this same point in *Attorney-General v Moagi* 1982 BLR (II) 124 when he said at 184– "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them so as to bring them into line with the common law."

Status of section 3 of the Constitution

There was some suggestion that section 3 of the Constitution is a mere preamble to the other sections which follow merely because it begins with the words "whereas". However, that that cannot be so has been exhaustively and adequately dealt with by my brother the learned Judge President in the judgment which he has just delivered and I do not feel that I should traverse the same route again. But I must express, as strongly as I can, that by no stretch of the imagination can such a basic overriding provision of the Constitution be regarded as a mere preamble and the learned deputy attorney-general conceded this during argument. There can be no iota of doubt as regards the status of section 3, namely, that it is a substantive provision of the Constitution. This conclusion is very much compelling when it is noted that the Constitution itself (section 18) gives power to any person to institute an action in Court to test if the right entrenched in sections 3 to 16 has been, is being or is likely to be contravened in relation to him.

At this juncture I would wish to point out that section 1 of the Constitution says that Botswana is "a sovereign republic" whilst section 2 deals with the "public seal". The very next section is section 3 which deals with "fundamental rights and freedom of the individual" which in my view suggests that it is a provision of extreme importance. It seems clear therefore that the construction of any section of the Constitution must begin from the premises that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual" including the right to life, to liberty, to the security of his person and to the protection of the law. In parenthesis the learned deputy attorney-general agreed quite correctly in my view that the last five words should read "the equal protection of the law". If one looks at the issue along these lines, the inevitable conclusion that the mere omission of the word "sex" from the provision of section 15(3) of the Constitution cannot be held to limit the fundamental rights and freedoms of the individual entrenched in section 3, seems to me inevitable. The learned Judge President

has dealt so exhaustively with this matter in his judgment that it will be a futile exercise on my part were I to attempt to proceed at any further examination of it.

The status of international treaties, agreements, conventions, protocols, resolutions etcetera

In considering whether this Court can interpret section 15 of the Constitution in such a way as to authorise legislation which in its term and intent meant to discriminate on grounds of sex, in this case the female sex, it appears to me that, now more than ever before, the whole world has realised that discrimination on grounds of sex, like that institution which was in times gone by permissible both by most religions and the conscience of men and those times, namely, slavery, can no longer be permitted or even tolerated, more so by the law.

At this juncture I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of the government – the legislative, the executive and the judiciary – must strive to make it remain so except to any extent as may be prohibited by the Constitution in clear terms. It seems clear to me that in so striving we cannot afford to be immuned from the progressive movements going on around us in other liberal and not so liberal democracies such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable and respected voices of our other learned brethren in the performance of their adjudicatory roles in other jurisdictions. Mr *Browde* SC, counsel for the respondent, referred us to the words of Earl Warren CJ of the United States, when he said in *Trop v Dulles* 356 US 86 that – "The provisions of the Constitution are not time worn adages or hollow shibboleths. They are vital, living principles that authorise and limit government powers in our nation."

Learned counsel also pointed out what Mohamed AJA of the Supreme Court of Namibia said in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (Nm) as regards the question of corporal punishment, thus

> What may have been accepted as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

Now in the report of a judicial colloquium held in Banglore, Pakistan on 24 February 1988 (*Developing Human Rights Jurisprudence*, Commonwealth Secretariat, London September 1988), the Hon Justice Michael Kirby CMG, President of the Court of Appeal, Supreme Court of New South Wales, Australia, said (at 78 of the report):

> . . . in the function of Courts in giving meaning to a written Constitution, to legislation on human rights expressed in general terms or even to old precedents inherited from Judges of an earlier time, there is often plenty of room for judicial choice. In that opportunity for that choice lies the scope for drawing upon each Judge's own notions of the content and requirements of human rights. In doing so, the Judge should

> normally seek to ensure compliance by the Court with the international obligations of the jurisdiction in which he or she operates. An increasing number of Judges in all countries are therefore looking to international developments and drawing upon them in the course of developing the solutions which they offer in particular cases that come before them.

At the same colloquium the Chief Justice of Pakistan, Humammad Heleen CJ, voiced his own opinion thus (at 101 to 103 of the report):

> A state has an obligation to make its municipal law conform to its undertakings under treaties to which it is a party. With regard to interpretation, however, it is a principle generally recognised in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the state's international obligations . . .
> The domestic application of human rights norms is now regarded as a basis for implementing constitutional values beyond the minimum requirements of the Constitution. The international human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level. The domestic courts can assume the task of expanding these liberties.

I am prepared to accept and embrace the views of these two great Judges and hold them as the light to guide my feet through the dark path to the ultimate construction of the provisions of our Constitution now in dispute.

However, whatever the views of Judges within the Commonwealth must have been in the past as regards the position of a state's international obligations and other undertakings vis-à-vis their domestic laws, many of them have since the past two decades or so begun to have a rethink. They have started to express the opinion that they have an obligation to ensure that the domestic laws of their countries conform to the international obligations of those countries. Lord Scarman in *Attorney-General v British Broadcasting Corporation* (1981) AC 303 at 354 HL said: "Yet there is a presumption, albeit rebuttable that our municipal law will be consistent with our international obligations."

And in *Schering Chemicals Ltd v Falkman Ltd* (1982) QB at 18; (1981) 2 All ER 321 (CA) Lord Denning MR said of the law of England that – "I take it that our law should conform so far as possible with the provisions of the European Convention on human rights."

England has no written constitution and the rather cautious but clearly progressive approach of these great Judges of that country must be understood in that light. We have a written constitution, and if there are two possible ways of interpreting that constitution or any of the laws enacted under it, one of which obliges our country to act contrary to its international undertakings and the other obliges our country to conform with such undertaking, then the courts should give their authority to the latter.

I would wish to call attention to two documents which were placed before us. The first is the convention on the elimination of all forms of discrimination against woman which was adopted by the general assembly of the United Nations GA Res 34/180 on 18 December 1979 by a vote of 130-0, and which came into effect on 3 December 1981. Article 2 of the convention says that states parties to it "condemn discrimination against women in all its form", and that they would take all appropriate measures, including legislation for "the purpose of guaranteeing women the exercise and enjoyment of human rights and fundamental freedom on a basis of equality with men" (article 3). Article 9(1) says that "states parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife" whilst article 9(2) says that "states parties shall grant women equal rights with men with respect to the nationality of their children".

By the end of February 1990, 100 states had ratified or acceded to this convention. There is no evidence that Botswana is one of the 100 states that have ratified or acceded to the convention but I take it that a Court in this country is obliged to look at the convention of this nature which has created an international regime when called upon to interpret a provision of the constitution which is so much in doubt to see whether that constitution permits discrimination against women as has been canvassed in this case.

I take judicial notice that Botswana is an important member of the Organisation of African Unity (the OAU). We were informed by the deputy attorney-general that she has ratified the African Charter on Human and Peoples' Rights which were adopted on 27 June 1981 by members of the OAU. Indeed the published document itself shows that Botswana was among the 35 states that had ratified it by 1 January 1988. I need quote only two of its 68 articles. Article 2 says that -

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political opinion.

And article 3 says:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched in Chapter 2 of our Constitution which deal with fundamental rights and freedoms of individual, is entitled to look at the international agreements, treaties and obligations entered into before or after the legislation was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties and obligations binding upon this country save upon clear and unambiguous language.

In my view this must be so whether or not such international conventions, agreements, treaties, protocols or obligations have been specifically incorporated into our domestic law. In this respect I wish to make reference to what Barker J said in *Bird's Galore Ltd v Attorney-General* (1989) LRC (Const) 928 at 939 thus:

> An international treaty, even one not acceded to by New Zealand, can be looked at by the Court on the basis that in the absence of express words Parliament would not have wanted a decision maker to act contrary to such a treaty. See for example *Van Gorkom v Attorney-General* (1977) 1 NZLR 535 where the treaty had not been acceded to by New Zealand.

If an international convention, agreement, treaty, protocol or obligation has been incorporated into domestic law, there seems to me to be no problem since such convention, agreement, and so on will be treated as part of the domestic law for purposes of adjudication in a domestic court. If it has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the legislature or the executive will not act contrary to the undertaken given on behalf of the country by the executive in the convention, agreement, treaty, protocol or other obligation. However where the country has not in terms become party to an international convention, agreement, treaty, protocol or obligation it may only serve as an aid to the interpretation of a domestic law, or the construction of the Constitution if such international convention agreement, treaty, protocol etcetera purports to or by necessary implication, creates an international regime within international law recognised by the vast majority of states. One can cite some of such conventions, agreements, treaties, protocols which have created regimes which no member of the community of nations can or should neglect with impunity. Take for example the United Nations' declaration of the rights of the child adopted by Resolution 1286 on 29 November 1959, which says that the child shall – "Wherever possible grow in the care and under the responsibility of his parents . . ." and that – "a child of tender years shall not, save in exceptional circumstances, be separated from the mother."

Another example is United Nations general assembly declaration on the elimination of discrimination against women passed on 7 September 1967, to the effect that "Discrimination against women, denying or limiting as it does their equality of rights with men is fundamentally unjust and constitutes an offence against human dignity."

One may also be permitted once more to note the African Charter on Human Rights and Peoples' Rights article 18(3). It says emphatically that -

> The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and convention.

In my view there is clear obligation on this country like on all other African states signatories to the charter to ensure the elimination every discrimination against their women folk. In my view it is the clear duty of this court when faced with the difficult task of the construction of provisions of the Constitution to keep in mind

the international obligation. If the constitutional provisions are such as can be construed to ensure the compliance of the state with its international obligations then they must be so construed. It may be otherwise, if fully aware of its international obligations under a regime creating treaty, convention, agreement or protocol, a state deliberately and in clear language enacts a law on contravention of such treaty, convention, agreement or protocol. However in this case before this court the clear provisions of section 3 of the Constitution accords with the international obligations of the state whilst construing section 15 in the manner canvassed by the appellant will lead to the inevitable failure of the State to conform with its international obligation under international regimes created by the UN and the OAU. In this regard I am bound to accept the position that this country will not deliberately enact laws in contravention of its international undertakings and obligations under those regimes. Therefore the Courts must interpret domestic statutory laws in a way as is compatible with the State's responsibility not to be in breach of international law as laid down by law creating treaties, conventions, agreements and protocols within the United Nations Organisation and the Organisation of African Unity.

In the light of all the foregoing therefore the Constitution must be held not to permit discrimination on grounds of sex which will be a breach of international law. Therefore section 4 of the Citizenship Act must be held to be *ultra vires* the Constitution and must therefore be and it is hereby declared null and void.

Relevance of other sex discriminatory statutes

Before I am completely done with this aspect of this appeal I must take note that the learned deputy attorney-general has called our attention to and listed as an appendix to his heads of argument certain statutes which in his submission are not gender neutral. This he said in order to convince us that there can be nothing wrong with the Citizenship Act, section 4, in that there are other provisions on our statute books which are similarly sex discriminatory. With due respect to learned counsel, all the arguments founded on this are not only irrelevant but they probably call for further scrutiny by the legislature. This Court is not, however, in these proceedings, concerned with whether or not any provisions of the 26 statutes listed by the learned counsel are *ultra vires* the Constitution or not.

If all our statutes contain provisions which are *ultra vires* one provision of the Constitution or the other, this Court should not be deterred by that fact from pronouncing on the one provision which has been challenged.

What we have been called upon to decide in these proceedings is whether a single provision is *ultra vires* section 3 and some other sections of the Constitution. Learned counsel tells us that for example under the Administration of Estates Act, Cap 31:01, section 28(5) the administration can be granted to a woman only with the husband's consent; that under the Deeds Registry Act, Cap 33:02, section 18(4), immovable property cannot be registered in the name of a woman married in community of property; and that under the Companies Act

Cape 42:01 such a woman can be a director of a company only if her husband gives his consent. As I have said this Court has not been called upon to make any pronouncement as to the validity of any or all of these provisions, and I therefore refrain from making any pronouncement on them. However, the learned deputy attorney-general is quite right in pointing out that there are some other areas of human existence that persons of both sexes cannot for obvious reasons be expected to have equal treatment. As an example of course is that a pregnant woman may not be sentenced to death (under the Penal Code); and that a pregnant woman who is in employment will be entitled to a maternity leave (under the Employment Act), and so on. But the matter before this Court in this appeal is not of that nature. What has been canvassed before us in this appeal is the construction of a certain provision of the Citizenship Act. Had we accepted the views canvassed by the appellant this Court would then have given the State – the legislature, the executive, and the judiciary – the power to take actions within their own spheres of government, which without limit, could be discriminatory against the women folk. In my view that cannot be correct, and for this reason and for the other very cogent and compelling reasons so clearly and ably advanced by the learned Judge President in his judgment, I do hold that the learned trial Judge was right in holding that section 4 of the Citizenship Act is *ultra vires* the Constitution.

Locus standi

The appellant has submitted that the present respondent had no *locus standi* to have brought the original application in the Court below. If any person had such a *locus standi* it was either the respondent's husband or her children. The arguments of the learned deputy attorney-general in this regard are not only attractive, but superficially plausible. Again my learned brother the Judge President has dealt with this matter, and I fully and respectfully accept and embrace his views and the conclusions reached by him.

According to the learned deputy attorney-general the respondent had no *locus* to have brought this suit before the High Court because the Constitution by itself, section 18(1) provides that

> If any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been is being or is likely to be contravened in relation to him, then . . . that person may apply to the High Court for redress.

The learned attorney-general emphasises that the alleged contravention of any of the constitutional provisions must be in relation to the person who has instituted the proceedings. In this case the alleged contravention of the Constitution is only in relation to two of the children of the respondent to whom she could not pass her own citizenship by virtue of the Citizenship Act, section 4. The respondent has neither personally suffered any injury nor does she apprehend any arising out of the Citizenship Act, argued counsel for the appellant. After all the *popularis actio* of the Roman law has never been part of Botswana common law. Placing reliance on some decisions of the Courts of the Republic of South Africa and on some *dicta* of some of our brothers on the

benches of that country, the learned deputy attorney-general goes further to submit that

> The principle of our law is that private individual can only sue on his own behalf, not on behalf of the public. The right he seeks to enforce must be available to him personally, or the injury for which he claims redress must be sustained or apprehended by him.

Learned counsel for the respondent, Mr *Browde* SC, provides an answer to these two submissions when he says that the South African cases relied upon by the appellant are both misapplied and, in any event, inappropriate for a determination of the present issue. “They are inappropriate since they even concern common law rules of standing while the present case requires an interpretation of a constitutional instrument which specifically confers standing in broad terms.” But then the learned deputy attorney-general then goes on to submit further that “political adverse consequences which are speculative in nature rather than imminent and threatened will not be sufficient to confer *locus standi* under section 18 of the Constitution”. In support of this submission the appellant cites a number of decisions of the Courts of the Republic of South Africa, for example *Dalrymple v Colonial Treasurer* 1910 TS 372: *Director of Education, Transvaal v McCagie* 1918 AD 621; *Veriava v President of the South African Medical and Dental Council* 1985 (2) SA 293;(T) and *Cabinet of the Transitional Government of South West Africa v Eins* 1988 (3) SA 369 AD.

In my view the only question to be answered is whether on all the facts and circumstances of his case the respondent had the *locus* to have instituted this action under section 18 of the Constitution. Whatever the common law says on the issue of *locus standi* becomes of little or no importance. There are two legs to the case made by the respondent. As I understand it, it is her case that section 4 of the Citizenship Act has breached her right entrenched under section 3 of the Constitution, that is, the right to equal protection of the laws under paragraph (a) of the section. Because she is a woman, she is denied the equal protection of the law when compared with her male counterpart. The respondent also based her case on the allegation that section 4 of the Act also breached her right to liberty under section 5 of the Constitution in that her children, 5 and 3 years old born in lawful wedlock, are liable to be expelled from Botswana and because of her peculiar relation to these children her personal right to freedom of movement is impaired. It is also her case, if I understand it correctly, that the provision breached her right not to be subjected to degrading treatment under section 7, by reason of the same facts. The motherhood bond between her and the minor children, 5 and 3 years of age is under perpetual threat of disintegration in Botswana where they have made their home. This breaches her right not to be subjected to inhuman or degrading treatment.

The Constitution of Botswana like many other constitutions of the Commonwealth framed in the past 30 years or so have clearly shut the door of the Courts of those countries against “a mere busy body who is interfering in things which do not concern him” (in the words of Lord Denning in *R v Greater London Council,*

ex parte Blackburn (1976) 1 WLR 550 at 559); and those Courts "are not places for those who wish to meddle in things which are no concern of theirs" as was proclaimed by Megarry J in *Re Argentum Reductions (UK) Limited* (1975) 1 WLR 186 at 190, "just for the pleasure of interfering, or proclaiming abroad some favourable doctrine of theirs, or of indulging a taste for forensic display". Under our Constitution as well as under the constitutions of other countries with similar provisions – see section 42, and section 44 of the Constitution of the Federal Republic of Nigeria, 1979, and 1989 respectively – for a person to have the *locus* he must "allege" that any of the entrenched fundamental rights provisions "has been, is being or likely to be contravened" "in relation to him".

It is perhaps essential at this stage to say that in Great Britain where there is no written constitution, there has not been a statute directly giving power to the judiciary to review any act of the legislature, that is, of the Queen in Parliament. It seems clear therefore that very little inspiration can be drawn from the pronouncements of the Judges of that country save those who take appeals from the Commonwealth countries. Also neither the Constitution of the United States of America nor that of Australia contains any provision similar to that of section 18 of the Constitution of Botswana. It is perhaps needless to say that no such provision exists in the law of the Republic of South Africa.

In her classical book titled *Locus Standi and Judicial Review* Dr Thio observed that:

> The problem of *locus standi* in public law is very much intertwined with the concept of the role of the judiciary in the process of government. Is the judiciary function primarily aimed at preserving legal order by confining the legislature and executive organs of government within their powers in the interest of the public, *jurisdiction de droit objectif*, or is it mainly directed towards the protection of private individuals by preventing illegal encroachments of their individual rights, *jurisdiction de droit subjectif*?

I would say that in the case of Botswana this distinction is obviously uncalled for. The judiciary is charged with both functions as its primary role, one being correlative to the other. The judiciary in this country has one of its primary functions the responsibility of confining both the legislature and the executive within the powers allotted to them under the Constitution. However, it has another primary function, perhaps not less important for the maintenance of peace, order and good government namely, the protection of private individuals from illegal encroachments of their individual rights by either the legislature or the executive.

In order to give to the judiciary the power to exercise the latter primary function the Constitution itself has made provision, in its section 18. In my view the language of that section is very clear and totally devoid of any ambiguity. Therefore, founded upon the first leg upon which the claim is based, there can be no dispute as to the *locus* of the respondent in these proceedings.

When we come to the second leg upon which the respondent's claim is based, namely, the prevention of her two young children from acquisition of her citizenship by descent the matter is far more complicated and therefore requires further consideration. However, here again I agree entirely with the observations and conclusions of my learned brother, the Judge President, on this aspect of the matter. In her affidavit sworn on 9 February 1992, admitted by consent in theses proceedings, the respondent allege that her husband and her two young children were on 8 January 1992 granted a residence permit to reside in Botswana till 30 June 1992. It is clear from this that the respondent's two young children will thereafter be subject to expulsion from Botswana, away from their mother and away from the only place they have regarded as their home. Short of expressly saying the obvious, in his reply affidavit sworn on 13 February 1992, the chief immigration officer admitted that "a replacement permit was issued to Mr Dow, including the two children and valid from 17 April 1991 to 30 June 1992, when his course (of study in the University of Botswana) was to expire". In my view it is too artificial and unnatural to hold that in these circumstances the respondent's rights not to be subject to inhuman and degrading treatment, and her right to free movement within and into and out of Botswana have not been breached. If she travels out of the country with her husband and the children, the two children concerned, 5 and 3 years old and her husband may be refused admission. In that circumstance she must feel, rightly, that she has been subjected to both inhuman and degrading treatment. In my view she needs not suffer this sort of treatment before she can approach the Court under section 18 of the Constitution. She is entitled to come to Court once it is possible for her to allege upon sufficient grounds – as the founding affidavit has shown – that she was likely to be subjected to such a treatment.

In all these circumstances there can be no doubt that the respondent has the *locus standi* to bring this action.

I would therefore for the reasons to ably articulated by my learned brother, the Judge President, and by the additional and supporting reasons which I have herein given, dismiss the appeal with costs as ordered by the Judge President.

Bizos JA

I concur in the judgment of the Judge President and the proposed orders to be made dismissing the appeal from the judgment of Horwitz AJ. I agree with the reasons advanced by the Judge President.

In view of the importance of the matter and the arguments advanced I consider it necessary to deal with some of them. I will not set out the provisions of the Constitution nor the authorities quoted by the Judge President unless it is necessary for the purpose of understanding the views expressed by me.

I accept that could not be seriously disputed by the appellant that the Citizenship Act 1984 is discriminatory. Section 4 deprives her two minor children of

automatic citizenship of Botswana despite the fact that they were born in Botswana to her, a Motswana citizen by birth and her husband a citizen of the United States of America. The children would have been Botswana citizens if their father was a Motswana irrespective of the citizenship of their mother.

The main question to be answered is whether the Constitution allows the legislature to discriminate on the grounds of sex. The appellant contends that it does. He argues that because the word sex is left out of the definition in "discriminatory treatment" in section 15(3) of the Constitution, gender discriminatory legislation against women is permitted in Botswana because it is a patrilineal and male orientated society.

The appellant's submission ignores the clear and unambiguous words in section 3 of the Constitution.

> Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex . . .

And which thereafter, subject to certain limitations, sets out the rights referred to above. I disagree that the use of the word "whereas" in the context that it is used was not intended to confer the fundamental rights set out in section 3 but merely sets out a preamble or a statement of fact.

Section 18 of the Constitution provides: ". . . if any person alleges that any of the provisions of section 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then . . ."

A remedy is then provided. I know of no way in which the provisions of a preamble or a statement of fact may be contravened.

The appellant's argument that section 3 merely recorded a fact is inconsistent with his submission that Botswana was a patrilineal and male orientated society. It would mean that an unwarranted statement of fact was enshrined in the opening words of Botswana's Constitution at the time of the country's birth. I cannot credit the makers of the Constitution with such an intent.

I respectfully agree with the *dicta* of Maisels JP, Aguda JA and Kentridge JA in *Attorney-General v Moagi* 1981 BRLI and *Petrus v S* 1984 BLR 14 that as far as its language permits the Constitution should be given a broad construction. Their views and those of many other eminent Judges in various countries have been set out in the judgments of the Judge President and Aguda JA in this case. I find it unnecessary to repeat them. The full bench judgment of Berker CJ, Mohamed AJA and Dumbutshena AJA in *Minister of Defence Namibia v Mwandinghi* 1992 (2) SA 355 (Nm) and the cases therein cited provide further support for the approach to be adopted.

I am of the view that even if the matter before us is approached on the basis of what has been called "the austerity of tabulated legalism" the result would be the same. I intend examining the issue in accordance with some of the main rules of statutory interpretation as enunciated in the English and South African Courts in whose judgments this Court has sought guidance in the past.

What has become known as Lord Wensleydale's "Golden Rule" was enunciated in *Grey v Pearson* 6 HLC 106:

> We are to take the whole statute together and construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency . . . so to as to justify the Court in placing on them some other signification, which, though less proper, is one which the Court thinks the words will bear.

Solomon JA in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 554 said:

> *Prima facie*, the intention of the legislature is to be deduced from the words which it has used. It is admissible for a Court in construing a statute *to have regard not only to the language of the legislature, but also to its object and policy as gathered from a comparison of its several parts, as well as from the history of the law and from the circumstances applicable to its subject matter*. If on considerations of this nature, a Court is satisfied that to accept the literal sense of the words would obviously defeat the intention of the legislature it would be justified in not strictly adhering to that sense but in putting upon the words such other signification as they are capable of bearing.

(My emphasis.)

In *Attorney-General Tvl v Additional Magistrate for Johannesburg* 1924 AD, 421 at 436 Kotze JA relying on English law said:

> A statute says Cockburn CJ, 'should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'. *The Queen v Bishop of Oxford* (4 QBD at 261). To hold certain words occurring in a section of an Act of Parliament as insensible, and has having been inserted through inadvertence or error, is only permissible as a last resort. It is, is in the language of Erle CJ 'The *ultima ratio*, when an absurdity would follow from giving effect to the words as they stand'.

In *Ditcher v Denison* 11 Moore PC 325 at 357 it is said, the Privy Council advised:

> It is a good general rule in jurisprudence that one reads a legal document whether public or private, should not be prompt to ascribe – should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.

In *Wellworths Bazaars Ltd v Chandlers Ltd* 1947 (2) SA 37 (A) Davis JA at 43 said: ". . . a Court should be slow to come to the conclusion that the words are tautologous or superfluous."

If appellant's argument that gender discrimination is authorised by the Constitution is to be upheld, the Court would either have to ignore the inclusion of the word "sex" in section 3 or say that it was included for some mere cosmetic purpose. The main reason advanced by the appellant for his contention is that the word "sex" does not appear in section 15(3) wherein affording different treatment to different persons on the grounds of race, tribe, place of origin, political opinions, colour or creed is deemed to be discriminatory.

I cannot ignore that the word "sex" appears in section 3. I can find no necessity nor any sound reason for doing so.

As Solomon JA said in *Dadoo's* case (*supra*) we must also have regard to the object, politic history and circumstances applicable to the subject matter of the statute we have to interpret.

The Constitution of Botswana was enacted on 30 September 1966, in substantially similar circumstances as those mentioned by Lord Wilberforce in *The Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 at 328/329 where he says that the United Nations Universal Declaration of Human Rights of 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1953 had some influence. Both documents were no doubt inspired by the Atlantic Charter of 1941 which was intended to give hope for a better future for mankind after World War II. This was to be achieved by recognising the right of all people to self determination and self government.

The African Human and People's Charter and other continental and regional charters and declarations followed.

By the middle of the 20th century the terms "man" as used in "The rights of man" and "people" as used in "We the people" did not mean "men only" nor men and women of a certain colour. Women over 30 in the United Kingdom got the vote in 1918. Most democratic countries followed. The view of Aristotle and Jean-Jacques Rosseau that women were not fit to make decisions that affect the common good beyond the family was no longer considered good dogma. The claimed right of men that expected women to nurture their male children to virtuous citizenship, that they themselves and their daughters were never to enter, was challenged. Amongst the world's nations (except a small number of notable exceptions that refused to subscribe to the Universal Declaration) discrimination on the grounds of race and sex became equally heretical.

An analysis of the history, language, object and policy of the several parts of the Constitution of Botswana leads to an inevitable conclusion that gender discrimination was not permitted in legislation enacted after the adoption of the Constitution.

The adoption of the Constitution of sovereign Botswana emerging from colonial rule was obviously done with the lofty principles enshrined in the charters and declarations. The Constitution unequivocally declares in section 3 that the fundamental rights and freedoms of the individual whatever his or her race or sex shall be enjoyed subject only to certain stated limitations designed not to prejudice the enjoyment of those rights by others.

I am not unmindful that I have introduced the word “or her” in my paraphrasing section 3 of the Constitution. It speaks of “every person”. By the time the Botswana Constitution was enacted to one seriously contended that the word “person” and “people” did not mean both men and women.

The rights referred to in section 3 and under what circumstances exceptions to their exercise are set out in greater detail in sections 4 to 14. Sections 15 and 18 have been set out discussed and interpreted by the Judge President. Section 16 and 18 deal with what is to happen when Botswana is at war or when the President has declared a state of emergency in terms of section 17. Section 19 is a definition section in relation to the matters contained in Chapter 2 of the Constitution which is headed “Protection of fundamental rights and freedoms of the individual”.

In terms of section 89(3) parts of the Constitution may not be altered unless a special procedure is adopted and the bill is passed by two thirds majority. All the sections in Chapter 2 are so entrenched together with other sections set out in section 89(3) dealing with the office of the President, of ministers and assistant ministers in Chapter 4. The qualifications for the election of a person as president are set out in section 33. Being a woman is not a disqualification. A woman may become vice-president in terms of section 39 and a member of the cabinet as minister or assistant minister in terms of section 42. Sections 61 and 62 set out the qualifications and disqualifications for persons to become members of the national assembly. More than 10 issues are addressed in the provisions of these sections. Being a woman is not a disqualification.

If the makers of the constitution of Botswana intended it to discriminate against women because it is a patrilineal and male orientated society, they could not have missed the opportunity of expressly debarring them from holding office as president, minister, deputy minister or member of parliament. Persons entitled to the franchise are set out in section 67, also entrenched in terms of section 89(3)(b). Women are not excluded from the right to vote.

Mr Kirby in an able and well researched argument submitted that one of the reasons why the Constitution should be interpreted as allowing gender discrimination against women to quote his words “the whole fabric of the customary law in Botswana, is based upon a patrilineal society, which is gender discriminatory in its nature”. He also drew our attention that only adult men participate in the proceedings of the Lekgotla, an assembly presided over by a

chief in which the affairs of the community are discussed and decided upon and which at times act as a Court. We were told that women do not participate in these proceedings unless they are personally involved when the assembly sits as a Court. Mr Kirby quoted numerous other examples in customary law, the Roman-Dutch common law and the statute law of Botswana in which gender discrimination is to be found.

The argument taken to its logical conclusion would mean that although the makers of the Constitution provided that a woman could hold the highest offices in the land and have the right to vote for persons seeking high office, discriminatory legislation could be passed vitally affecting her, because among other reasons she was not entitled in customary law to attend the Lekgotla. In order to achieve this purpose, so the argument would have to proceed, the makers of the Constitution deliberately left out the word “sex” from section 15(3) of the Constitution despite what was declared in section 3.

The makers of the Constitution were well aware that provision would have to be made for the laws of the country and expressly provided in section 15(9) that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section– (a) if that law was enforced immediately before the coming into operation of this constitution and has continued in force at all times since the coming into operation of this constitution; or (b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of Constitution.

The meaning is clear. The laws of the past could not be declared unconstitutional in terms of section 18 but no new laws discriminating against any of the grounds set out in sections 3 to 14 after the adoption of the Constitution. The exceptions are clearly set out in sections 4 to 14. The further exceptions set out in subsections (4), (5), (6), (7) and (8) of section 15 and sections 16 and 17 deal with a state of emergency.

Having gone to so much trouble to provide so many exceptions for the protection of fundamental rights why would the makers of the Constitution not expressly state that women could be discriminated against in Botswana in order to preserve the patrilineal and male orientated society? Having gone to so much trouble to expressly enumerate so many exceptions, they would hardly have been content to express their intention in so elusive a manner by omitting the word “sex” from section 15(3) and hope that their intention would be discovered by the application of the rule of construction *expressio unius exclusio alterius*.

In my view, the overall intention of the makers of the Constitution is so clear that even if the matter is to be approached by very strict adherence to “the austerity of tabulated legalism” the *maxim* in Latin has no application. The intention of the makers of the Constitution that there would not be gender discrimination in any law passed after the adoption of the Constitution is clearly expressed. To hold

the contrary would have the effect of allowing a rule of interpretation to contradict the express words of the Constitution.

Mr Kirby in reply to Mr Browde's able argument relying on judgments of American, Australian, Canadian, Tanzanian and other Courts, to the effect that the Constitution such as that of Botswana should be given a broad construction rather than a restrictive interpretation, Mr Kirby urged us to have regard to Botswana's peculiarities and idiosyncrasies. During his peroration he appealed to us not to listen to what the world has to say, but to the heartbeat of Botswana. What he no doubt meant was that we should have regard to the traditional culture of Botswana which he says is a patrilineal and male orientated society. Botswana was not alone in this male orientated tradition. For no other reason than being a woman a Viscountess was precluded from taking her position in the House of Lords. See The Claim of *Viscountess Rhondda* (1922) 2 AC 339. Some fifty years later Lady Thatcher could not only take her place in the House of Lords but had been thrice elected as Prime Minister of Britain. Although the customs, traditions and culture of a society have to be borne in mind and afforded due respect they cannot prevail over the express provisions of the Constitution.

In relation to the protection of personal and political rights the primary instrument to determine the heartbeat of Botswana is its Constitution. In my judgment the passing of any law which clearly makes provision that is discriminatory either of itself or in its effect cannot stand. The effect of section 4 of the Citizenship Act is to discriminate against the respondent whose children are deprived of Botswana citizenship even though they were born in Botswana. This could not be done by the legislature in view of the provisions of sections 3, 14 and 15 of the Constitution.

In my view there is no substance in the submission that the applicant does not have *locus standi* in relation to her children.

The Judge President has referred to the cases dealing with *locus standi* in Roman-Dutch law and more particularly *Wood v Odangwa Tribal Authority* 1975 (2) SA 294 (A). I agree with this conclusion. The matter was considered further in *Jacobs v Waks* 1992 (1) SA 521 (AD) in circumstances fairly close to the matter before us. It was argued on appeal on behalf of the mayor of the Town Council f Carltonville that had resolved to reserve entry into a park to whites only that the applicants did not have *locus standi* to apply to Court to set aside the decision. The first and third applicants were found to have *locus standi* because they were a director and a manager respectively of businesses within the town. Because the African population living in a segregated township adjoining the town had mounted a successful boycott of all the businesses as a protest against the town's racist decision, they contended that the decision of the Town Council should be set aside so that the boycott may come to an end. The second applicant, an African, who lived and had a business in the segregated township of Khutson but did his shopping in Carltonville and was closely involved with its

community contended that the decision of the Town Council extremely upset him and that he and many other black people felt insulted and aggrieved. The provincial division to which the application was brought held that the second applicant did not have *locus standi*, *Waks v Jacobs* 1990 (1) SA 913 (T) at 918F-I. However, Botha JA with whom Corbett CJ and Smallberger, Milne and Nienaber JJA concurring, held in the Court of Appeal that he did have *locus standi* because his dignity had been affected by the decision of the Council. The learned Judge of Appeal says that *dignitas* is a deep rooted notion in Roman-Dutch law which the court will protect.

The strength of the bond between a mother and her children does not require discussion. Whatever may aggrieve the children directly affects her. To say that she has no *locus standi* to protect her children's right to citizenship of the country of their birth because their father is an alien finds no support in the law of Botswana.

Schreiner JA
I do not intend to set out details of the notice of motion and affidavits in this matter because they appear from the judgment of the learned Judge President. This will be a minority judgment and, consistent with its status, I will make it relatively short.

Introduction
The Constitution of Botswana followed upon, and was necessary for, the independence of the country from the control of the United Kingdom. It established a governmental and administrative structure for the new country. It was designed not only for the immediate, but also the more distant, future as a governing document having a measure of rigidity but also capable of being altered by procedures which would afford an opportunity for the members of parliament and sometimes the people of Botswana to give due consideration to changes. Because it was a new sovereign State, there had to be provisions for citizenship and these were embodied in the first instance, in Chapter 3 of the Constitution. The systems of Roman-Dutch law and customary law which, until independence, had prevailed in the Bechuanaland Protectorate are not mentioned in the Constitution and the social *mores* of the various groups of inhabitants of the country were presumably intended to continue unaffected by independence save to the extent that changes were specifically provided for in the Constitution.

The procedures for changing the Constitution are three (see section 89). Certain provisions may be altered by Parliament in the ordinary way by simple majority, save that the text of the Bill making the change must be published in the Gazette not less than 30 days before its introduction (subsection (2)). There are other sections the amendment of which requires that the final voting in the assembly should take place not less than three months after the previous voting thereon and, on the final vote, must be supported by not less than two-thirds of all the

members of the assembly (subsection (3)). Lastly, there are certain provisions which can be altered only by the further step of a referendum of voters after the change has been passed by Parliament (subsection (4)). The provisions concerning citizenship in Chapter 3 of the Constitution were capable of being altered merely by publishing the text at least 30 days before introduction of the Bill. The amendment of the "Bill of Rights" sections in Chapter 2 requires that the final voting should take place not less than three months after the previous voting and achieve a two-thirds majority. The matters requiring a referendum include alterations to the composition and operation of Parliament, elections, the franchise and the provisions establishing the Superior Courts. This is understandable because these provisions are intended to entrench a particular form of democratic government and set up a court structure to ensure that that government acts within the Constitution.

Interpretation of constitutional provisions

There are *dicta* in judgments of this Court and others which declare that a constitution should justifiably receive a slightly different approach to interpretation than ordinary legislation. These statements must be confined to those portions of the Constitution which create or protect rights of citizens or others in the country. The bulk of the Constitution of Botswana, indeed everything other than Chapter 2, contains nothing which would justify any peculiar treatment from the point of view of interpretation. Thus, to the extent that certain *dicta* refer generally to the Constitution and lay down a "liberal" or "generous" construction or a rule that a "technical" or a "close and literal" interpretation is to be avoided, they must be applicable, in my view, only to those provisions which are designed to confer rights upon or introduce protections for the individual person.

In a recent decision of the Supreme Court of Namibia, *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (Nm), the Court was called upon to interpret the words "anything done under such laws prior to date of independence" in sub-article (3) of article 140 of the Constitution. The sub-article had nothing to do with the rights and freedoms of individuals, but was a purely transitional provision to secure the continued operation of the laws introduced by the previous government and things done pursuant thereto. Notwithstanding this, the Supreme Court used the authorities concerning liberality and absence of technicality in interpretation to support the contention that the words "anything done" should mean "anything done, lawful or unlawful". While the ultimate conclusion is no doubt correct, I do not think that there was any justification for approaching the transitional provision in a constitutional statute in any different way from a transitional provision in an ordinary statute. It may be that lawyers and Judges are inclined in their approach to any ordinary problem of interpretation to look very closely at dictionary meanings of words and grammatical construction and to apply rules which have been laid down by the common law or developed in judicial precedent over the years in order to ascertain the intention of the legislature. This has the merit of consistency and clarity.

Sometimes the words of a statute specifically, by way of definition, direct that a particular meaning should be given to a word or a certain approach to interpretation should be adopted. This may be an absolute injunction or merely a direction that, though the context should be the ultimate determinant, this statutory meaning or approach should generally be applied. The admonition by the Courts that, in the case of the provisions of a Constitution creating or protecting human rights, the interpretation should be "liberal" and "generous" and not "technical" or "close and literal" does not justify any departure from a definition section of the absolute kind or the "plain" meaning of words or sentences in order to give them a meaning and effect which the Court considers that the lawmaker should have given them. The general injunctions regarding the interpretation of constitutional statutes should not be relied upon as a licence to a Court, even when dealing with rights and freedoms, in effect, to alter a provision to avoid a consequence which it considers is not, in view of its assessment of the position in existing society,, socially or morally desirable, if the meaning is clear. The special approach to interpretation applies only (a) where there is an ambiguity or an obscurity or (b), in a very different way, when the meaning of a word requires to be determined at a particular time against an existing social situation. The first justifiable relaxation from conventional interpretation is illustrated by *Minister of Home Affairs v Collins McDonald Fisher* (1980) AC 318 (PC) where the meaning of the words "child of that person" in section 11 of the Constitution of Bermuda was considered. The Privy Council advised that the commonly applied limited meaning of "child" to be found in various contexts did not apply and that a "child of that person" was intended to include illegitimate children. The second situation is illustrated by *Ex parte Attorney-General, Namibia: In re Corporal Punishment* 1991 (3) SA 76 (Nm), *Petrus v S* (1984) 1 BLR 14 and *S v Nkubi* 1988 (2) SA 702 (Z) which deal with the vexed question of corporal punishment. There are many other cases referred to in these authorities which deal with the same subject and together they show a growing distaste on the part of the courts in recent years to the imposition of corporal punishment and, where there is a constitution outlawing cruel and inhuman punishment or degrading treatment, declaring that legislatures are wholly or partially precluded from passing legislation imposing corporal punishment. Here, and no doubt in many other cases, the effect of words having a meaning which to some extent vary with the *mores* of the time must influence the Court and so one gets the notion of a constitution being adapted by the Courts to the needs of a changing society. Whichever way is it framed, the idea of the so-called changing constitution must be limited to the area of changing moralities affecting the ambit of the content of words. This must be narrow indeed.

The liberal, generous and non-literal, non-technical approach to human rights legislation is dictated by its nature and purpose and is justified on this ground, but it is not to be taken as permission to Courts to cease always to seek the intention of the legislature from the words which have been used. If a human rights code does not outlaw discrimination on the ground of sex, the Court has no right to

declare that it does because, in its view, such a provision is desirable in the atmosphere of the time: it must be satisfied from the wording of the provision that the legislature intended to prevent such discrimination.

Citizenship legislation

Independence was accorded to the former Bechuanaland Protectorate as from 30 September 1966 ("the appointed day") and the area became a Republic under the name of Botswana (Botswana Independence Act 1966, 14 and 15 Eliz Chapter 23, section 1). Section 3(3) of the United Kingdom Act provided that, except as provided by section 4, any person who, immediately before the appointed day, was a citizen of the United Kingdom and Colonies should, on that day, cease to be such a citizen if he became on that day a Botswana citizen. Section 4 dealt with certain cases where citizenship of the United Kingdom and Colonies was retained. Overall, the right to retain citizenship of the United Kingdom and Colonies was to be determined patrilineally. A woman who was married to a citizen of the United Kingdom and Colonies did not cease to be such unless her husband did so.

It was necessary by reason of the change in status of the area which is now Botswana for Parliament to introduce legislation creating a citizenship of Botswana and Chapter 3 of the Constitution did so. Sections 20 to 25 dealt with citizenship of Botswana and, in those situations in which parentage was the determining factor, it was acquired patrilineally irrespective of legitimacy or illegitimacy. Section 27 dealt with Commonwealth citizenship. Save in case of Commonwealth citizenship, dual citizenship was prohibited, and in order to obtain Botswana citizenship any citizenship of another country had to be renounced at a certain stage.

It was common cause between the parties during the argument of the present case that, if sections 4 and 5 of the present Citizenship Act, Chapter 01:01 conflicted with Chapter 2 of the Constitution, Chapter 3, if it had not been embodied in the Constitution, would also have done so, because, though not in the same terms as the Citizenship Act, it was based upon the same principle, namely patrilineal determination.

At the hearing before this Court counsel for the appellant placed great emphasis upon the presence in the new Constitution of provisions which discriminated against women. This, it was argued, was a very fair indication that Chapter 2 of the Constitution was not intended to contain provisions which prohibited discrimination against women. I did not hear any real answer to that point. However, if the wording of Chapter 2 compels a construction which does give rise to such an anomalous situation, this construction must prevail notwithstanding the anomaly.

The Citizenship Act was assented to on 31 December 1982 and has been amended. The two sections to which the respondent now takes objection are as follows:

> 4(1) A person born in Botswana shall be a citizen of Botswana by birth and descent, if at the time of his birth – (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock his mother was a citizen of Botswana.
>
> 5(1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth – (a) his father was a citizen of Botswana; (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana

Locus standi

There was some debate concerning the *locus standi* of the respondent to bring the present proceedings especially in regard to the declaration concerning section 5. None of the children of the respondent was born outside Botswana and there was no suggestion that further children would be born outside this country.

Since the argument of the respondent was based upon the contention that sections 4 and 5 of the Citizenship Act had been, or were being, or were likely to, contravene the Constitution in relation to her and not to her children, she has, I consider, *locus standi*. In a sense, I suppose, if at the end of the case it is found that this is not so, and the respondent has not shown a contravention actual or potential of any of sections 3 to 16 of the Constitution, she would then have been shown not to have *locus standi*. But I would prefer to put it on the basis of a failure to prove her case rather than an absence of the right to bring it.

However, this should not be regarded as a licence to any person to bring proceedings notwithstanding that he is unable to show that the provisions of sections 3 to 16 have been, are being or are likely to be infringed in relation *to him*.

Section 3

Fundamental to the problem of the structure of Chapter 2 of the Constitution is the meaning and intention of section 3. Does it, by itself and independently of the remainder of the sections of the Chapter, create and protect rights and freedoms which may or may not be the subject of further characterisation and definition in the subsequent provisions of the Chapter? If this is so, the Courts will in the future be called upon to give substance to those general rights and freedoms which are described in sub-paragraphs (a), (b), and (c) and, in these circumstances, the additional rights and freedoms not specifically dealt with in section 4 to 15 will have to be spelled out by the Courts in individual cases as and when they arise.

The alternative approach is to regard section 3 as an introductory or explanatory section which does not, by itself, create substantive rights and freedoms, but which is intended to create the background against which the specific right-creating provisions of sections 4 to 15 have to be viewed. It would then be taken

as in the nature of a preamble or recital. I am of the view that the form of section 3 is such that the second approach must be the correct one. The Court must not look to this section independently of those that follow and try to discover whether a particular right which is claimed to exist falls within the description of the rights and freedoms in sub-paragraph (a), (b) or (c) taken together or separately. If that had been the intention, the word "whereas" would not have been used to introduce the section. The presence of this word is inappropriate to a section which is intended to create rights. Though its meaning varies in the context in which it is used, it generally introduces a statement of fact and not a legislative command. The possible relevant meanings of "whereas" in the Shorter Oxford Dictionary are as follows: "1 In view or consideration of the fact that; for as much as, inasmuch as (chiefly, now only, introducing a preamble or recital in a formal document) . . ."

If the section had been intended by itself to be a right-creating provision, it would have read: "Every person in Botswana is entitled to the fundamental rights and freedoms of the individual . . ." The rest of the section is not consistent with this approach. It says: ". . . the provisions of this Chapter shall have effect *for the purpose of affording protection to those rights and freedoms* subject to such limitations of that protection as are contained in those provisions . . ." (my emphasis). This, in my view, is a clear expression of the intention that the rights and freedoms to which an individual is entitled are to be found in the specific provision of the following sections in the Chapter. The words "the provisions of this Chapter shall have effect" mean the *other* provisions of the Chapter. It is clear also from these words that the provisions of subsequent sections 4 to 15 are there "for the purpose of affording protection to the rights and freedoms" and not primarily to introduce qualifications or restrictions thereon.

One is tempted in a case which for the first time requires of the Court an analysis of the basic structure of the Bill of Rights Chapter of the Constitution to illustrate or support a conclusion by taking various hypothetical situations in order to establish its correctness. However, this might have the effect, in subsequent concrete situations debated before this Court or before the High Court, of reliance upon, or discussions about, *obiter dicta* in relation to matters which have not been argued in the case under discussion and might lead to wrong decisions. If possible, it is better left alone when the case law about the meaning of the Constitution is emerging for the first time and to stick closely to what is strictly relevant and necessary to decide the matter placed before the Court. I will therefore not discuss the question of what the result would be of holding, in regard to matters other than those under immediate discussion, that section 3 gives enforceable rights and freedoms which do not fall specifically within the more detailed provisions of sections 4 to 15. In my view, section 3 does not create specific rights and freedoms which do not fall within those declared and enacted in detail in the later sections of Chapter 2. Section 3 is a preamble or recital and may be used to assist in the construction of any of the provisions of sections 4 to 15. It is declaratory, in general terms, of the goal which it is sought

to be reached by the provisions of the Chapter as a whole and its tenor must be studied if a doubt arises concerning the meaning and effect of the specific provisions regarding freedoms and liberties which are contained in section 4 to 15.

The preamble or *considerans*, as it is sometimes called in Roman-Dutch law, is still to be found in private acts and in public laws of more solemn import (see Steyn *Uitleg van Wette*, 5ed at 145). It is generally an expression of the intention of the legislature and, in situations where the operative provisions of the legislation are not clear, may constitute a strong indication of the correct meaning (see *Colonial Treasurer v Rand Water Board* (1907) TS 479 at 482; *Law Union and Rock Insurance Co Limited v Carmichael's Executor* (1917) AD 593 at 597; *Attorney-General v Prince Ernest Augustus of Hanover* (1957) AC 436 at 467). One cannot look to it, as the respondent in the present case would have us do, to find within its four walls substantive legislative commands. In the present case which basically concerns alleged unlawful discriminatory legislation on the ground of sex, it is also significant that, though the section declares an entitlement to fundamental rights and freedoms irrespective, *inter alia*, of sex, section 3 does not, when listing the fundamental rights and freedoms, mention freedom from discrimination. But for section 15 it would appear that freedom from discrimination, as such, was not envisaged as a right or freedom which should be protected separately. The only rights which might conceivably embrace freedom from discrimination on the ground of sex is the right to "liberty" and the right not to be subjected to "degrading treatment". These matters will be dealt with hereafter.

Section 15

As I have already said the right not to be subjected to discrimination is not dealt with in section 3. To some extent, therefore, section 15 stands alone among the various rights and freedoms to be found in Chapter 2 because it does not fall obviously within any of the rights and freedoms mentioned in paragraph (a), (b) and (c) of section 3. Section 15 prohibits two things – discriminatory legislation (subsection (1) and discriminatory treatment (subsection (2)).

Both forms of discrimination are declared to be subject to certain specified exceptions and qualifications. It is not necessary in the context of section 15 to investigate the various possible nuances of meaning of the word "discriminatory". This is so, because it is defined and defined not in the common way by the introductory words "unless the context otherwise requires" or "unless from the context it otherwise appears" or similar modifications. In subsection (3) it says that "discriminatory" for the purpose of section 15 "*shall mean*" what follows. Thus the introduction of a latitude in definition dictated by context is not permitted because the very purpose of the definition is to avoid such an approach. The intention is clearly that no other meaning than that contained in subsection (3) may be applied when construing section 15.

"Discriminatory" in terms of subsection (3) means "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".

Why no mention of discrimination on the grounds of sex? For the respondent it was argued that, notwithstanding the absence of any mention of discrimination on the grounds of sex, the definition must be read as if such discrimination were expressly mentioned together with the other descriptions of personal characteristics actually listed. As I have already said, section 3 only becomes relevant if it can be shown that there is some vagueness or ambiguity in section 15(3). The mere absence of mention of sexual discrimination does not create any such vagueness or ambiguity and a reference to section 3 in order to create one is not permissible. This would be similar to the situation of the unambiguous operative provision and ambiguous preamble which is dealt with in *Eton College v Minister of Agriculture, Fisheries and Foods* (1964) 1 Ch 274 at 280. There might have been more substance in this argument if it could be shown that section 3 had something to do with the absence of discrimination as a separate right or freedom. But the rights and freedoms of sub-paragraphs (a), (b) and (c) of section 3 do not include a right not to be discriminated against. Any possible uncertainty appears in the preamble and not in section 15(3). The first possibility which was put forward was that the list of descriptions of categories of persons in subsection (3) of section 15 is intended only to be illustrative and that the Court is at liberty to add to those descriptions that of sex. This can be done in two ways. Either the categories of persons mentioned in section 3 can be included in the definition of any category of persons which the Court may from time to time think should not be discriminated against may be included in the definition provided that the category is *ejusdem generis* with those expressly listed. An intention to repeat in section 15(3) the categories of section 3 can hardly be inferred when section 15(3) introduced the category of "tribe" which is not to be found in section 3. As for the second possibility, I cannot think that what is obviously intended as an attempt to list different descriptions of persons which is only limited to the extent that the *ejusdem generis* rule should be applicable to it.

Thus the idea that the list of descriptions of persons in subsection (3) of section 15 is not exhaustive must be rejected.

The last contention on behalf of the respondent was that there had been an error by the omission of sex from the list of descriptions in subsection (3) of section 15. Whatever the Roman-Dutch law might say about circumstances in which it is justifiable to substitute or add to words in an enactment, one thing is clear and that is that this only becomes possible when it is apparent what the legislature intended. It was argued that something as clearly part of modern sociological thinking as the desirability of non-discrimination on the ground of sex could not

conceivably have been excluded from the description of persons who are entitled to non-discriminatory protection.

No evidence was introduced in the papers before the Court which could throw light on the subject of the development of a belief in non-discrimination between the sexes throughout the world. There have been cases in this Court where reference has been made to books on the social structure and customs of certain groups of persons in Botswana (see *Petrus v S* (1984) BLR 14 where reference is made to Prof Schapera's *A Handbook of Tswana Law and Custom* and also Major ESB Tagart's *Report on Conditions existing among the Masarwa in the Bamangwato Reserve*). In the present case, the State called in aid the Restatement of African Law 5 Botswana and the above-mentioned handbook to establish that the basis of customary law in Botswana was at the relevant time patrilineal and not matrilineal and that, inevitably, there must be discrimination against women in such a society. I do not think that, in the absence of agreement between the parties as to the attitude of the Botswana people generally to discrimination on the ground of sex, this Court can make a positive finding that the majority of persons in this country have any decided view on the question. It is not for us to speculate or to express our own view on that subject even though section 7 of the Common Law and Customary Law Act (Chapter 16:10) given the Court the widest of powers in the ascertaining the existence or content of customary law.

For the respondent it was argued that the existence of certain international agreements before and after the date of the passing of the statute embodying the Constitution of Botswana to some of which Botswana was a party showed that the majority of the world was opposed to discrimination against women on the ground of sex and that it must not be lightly assumed that the Botswana Parliament would approve of a Constitution in which discrimination on the ground of sex was not outlawed.

Subsection (9) of section 15 specifically preserves the validity of discriminatory provisions in legislation on the statute book when the Constitution came into operation. Furthermore, the provisions of Chapter 3 before amendment, whereby the children of a marriage were, in certain circumstances, to take the citizenship of their father and not their mother originally formed part of the Constitution itself. It would therefore be very hard to find that there was an intention expressed in the Constitution to outlaw discrimination on the ground of sex so as to comply with international declarations in this regard. No doubt the then Government of Botswana, by becoming a party to such declarations, committed itself to a course which will ultimately lead to the exclusion of sex as a basis for discrimination, but the existence of such a direction is not a reason so compelling as to require the alteration of the meaning of section 15(3) by the insertion of words which are not there.

The conclusion to which I am therefore driven is that discrimination on the ground of sex is not prohibited by section 15 of the Constitution.

Sections 5 and 7

I now deal with certain other provisions of Chapter 2 because it s been suggested that, even if they are not "discriminatory" within the definition of that term in subsection (3) of section 15, the citizenship provisions of the present Act may nevertheless infringe upon other rights and freedoms provided for in sections 4 to 14.

Section 5 prohibits deprivation of "personal liberty", subject to certain limitations. It was suggested that, even if they are not "discriminatory" within the meaning of section 15(3), in considering this section one should have regard to the realities of the situation. The mother of children who are not citizens of this country because their father is not a Botswana citizen may, *de facto*, if not *de jure*, be restricted in her movements because of her obvious duty to care for and protect her minor children wherever they may be and because of the possibility that they may be prevented from having the right to enter this country by reason of their not being Botswana citizens.

In certain situations there may well be a very real limitation upon the options open to a woman who is a Botswana citizen but whose children are not. The same would apply where a father, who is not a Botswana citizen, has children born out of wedlock as a result of which the mother's citizenship is the criterion.

Is this a deprivation of "personal liberty" as contemplated by section 5(1) of the Constitution? I do not think that it is. No doubt the question of what is or is not a condition of "personal liberty" will be the subject of debate in the future in relation to a number of situations. The Citizenship Act, by declaring the children to have a particular citizenship, does indeed limit the various practical options which a family might have in the ordering of their personal lives. It also involves irritations and frustrations. But whatever might be the position of persons directly subjected to the legislation, in this case the children, it cannot, by any stretch of imagination be said that the respondent's right to personal liberty is infringed by the fact that her children do not acquire Botswana citizenship under the Citizenship Act notwithstanding that she has to adapt her life to that situation. There are very few Acts of Parliament which do not place practical restraints, directly or indirectly, upon the ways in which people are entitled to behave.

Section 7 prohibits, *inter alia*, "degrading treatment", and it is suggested that the mother of children who are not Botswana citizens is subjected to degrading treatment because of the procedures at points of entry to and exit from Botswana and the requirements of Immigration Act regarding residence permits for her children. It is no doubt correct that immigration officials may, if not properly trained and supervised, act towards members of the public in a high-handed and obstructive manner. This behaviour carried to extremes may well have the effect

of subjecting a member of the public to degrading treatment. Such conduct may even justify, in appropriate circumstances, legal proceedings for a declaration that the constitutional rights of the victim of such treatment have been infringed. But we are here concerned only with the Citizenship Act and what is done in terms of Act. Unless its provisions necessarily involve the imposition of degrading treatment, it cannot be held to be *ultra vires* the Constitution. The respondent is seeking to have sections 4 and 5 of the Citizenship Act declared null and void not particular conduct under that Act interdicted. I do not think, therefore, that sections 4 and 5 of the Citizenship Act are rendered a nullity by any provision in sections 4 to 14 of the Constitution.

Conclusion

In my view the provisions of sections 4 and 5 of the Citizenship Act are not *ultra vires* Chapter 2 of the constitution and I would allow the appeal, set aside the declaration made by Horwitz AJ and direct that the respondent should pay the costs in both the High Court and the Appeal Court.

Puckrin JA

I have read the judgments of the other members of this Court and it is with sincere regret that I am unable to concur with the conclusions reached by my learned brothers constituting the majority of the Court. My regret stems, first, from the fact that I do not lightly disagree with the views of Judges with such experience and erudition in this field and it is my earnest hope that my views will not be considered unduly contumacious, and, second, because I have great personal sympathy for the aspirations of the respondent in this case, Ms Unity Dow. However, I do not perceive that it is my duty as a Judge of this Court to impose my personal convictions upon an interpretation of the Constitution, for to do so would, in my respectful view, permit this Court to become the overlord of the Constitution rather than its guardian. I agree entirely with the rations and conclusion reached by my brother Schreiner JA, and in order to avoid prolixity I shall not repeat in this judgment anything stated by him. I do, however, wish to deal briefly with certain philosophical questions relating to the interpretation of constitutions.

It is correct that Government, the Court and citizens should pay obeisance to the Constitution of the land. In order to emphasise the importance of a written Constitution authors are wont to describe it in lofty, indeed often anthropomorphic language. But the truth of the matter is mundane; a constitution consists of a piece of paper with ciphers inscribed thereon. It is the thought and will of men who breathe life into the inanimate body of a constitution. First, Parliament enacts laws in terms of the Constitution. Second, the Courts are enjoined to interpret those laws and, (as in the present case) the Constitution, and third, the citizens of the land have to obey, and act in accordance with, such laws, but are entitled to rely on the protection afforded them by the Constitution. It is this complicated interaction between various branches of Government and the

citizens of the land which render a constitution the majestic thing of which much is spoken.

I turn now to deal with the manner in which the Courts fulfil a role in upholding a written Constitution. A Constitution, like any other statutory enactment, has to be interpreted. It is often said that it is the function of the Court to interpret the law, not to make it. This somewhat pithy statement requires considerable qualification. As is pointed out by Gray in *Nature and Sources of Law*, 2ed at 170 to 171:

> Statutes do not interpret themselves; their meaning is declared by the Courts, and it is within the meaning declared by the Courts, and no other meaning, that they are imposed on the community as law . . . A statute is the express will of the legislative organ of the society; but until the dealers in psychic forces succeed in making full transference a working controllable force . . . the will of the legislature has to be expressed by words, spoken or written; that is by causing sounds to be made or by causing black marks to be made on white paper.

In a sense therefore, all law is judge-made law and the shape in which a constitution or statute is imposed on a community as a guide to conduct is that statute or constitution as interpreted by the Courts. The Courts thus put life into the dead words of a statute or a constitution. But this by no means implies that the Courts have a wide and unfettered discretion to interpret either constitutions or statutes. The power of the Courts to interpret constitutions and statutes is circumscribed by various rules of interpretation, some less well-defined than others. But the first among all rules must surely be that where the language used in a constitution is unambiguous and clear the Courts may not deviate therefrom. Indeed, so much is clearly implied in the *dictum* of Kentridge JA in his judgment in this court in *Attorney-General v Moagi* (1981) BLR 1 at 32 where he stated the following:

> A constitution such as the Constitution of Botswana, embodying fundamental rights, *should as far as its language permits* be given a broad construction. Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them so as to bring them in line with the common law.

(My emphasis.)

Thus, if the language of a constitution permits of only one interpretation, then it is that interpretation which must be upheld by the Courts. Of course, this approach may sometimes be simplistic because language by its very nature is often, at best, an imprecise tool and there are few words or phrases (at any rate in the English language) which do not permit of some nuance. How then are Courts to approach the interpretation of a constitution where some nuance is present in a phrase or word? There are at least three schools of thought on the subject, which have been lucidly identified by Madame Justice Bertha Wilson of the Supreme Court of Canada, in a paper presented at a seminar at the University of Edinburgh, May 1988 on *Constitutional Protection of Human Rights – the Canadian Experience since 1982*. I adumbrate the schools hereunder:

1. The "Framer's Intent" school of interpretation

An influential school of American scholars believes that he Constitution should be interpreted according to the intent of those who framed it. Adherents to this school hold that for a constitutional enterprise to be legitimate answers to constitutional problems must come from the text of the constitution itself. Concomitantly, contemporary *mores* are irrelevant to the exercise and the only relevant values are those held by the framers at the time that the constitution was created.

Whilst the "Framer's Intent" principle may be extremely relevant in the interpretation of ordinary statutes, its applicability to the construction of a constitution has all but been debunked in those jurisdictions which share in common with Botswana a written constitution. Perhaps the most serious criticism of the principle is that a group of draughtsmen, perhaps long since deceased, should be allowed to constrain the progressive development of any nation. The American experience provides an extreme example, for to apply the "Framer's Intent" principle would forever place American governmental thought into an 18th century straight jacket. This is precisely what the Court sought to achieve in the infamous case of *Dred Scott v Sandford* 19 How 393 (1857).

In this case the Court was asked to determine whether blacks were American citizens within the meaning of the Constitution. Taney CJ concluded:

> The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and not intended to be included under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race.

Dred Scott (*supra*) at 404 to 405.

There seems to me little doubt that the sentiment expressed by Holmes J in *Missouri v Holland* 252 US 416 (1920) to the effect that ". . . the case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago" is correct. In my view therefore, the "Framer's intent" is not the correct approach to be adopted in interpreting the Constitution of Botswana.

Indeed, this Court has recognised this expressly in the judgment of Aguda J in *Petrus v S* (1984) BLR 14 as follows:

> . . . (The Constitution) . . . is a written, organic instrument meant not to serve not only the present generation, but also several generations yet unborn . . . but the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve . . .

2. The 'living tree' metaphor

The metaphor was first used by Lord Sankey in the case of *Edwards v The Attorney-General of Canada* (1930) AC 124 (PC)

The point to be decided in the case was whether women were "persons" and eligible as such to be appointed to the Canadian Senate. The Supreme Court of Canada concluded that women were not "persons" within the meaning of the Canadian Constitution. An appeal to the Privy Council was upheld, the Council concluding that women were indeed "persons". Lord Sankey in his speech referred to the Canadian Constitution as "A living tree capable of growth and expansion within its natural limits".

Ibid at 136 Madame Justice Bertha Wilson *op cit* states the following:

> The living tree metaphor is not without its critics. It provides, it is said by some, a cloak for the crudest and least warranted judicial activism. Even the most modest of trees, it is pointed out, occasionally needs pruning. Besides, how does one know at what point the Constitution ceases to be a living tree and becomes a noxious weed choking off legitimate governmental goals? Thus, if the American Framer's Intent approach risks being over conservative, the Canadian living tree approach is open to the converse charge of being overly liberal and anti-democratic. As Canadian Judges, we are appointed and not elected officials. There would be something deeply illegitimate about our forays into judicial review of legislation if all there was to them was a desire to substitute our own personal values for those of our duly elected representatives. WE cannot placidly assume that by some mysterious process we, the Judges, have been given access to the true answers to fundamental, social and political dilemmas. . . . There is, therefore, no plausible justification for us to substitute our personal values and our moral choices for those of the elected legislature. The metaphor of the living tree is a harmless one so long as it is used merely to suggest that a constitution must adapt and grow to meet modern realities. It could, however, become dangerous and anti-democratic if it were used to justify the shaping of the Constitution according to the personal values of individual Judges.

I would heartily endorse the views expressed above by Madam Justice Bertha Wilson. If I may be permitted some poetic licence in regard to the "living tree" metaphor; the nutrients for the living tree must perforce derive from the democratic process and not from judicial conviction, and I do not consider myself either competent or qualified to superimpose my own personal convictions upon the Constitution and hence the people of Botswana.

3. Purposive interpretation

In recent years the House of Lords, (and particularly Lord Diplock) has emphasised the necessity of a "purposive construction" in relation to the written word. Thus a purposive construction has been applied in constitutional cases, the law of contract and even the law of intellectual property. See *Attorney-General of the Gambia v Momodou Jobe* (1984) 3 WLR 174 at 183; *Societe United Docks v Government of Mauritius* (1985) LRC (Const) 801 at 844; *Catnic Components Ltd v Hill & Smith Ltd* (1982) RPC 183 (HL). Once again I quote from Madam Justice Bertha Wilson, *op cit*:

> Thus constitutional interpretation should be purposive. Rights should be interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity.

In her judgment in *R v Morgentaler* (1988) 1 SCR 30 the same Judge expresses herself as follows:

> The (Canadian Charter) is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The Charter reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the State will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

This approach to construction accordingly allows a Judge to combine a purposive with a contextual approach in order to determine the ambit and extent of any individual or right under debate.

In my view a purposive construction of a constitution is the correct means if interpretation. It provides a court with a metewand whereby the excesses of personal conviction may be kept in check. At each juncture in the exercise of construction a Judge should ask himself the question “within the context of this Constitution and taking into account the societal values, what is the purpose of the right sought to be protected?” The question is not therefor one of what the framers of the Constitution may have had in mind as at the date of its drafting, nor of what individual Judges believe the protection afforded under the Constitution should be.

In my view, therefore, and applying a purposive construction to the Constitution and attempting to “map out piece by piece the parameters of the fence”, I am of the view that the Constitution, and particularly section 15 thereof, does not preclude the legislature from enacting a statute which provides that citizenship shall pass in a patrilineal but not matrilineal fashion. In my view, for the reasons set out in my brother Schreiner JA’s judgment, the provisions of section 15 of the Constitution are clear and it is not necessary to invoke such extraneous aids to interpretation as Botswana’s international obligations under various conventions and the like. I should emphasise that the opinion of the Chief Justice of Pakistan quoted by my learned brother Aguda JA in his judgment herein, emphasises that *in the event of doubt* the national law is to be interpreted in accordance with a State’s international obligations. Where there is no such doubt there is no room for an invocation of statements flowing from international conventions and the like. It is, in my respectful view, a dangerous precedent to allow a court free reference to international declarations where no “doubt exists” (that is, where the Constitution sought to be interpreted in unambiguous) for this would ultimately

lead to an abandonment of sovereignty which would be wholly at variance with the entire purpose of the Constitution of Botswana.

Accordingly I would allow the appeal.

For the appellant:

IS Kirby and Miss B Maripe

For the respondent:

Adv J Browde SC and C Loxton